



**Before The
State of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

[Student]

DHA Case Nos. DPI-21-0005
and DPI-21-0007

v.

DPI Case Nos. LEA-21-0005
and LEA-21-0007

[School District]

DECISION GRANTING SUMMARY JUDGMENT MOTION

The PARTIES to this proceeding are:

[Student], by

[Parent]

[School District], by

[District's Attorney]

PROCEDURAL HISTORY

The present matter involves two due process hearing requests filed on behalf of [Student] against the [District]. The current due process hearing requests, Case Nos. DPI-21-0005/LEA-21-0005 and DPI-21-0007/LEA-21-0007, are the fourth and fifth such cases filed on behalf of the Student since January 2021.

The parties in this matter have been involved in ongoing disputes involving the Student's educational services, placement and the District's handling of the Student's behaviors going back to at least January 2021. Moreover, the Student's parent has repeatedly requested that the Student be placed at a private school placement at [Private school]. The parties' disputes have resulted in the parent's filing of repeated and successive due process hearing requests with the Wisconsin Department of Public Instruction (DPI) beginning in January 2021 alleging violations under the Individuals with Disabilities Education Act (IDEA). The first due process hearing request, Case No. DPI-21-0001/LEA-21-0001, was filed on January 15, 2021, and alleged that the District refused services, consideration of an alternative placement or to hold an Individualized Education Program (IEP) meeting. The matter was resolved by a written resolution agreement and dismissed on February 2, 2021. Less than a week later and immediately after the parties participated in an IEP meeting on February 5, 2021, the parent filed a second due process hearing request on February 8, 2021, Case No. DPI-21-0002/LEA-21-0002. The second matter alleged claims similar to the first due process hearing request but added a claim that the District refused

to change the Student's placement to a private placement during the February 5, 2021, IEP meeting.

After the District filed a motion seeking dismissal of the claims in the second due process complaint that were identical to those addressed in the first matter, the Student's parent filed a third due process hearing request on March 3, 2021, Case No. DPI-21-0003/LEA-21-0003. On March 26, 2021, the Division of Hearings and Appeals issued a decision granting partial dismissal of the claims in Case No. DPI-21-0002/LEA-21-0002. The remaining issues in the second due process matter were consolidated with the third due process matter and set for hearing on April 29-30, 2021. However, on April 22, 2021, the parties executed a written Compromise and Settlement Agreement (settlement agreement) with respect to both matters.

Shortly after resolving the second and third due process hearing complaints, on May 11, 2021, the Student's parent filed a fourth due process hearing request, Case No. DPI-21-0005/LEA-21-0005. A fifth due process hearing request was filed on May 21, 2021, Case No. DPI-21-0007/LEA-21-0007. The two most recent cases were consolidated, and a telephonic prehearing conference was conducted on June 7, 2021 during which a briefing schedule was set to address the District's current motion to dismiss, which asserts that the claims asserted in the most recent due process hearing requests are covered by the parties' prior written settlement agreement and/or that the administrative law judge (ALJ) does not have authority to address the claims under State or Federal law.

By agreement of the parties, the motion briefing schedule was amended extending the parties' respective response and reply deadlines by one week. On June 21, 2021, the District filed a summary judgment motion with supporting brief, affidavits, and related documents. The Student's parent submitted a written response to the motion on July 12, 2021. The District filed its reply brief on July 20, 2021. A decision on the motion is due by August 13, 2021.

FINDINGS OF FACT

1. [The Student] is a resident of the [The District] and has attended school in the District since February 1, 2017. The Student is eligible for special education and has an IEP, which incorporates a behavioral intervention plan (BIP).
2. On April 22, 2021, the Student's parent, [Student's Parent], executed a written Settlement Agreement with the District resolving issues raised in Due Process Hearing Case Nos. DPI-21-0002/LEA-21-0002 and DPI-21-0003/LEA-21-0003. The April 22, 2021, Settlement Agreement identified the following issues that were being resolved:
 - a. Whether the District denied the Student a Free Appropriate Public Education (FAPE) when it refused to change the Student's placement to a private placement during the February 5, 2021, IEP meeting;
 - b. Whether the District denied the Student a FAPE by not promptly scheduling an IEP meeting subsequent to her re-enrollment on February 1, 2021;

- c. Whether the District failed to implement the Student's behavioral intervention plan resulting in a denial of FAPE;
- d. Whether the District failed to include 1:1 supervision during unstructured times and 1:3 supervision during structured class time as part of the Student's IEP; and
- e. Whether the District failed to provide technological support on or after February 1, 2021, resulting in a denial of FAPE.

The Settlement Agreement further stated that "the [p]arties agree that that no IEP team meeting is necessary to implement the provisions of this Agreement." Finally, the Agreement provided the Student with 1:1 tutoring at an alternate District school suggested by the parent but allowed the Student to return to her high school at any time during the remainder of the school year at which time the tutoring would cease. (Affidavit of [Attorney], Ex. E)

3. Based upon the parties' Settlement Agreement, on April 26, 2021, the Division of Hearings and Appeals dismissed with prejudice both Case Nos. DPI-21-0002/LEA-21-0002 and DPI-21-0003/LEA-21-0003. ([Atty.] Aff., Ex. G)
4. On April 27, 2021, the Student's parent sent an anonymous email to the District alleging that the Student stole candy bars from a local Walgreens. District staff interviewed the Student on April 29, 2021, and again on May 6, 2021, at the insistence of the Student's parent but ultimately determined that the Student did not commit a violation of their student code of conduct. (Affidavit of [E], ¶¶ 5 and 6, 8-10; [Atty.] Aff. Ex. C)
5. On May 11, 2021, the Student's parent filed a fourth Due Process Hearing request complaint, Case No. DPI-21-0005/LEA-21-0005. The complaint alleged that the District failed to document the Student's behaviors and theft per her BIP, did not enforce the code of conduct or follow the Student's BIP, and that the Student was not supervised per the parties' Settlement Agreement. The Student's parent further requested a private placement at the [Private school], WI. ([Atty.] Aff., Ex. A)
6. On May 18, 2021, the District sent the Student's parent written notice refusing the parent's request to convene an IEP team meeting to consider placement of the Student at the [Private school], based, in part, upon the parties April 22, 2021, settlement agreement. ([Atty.] Aff., Ex. H)
7. On May 21, 2021, the Student's parent filed a fifth Due Process Hearing request complaint, Case No. DPI-21-0007/LEA-21-0007, based upon the District's refusal to convene an IEP team meeting to consider the Student's placement at the [Private school] and listed several reasons why the District should have conducted an IEP to consider the private placement. ([Atty.] Aff., Ex. B)
8. An IEP team meeting was conducted on June 10, 2021. (Student's Response to Motion; District reply brief)

DISCUSSION

I. Summary Judgment Methodology

The District has filed a Motion for Summary Judgment seeking dismissal of the Student's due process hearing requests in Case Nos. DPI-21-0005/LEA-21-0005 and DPI-21-0007/LEA-21-0007. A party is entitled to summary judgment when the record establishes "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Wis. Stat. § 802.08(2).

The Wisconsin Supreme Court has set forth the methodology for deciding motions for summary judgment, which will be followed here. First the court must examine pleadings to determine whether a claim for relief has been stated and a material issue of fact presented; if a claim for relief has been stated, inquiry shifts to the moving party's affidavits or other proof to determine whether the moving party has made a prima facie case for summary judgment. If the moving party has made a prima facie case for summary judgment, the court must examine affidavits and other proof of the opposing party to determine whether disputed material facts or undisputed material facts exist from which reasonable alternative inferences may be drawn sufficient to entitle the opposing party to a trial. See *Voss v. City of Middleton*, 162 Wis. 2d 737, 470 N.W.2d 625 (1991).

Further, an adverse party may not rest upon the mere allegations or denials in the parties' pleadings; but rather, they must submit a response, by affidavits or other proof, setting forth specific facts to establish that there is a genuine issue requiring a hearing. Wis. Stat. §802.08(3). The court takes evidentiary facts in the record as true if not contradicted by opposing proof. *Lambrecht v. Estate of Kaczmarczyk*, 2001 WI 25, ¶ 23, 241 Wis. 2d 804, 623 N.W.2d 751.

II. The Issues

The District seeks dismissal of the Student's claims on the following grounds: (1) The administrative law judge (ALJ) does not have jurisdiction or authority to enforce or invalidate the parties' April 22, 2021 written settlement agreement, which the District asserts covers the issues raised in the Student's most recent two due process hearing complaints; (2) The ALJ does not have jurisdiction to enforce the District's student code of conduct when the application of the code does not result in a disciplinary removal or change of placement of a special education student. Prior to completing briefing on this motion, the parties conducted an IEP meeting on June 10, 2021. (Student's July 12, 2021, Response; District July 20, 2021, Reply). Thus, at least one of the issues raised in due process hearing Case No. DPI-21-0007/LEA-21-0007 regarding the District's failure to conduct an IEP meeting has been rendered moot. See *In the Matter of Due Process Hearing Request of Unnamed Student v. Racine Unified School District*, LEA-06-005 (SEA WI 2006), citing *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341.

III. The District Has Established That the Student's Due Process Hearing Complaints Must Be Dismissed As a Matter of Law.

- A. The issues raised in the Student's due process hearing request complaint case No. DPI-21-0007/LEA-21-0007 are precluded by the parties' April 22, 2021, written settlement agreement and rendered moot by the parties' completion of an IEP meeting on June 10, 2021.

An ALJ's authority in due process hearings filed under the Individuals with Disabilities Education Act (IDEA) is governed by Federal law, 20 USC § 1415(k), 34 CFR part 300, and also under State law, Wis. Stat. § 115.80 and Wis. Admin. Code Ch. PI II. Due process hearings filed under the IDEA most often involve a "refusal or proposal of the local educational agency to initiate or change his or her child's evaluation, individualized education program, educational placement, or the provision of a free appropriate public education ..." Wis. Stat. § 115.80(1); see also, 34 CFR § 300.503(a)(1) and (2) and 34 CFR § 300.507(a)(1). In addition, the IDEA provides for expedited due process hearings in disciplinary matters that could result in a change of placement for a special education student. 34 CFR § 300.532.

If the parties resolve a due process matter prior to a hearing, including through a resolution session or mediation, the IDEA provides that the agreement should be memorialized in writing and be enforceable in a State or Federal court of law. 34 CFR §§ 300.506(b)(7) and 300.510(d); see also, Wis. Stat. §§ 115.797(6) and 115.80(2m)(d). State and Federal laws governing IDEA do not grant an ALJ explicit authority to either enforce or invalidate the parties' written settlement agreement through a new due process hearing. *Id.* Rather, a written settlement agreement is governed by contract law and therefore within the jurisdiction of a court of law. *See e.g., D.R. v. East Brunswick Board of Education*, 109 F.3d 896 (3rd Cir. 1997) (mediated settlement agreement reached between school district and parents in an IDEA appeal is enforceable by a court); *Hillsboro School District*, 32 IDELR 190 (OR SEA 2000) (due process hearing is not the proper forum to enforce a settlement agreement); *Unknown District*, Case No. DPI-17-0020/LEA-17-0015 (SEA 2017) (dismissing due process hearing due to parties' prior execution of written mediation agreement).

Not only is an ALJ prevented from resurrecting issues addressed through the parties' written settlement agreements, but the law also prevents a party from attempting to relitigate identical matters that have been disposed of in a prior action under the doctrine of claim preclusion (also called *res judicata*). *Sopha v. Owens-Corning Fiberglas Corp.*, 230 Wis. 2d 212, 601 N.W.2d 627 (1999). The doctrine is intended to prevent repetitious claims and bar parties "from relitigating any claim that arises out of the same relevant facts, transactions or occurrences." *Id.* at 233. Claim preclusion requires three elements: (1) an identity between the parties; (2) an identity of claims between two actions; and (3) a final judgment on the merits on matters that either were litigated or could have been litigated in a prior proceeding. *Kruckenbergh v. Harvey*, 2005 WI 43, ¶ 21, 279 Wis. 2d 520, 694 N.W.2d 879. The claim preclusion/*res judicata* doctrine has been applied to IDEA due process cases. *See Drinker v Colonial School District*, 888 F. Supp. 674, 680 (E.D. Pa. 1995), *aff'd*, 78 F.3d 859 (3rd Cir. 1996); see also, *Indep. Sch. Dist. No. 283 v. S.D. ex rel JD.*, 88 F.3d 556, 562 (8th Cir. 1996) (applying claim preclusion in an IDEA matter).

In the present matter, the parties executed a written settlement agreement on April 22, 2021, resolving the Student's second and third due process hearing requests. ([Atty.] Aff. Ex. E) The settlement agreement identified the following issues as being resolved:

- Whether the District denied the Student a FAPE when it refused to change the Student's placement to a private placement during the February 5, 2021, IEP meeting;
- Whether the District denied the Student a FAPE by not promptly scheduling an IEP meeting subsequent to her re-enrollment on February 1, 2021;
- Whether the District failed to implement the Student's behavioral intervention plan resulting in a denial of FAPE;
- Whether the District failed to include 1:1 supervision during unstructured times and 1:3 supervision during structured class time as part of the Student's IEP; and
- Whether the District failed to provide technological support on or after February 1, 2021, resulting in a denial of FAPE.

(Id.) The settlement agreement also stated that "the [p]arties agree that no IEP team meeting is necessary to implement the provisions of this Agreement." ([Atty.] Aff., Ex. E, ¶ 9) Further, the Agreement provided the Student with 1:1 tutoring at an alternate District school suggested by the parent but allowed the Student to return to her high school at any time during the remainder of the school year at which time the tutoring would cease. (Id. at ¶¶ 1-3) Based upon the parties' settlement agreement, the Division of Hearings and Appeals issued orders dismissing both matters with prejudice on April 26, 2021. ([Atty.] Aff., Ex. G)

On May 11, 2021, the Student's parent filed a fourth due process hearing request, Case No. DPI-21-0005/LEA-21-0005, complaining that the District failed to follow the Student's BIP or the parties' settlement agreement when it failed to supervise the Student, failed to document the Student's behaviors, and when staff did not enforce the code of conduct, after the Student allegedly stole five candy bars from a local Walgreens on April 23, 2021 while she should have been at cross country practice. ([Atty.] Aff., Ex. A) The fourth due process hearing request also requested that the Student be placed at the [Private School]. (Id.) On May 21, 2021, the Student's parent filed a fifth due process hearing request, Case No. DPI-21-0007/LEA-21-0007, in response to the District's denial to hold an IEP meeting. ([Atty.] Aff., Ex. B) The fifth due process hearing request set forth seven reasons why an IEP meeting should be held. In addition, the fifth due process hearing requested as a resolution that the school conduct an IEP meeting with [Private School]. (Id.)

The District asserts in its motion that the issues raised in the Student's present due process hearing requests are issues covered by the parties' settlement agreement and therefore, this ALJ has no authority over the matters. (District Br. 11 12-18) In her response brief, the Student's parent acknowledges that she signed the settlement agreement but states she did so "as a final effort to get [Student] any services and stabilize her mental health" and "based on the false PWN that the [Private School] would not accept her." (Student Response Brief) The Student's response otherwise ignores the terms of the prior settlement agreement. Further, the

Student does not cite any legal authority or even make any argument as to whether this ALJ has authority to revisit the issues resolved by the parties' prior settlement agreement. (Id.)

To the extent that the Student seeks to challenge the District's compliance with or invalidate a prior written agreement, the Student must file that action in a county circuit court or federal district court. 34 CFR § 300.506(b)(7); 34 CFR § 300.510(d); Wis. Stat. §§ 115.797(6) and 115.80(2m)(d). But in the present matter, the Student's fourth due process hearing request alleges District actions (or inaction) that occurred after the parties' execution of the settlement agreement. Although the issues raised may be similar to the issues addressed in the parties' settlement agreement, the parties' settlement agreement does not and cannot waive disputes that "arise by reason of acts or omissions occurring after the date of the execution" of the agreement. ([Atty.] Aff. Ex. E, ¶ 12) Therefore, I do not find that the settlement agreement precludes the filing of the Student's fourth due process hearing complaint, Case No. DPI-21-0005/LEA-21-0005.

However, the settlement agreement explicitly states that the parties agree "no IEP team meeting is necessary to implement the provisions of this Agreement" and further, that the parties "agree to schedule an annual IEP meeting during the month of August 2021." ([Atty.] Aff., Ex. E, ¶ 9) The Student's fifth due process hearing complaint, Case No. DPI-21-0007/LEA-21-0007, filed on May 21, 2021, alleges that the District refused to convene an IEP meeting to consider placement at [Private School]. ([Atty.] Aff., Ex. B) Not only is the issue covered by the parties' written settlement agreement, but it has been rendered moot as a result of the parties having completed the IEP meeting on June 10, 2021.¹ See *In the Matter of Due Process Hearing Request of Unnamed Student v. Racine Unified School District*, LEA-06-005 (SEA WI 2006), citing *State v. Leitner*, 2002 WI 77, ¶ 13, 253 Wis. 2d 449, 646 N.W.2d 341 ("The appropriate disposition for moot controversies is dismissal."). Therefore, the District's motion for summary judgment is granted as a matter of law with regard to the Student's fifth due process hearing request, Case No. DPI-21-0007/LEA-21-0007.

- B. The Student's due process hearing complaint No. DPI-21-0005/LEA-21-0005 fails as a matter of law as it fails to establish that the District's application of its code of conduct involved a refusal or proposal to initiate or change the student's evaluation, IEP, placement and/or a denial of FAPE.

The District asserts that the Student's fourth due process hearing - which survived summary judgment above - must nevertheless be dismissed because this ALJ is without authority to enforce the District's student code of conduct. As stated above, a parent may file a due process hearing request regarding "the refusal or proposal of the local educational agency to initiate or change his or her child's evaluation, individualized education program, educational placement, or the provision of a free appropriate public education..." or regarding disciplinary matters that could result in a change of placement for a special education student. Wis. Stat. § 115.80(1); 34 CFR §§ 300.503(a)(1) and (2), 300.507(a)(1), and 300.532. The IDEA does not otherwise grant authority to this ALJ to address a school's disciplinary process or code of conduct through a due process proceeding. *Id.* The present matters do not involve an evaluation or disciplinary removal. Rather, the Student's parent alleges that the District failed to follow the Student's IEP when

¹ Any new disputed issues or occurrences related to the June 10, 2021, IEP or regarding the District's failure to implement agreed upon IEP services during the summer that the Student raises in her response brief fall outside the coverage of the present due process hearing requests. Wis. Stat. § 115.80(1)(g)

District staff did not find that the Student violated her school code of conduct or when they failed to supervise the Student when she allegedly stole candy bars from a local Walgreens on April 23, 2021. ([Atty.] Aff. Ex. A)

The District learned about the theft allegation against the Student from an anonymous email received on April 27, 2021, that the District later learned had been submitted by the Student's mother. ([E] Aff., ¶¶ 5-6) District staff interviewed the Student about the alleged theft on two occasions: April 29, 2021, and May 6, 2021. Both times the Student denied having stolen candy bars from the Walgreens. (Id., ¶¶ 8-12) The Student's mother sent the District a picture of unwrapped candy bars as proof that they were stolen but did not provide any records from law enforcement or any information from the business to substantiate the theft allegation. Nor were there any witnesses to the alleged theft. (Id., ¶¶ 14-16) Based upon the Student's repeated denial and because the alleged conduct occurred off of school grounds after the school day had ended and when the Student was not under the supervision of any District staff, the District did not establish that a violation of the student code of conduct had occurred. (Id., ¶ 17)

According to the Student's BIP, the District is expected to apply the code of conduct to the Student's conduct the same as it would be applied to regular education students. ([Atty.] Aff., Ex. E, attachment) If the Student is suspected of stealing during the school day, police are to be contacted. (Id.) According to the parties' April 22, 2021, settlement agreement, the District agreed that the BIP would be implemented for any theft in-school or during a school activity and to increase supervision between students and coaches and provide consultation with coaches to make them aware of the Student's disability. ([Atty.] Aff., Ex. E, ¶¶ 4 and 6) On the day in question, the Student apparently failed to report to her after school activity. The Student's parent does not assert nor has she presented any evidence that the Student's conduct occurred during the school day or while the Student was participating in a school activity. On the contrary, the Student's parent acknowledges that the Student's conduct occurred while the Student was not at her sports practice. Instead, the parent asserts that the Student was not properly supervised after school. Regardless, in her response brief, the Student's parent fails to demonstrate how the Student's conduct violates the school's code of conduct and presents no support for how the District's actions (or inaction) fail to comply with the Student's BIP or the parties' settlement agreement. Based upon the facts that any alleged theft occurred off school grounds, outside the school day and while the Student was absent from her school activity, it is not unreasonable that the District was unable to find the student violated the code of conduct.

Not only has the Student's parent failed to present any evidence to support the assertion that the District failed to follow the Student's IEP, BIP, or the parties' settlement agreement, but the Student's parent has failed to present any facts to support a conclusion that the District's actions amount to a violation under the IDEA that resulted in a denial of FAPE to the Student. There have been no facts alleged, let alone factual evidence presented, that the District's actions resulted in the Student's loss of educational benefits or access to her education. The Student's parent has not established how the alleged failure to supervise the Student who skipped her after-school sports practice amounted to a denial of FAPE by the District under IDEA. The parent's response brief is devoid of any argument or presentation of genuine issues of material fact to demonstrate how the District's actions amount to a denial of FAPE and thus, the Student's claim is not viable as a matter of law.

The Student's response to the District's motion fails to demonstrate that disputed issues of genuine material fact exist or facts from which reasonable alternative inferences may be drawn sufficient to require a hearing in these matters. I find that the District has set forth a prima facie case for summary judgment that the Student has failed to rebut. Therefore, it is appropriate to grant the District's motion for summary judgment as a matter of law with regard to the Student's due process hearing request in Case Nos. DPI-21-0005/LEA-21-0005 and DPI-21-0007/LEA-21-0007.

CONCLUSIONS OF LAW


- I. The District has established grounds to dismiss the Student's due process hearing request No. DPI-21-0005/LEA-21-0005 as a matter of law because the request fails to allege genuine issues of material fact demonstrating a violation of the IDEA and/or a denial of FAPE.
2. The Student's due process hearing request No. DPI-21-0007/LEA-21-0007 is dismissed as a matter of law as it is precluded by the parties' April 22, 2021, settlement agreement and rendered moot by the parties' subsequent completion of an IEP meeting on June 10, 2021.

ORDER

WHEREFORE IT IS HEREBY ORDERED that the due process hearings in Case Nos. DPI-21-0005/LEA-21-0005 and DPI-21-0007/LEA-21-0007 shall be DISMISSED.

Dated at Madison, Wisconsin on August 12, 2021.

STATE OF WISCONSIN
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By: 

Kristin P. Fredrick
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

Any party aggrieved by the attached decision of the administrative law judge may file a civil action in the circuit court for the county in which the child resides or in federal district court, pursuant to Wis. Stat. § 115.80(7), 20 USC§ 1415, and 34 CFR § 300.512. The court action must be filed within 45 days after service of the decision by the Division of Hearings and Appeals.

It is the responsibility of the appealing party to send a copy of the appeal to the Director of Special Education, Special Education Team, Department of Public Instruction, 125 South Webster Street, Madison, WI 53703. The Department of Public Instruction will prepare and file the record with the court only upon receipt of a copy of the appeal. The record will be filed with the court within 40 days of the date that the Special Education Team at the Department of Public Instruction receives the appeal.