

ALTERNATIVE, MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM IN SUPPORT THEREOF. On October 6, 2015, the Hearing Officer set out via email to the parties a briefing schedule for Respondent's Motion. Said briefing schedule clarified the time period and manner in which Petitioners could submit a response to Respondent's Motion and for submission of a reply by Respondent. According to the briefing schedule, Petitioner timely filed a responsive brief on October 16, 2015, and Respondent timely filed a reply brief on October 23, 2015. Respondent's Motion will be reviewed as a motion for summary judgment using the standards appropriate for such motions.

ISSUE PRESENTED

Respondent's Motion asserts that the claims asserted by Petitioner's Due Process Hearing Request should be dismissed with prejudice by application of the doctrine of *res judicata*. Respondent argues that Petitioner's current Due Process Hearing Request attempts to re-litigate claims by alleging facts and issues that were brought or could have been brought and asserted in Petitioner's prior hearing requests. Alternatively, Respondent asserts that Petitioner's allegations fail to state a claim under the IDEA for which relief can be granted.

In response, Petitioner argues that *res judicata* is inapplicable because there is no identity of claims between the current Due Process Hearing Request and prior due process "Complaints" filed by Respondent. Further Petitioner asserts that her Due Process Hearing Request states valid claims upon which relief can be granted.

SUMMARY JUDGMENT STANDARD

The Idaho State Board of Education has adopted rules which address the IDEA

Due Process Hearing procedures:

Due process hearing shall be conducted pursuant to IDAPA 04.11.01, "Idaho Rules of Administrative Procedure of the Attorney General," Individuals with Disabilities Education Act (IDEA) requirements, and the Idaho Special Education Manual. In case of any conflict between IDAPA 04.11.01 and IDEA, the IDEA shall supersede the IDAPA 04.11.01, and the IDAPA 04.11.01 shall supersede the Idaho Special Education Manual.

IDAPA 08.02.03.109.05(e)

This Hearing Officer finds that the Idaho Rules of Administrative Procedure of the Attorney General ("IDAPA") for purposes of considering a Motion to Dismiss or a Motion for Summary Judgment are not in conflict with IDEA and the procedures set forth therein permit an SDE Hearing Officer to consider and decide pre-hearing motions. IDAPA 04.11.01.565.

There does not appear to be any Idaho authority on the standard for Summary Judgment in an administrative process, therefore, the standard employed by the Idaho courts is appropriate. The standard then is whether there are any genuine issues of material fact and is Respondent entitled to Judgment as a matter of law. I.R.C.P. 56(c).

FINDINGS OF FACT

This Hearing Officer finds that there is no genuine issue of material fact as to the following facts:

1. On March 27, 2015, Petitioner filed a due process hearing request under the IDEA, case number SDE No. H-15-03-27 (hereinafter "March Hearing").
2. In the March Hearing, Petitioner asserted a denial of Free and Appropriate Public Education ("FAPE") based upon an IEP that was in effect in September 2013. This

hearing officer finds that the allegations made by Petitioner in the March Hearing were accurately identified by the hearing officer in the March Hearing, to wit: the District improperly handled disciplinary actions involving the Student in September 2013; the District failed to timely and properly initiate appropriate assessments following the Student's discipline; the District conducted a Threat Assessment under the District's Policies and Procedures which did not comply with the IDEA; and the Threat Assessment conducted by the District did not permit Parent participation.. March Hearing, Memorandum Decision And Order, p. 2, April 30, 2015,

3. Petitioner sought the following relief in the March Hearing:
 - 1) Due to these IDEA violations, we ask for reimbursement for providing at private expense what should have been offered by the school in the form compensatory and/or punitive damages available in §1983 action for IDEA violations. [REDACTED] and the entire family have suffered a great deal due to the discrimination and taking the time to recover [REDACTED] from suicidal ideation.
 - 2) We also ask that the report generated following the threat assessment be expunged due to the discrimination that occurred in the drafting of this document. We also ask that correction to other disciplinary/education records be made as there is inaccurate information.
 - 3) We also ask that the school in question in this complaint, please commence [REDACTED]'s current IEP as he has been placed in special education as indicated by signature and consent to placement sheet that was accepted by [REDACTED]
 - 4) Reimbursement of attorney fees associated with this action.

Due Process Hearing Request Form, received 03/27/15, Attachment p. 2

4. On May 8, 2015, Petitioner filed a due process hearing request under the IDEA, case number SDE No. H-15-05-08 (hereinafter "May Hearing").
5. Petitioner's facts in the May Hearing allegedly occurred in May 2013 and September 2013. All of these factual allegations occurred at the District's Elementary School. All of the alleged facts originate from the same actions or inactions of the School District's employees in May 2013 or September 2013. The alleged facts in September 2013 are

substantially the same as those facts alleged by Petitioner in the March Hearing. See May Hearing, p.1-9.

6. The specific relief sought in May Hearing included:
 - A. Reimbursing parents for providing at private expense an environment that would not exacerbate [REDACTED]'s behavior so that he could be successful in learning.
 - B. Compensatory Education in the area of social skills.
 - C. Ordering Respondent to conduct staff training on the proper use of Respondent's IEP, BIP, and Positive Behavioral Supports.

Due Process Hearing Request, received 05/08/15, p.9.

7. On September 22, 2015, Petitioner filed a third due process hearing request under the IDEA, case number SDE No. H-15-09-22 (hereinafter "September Hearing"). Due Process Hearing Request, received 09/22/15.

8. The facts alleged by Petitioner in this action stem from the September 2013 Threat Assessment, a Functional Behavioral Assessment proposed in September 2013, enrollment of [REDACTED] at Idaho Virtual Academy, and Petitioner's attempt to participate in the School District's open enrollment during August 2014. Ibid, at p. 2-5.

9. The relief sought in the September Hearing is:
 - 1) Hearing to amend the threat assessment and other educational records.
 - 2) Remedial education.
 - 3) Benefit of open enrollment

Ibid, at p.6.

10. Petitioner does not contest the issue of privity between the parties in the September Hearing, May Hearing and March Hearing. See Plaintiff's Response To Respondent's Motion To Dismiss, Or In The Alternative, Motion For Summary Judgement And Memorandum In Support Thereof.

11. The March Hearing and the May Hearing were both resolved on their merits. See *Ibid* at 2.

ANALYSIS

I. APPLICATION OF RES JUDICATA

Res judicata applies when there is an identity of claims, a final judgment on the merits and privity between the parties. *Stratosphere Litig. L.L.C. v. Grand Casinos, Inc.*, 298 F.3d 1137, 1143 (9th Cir. 2002). In the current action, the element of privity exists in that the parties to this action are the same petitioner and respondent as in Petitioner's prior March Hearing and May Hearing. Petitioner does not contest the element of privity. FF No. 10. Petitioner also affirms that the prior hearings were "resolved on the merits." FF No. 11; Plaintiff's Response to Respondent's Motion for Summary Judgment and Memorandum in Support Thereof, p.2. The issue then in regard to Respondent's argument, that Petitioner's claims are barred under the doctrine of res judicata, is whether or not the element of identity of claims is present. As framed by Petitioner, "res judicata is inapplicable because there is no identity of claims between the due process Complaint sub judice and the prior due process complaints . . ." *Ibid*.

II. IDENTITY OF CLAIMS.

Identity of claims exists when two arguably separate actions arise from the same transactional nucleus of facts. *Jaylynn Bacon-Dorow v. Prescott Unified School District No. 1*, 114 LRP 49111. The 9th Circuit Court of Appeals has clarified that, as relating to identity of claims, the doctrine of res judicata bars re-litigation of all claims that were asserted, or could have been asserted, in a previous action between the parties which was resolved on the merits.

See *United States ex rel. Barajas v. Northrop Corp.*, 147 F.3d 905 (9th Cir. 1998). The 9th Circuit Court of Appeals has further stated that “Newly articulated claims based on the same nucleus of facts may still be subject to a res judicata finding if the claims could have been brought in the earlier action.” *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg. Planning*, 322 F.3d 1064, 1084 (9th Cir. 2003).

Petitioner’s claims in this current action and the claims asserted in Petitioner’s prior due process hearing requests, March Hearing and May Hearing, are based upon the same nucleus of facts, specifically, the facts alleged by Petitioner to have occurred in September 2013. See FF 2, 5, and 8. The nucleus of factual allegations occurring in September 2015 form the basis for all three due process hearing actions and include the conduct of the parties relating to the Threat Assessment and “other disciplinary/educational records”, a functional behavioral assessment, withdrawal of [REDACTED] from the School District and enrollment in a home school program, Idaho Virtual Academy. Petitioner’s claims based upon this nucleus of facts were fully adjudicated and resolved in the MEMORANDUM DECISION AND ORDER issued on April 30, 2015, resolving the March Hearing. Thus, the identity of claims element is met and the doctrine of res judicata now bars Petitioner from re-litigating claims based upon the same nucleus of facts that was alleged in the March Hearing. Further, Petitioner is barred from re-litigating claims based upon this same nucleus of facts that could have been asserted in the March Hearing but were not raised at that time. See *United States v. Barajas*, *supra*, p. 909 (holding “It is immaterial whether the claims asserted subsequent to the judgment were actually pursued in the action that led to the judgment; rather, the relevant inquiry is whether they could have been brought.”).

Specifically, Petitioner’s claims for a hearing to amend the September 2015 Threat Assessment and “other disciplinary/education records” and for remedial education are based

upon the same nucleus of facts asserted in the March Hearing therefore said claims may not be re-litigated in this or another due process hearing.

III. FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

34 C.F.R. § 300.507 implements this due process complaint requirement of the IDEA and sets forth that the scope of a complaint under the IDEA is limited to matters “relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child.” 34 CFR 300.507(a)(1). This Hearing Officer’s authority to make determinations in this case is limited to issues within the scope of 34 C.F.R. § 300.507. The claims asserted, or which Petitioner attempts to assert, concerning open enrollment do not present claims “relating to the identification, evaluation or educational placement of a child with a disability, or the provision of FAPE to the child”, rather, Petitioner asserts that the School District’s open enrollment policy places disabled students at a disadvantage as compared to non-disabled students. Such a claim does not come within the scope of 34 C.F.R. § 300.507. Further, Petitioner failed to cite legal authority or argue facts which would provide a basis for this hearing officer to have authority or jurisdiction to determine Petitioner’s claim relating to School District’s open enrollment policies. Accordingly, Petitioner’s request for relief relating to open enrollment benefits is not relief that can be granted in this IDEA hearing.

CONCLUSION AND ORDER

The doctrine of res judicata is applicable in this action whereas there exists: 1) identity of claims meaning that there is a common nucleus of facts between this action and prior actions; 2) said prior actions resulted in final judgment(s) on the merits; and 3) there is privity between the

parties in this and the prior actions. Res judicata bars Petitioner from pursuing claims for a “hearing to amend the threat assessment and education records” and for remedial education.

Petitioner’s claim for the “benefit of open enrollment” fails to state a claim upon which relief can be granted.

There are no factual disputes raising genuine issues of material fact and Respondent is entitled to Summary Judgment as a matter of law. The Due Process Hearing Request, SDE H-15-09-22, received by the State Department of Education on September 22, 2015, shall be and is hereby DISMISSED in its entirety with prejudice.

DATED this 6th day of November, 2015.



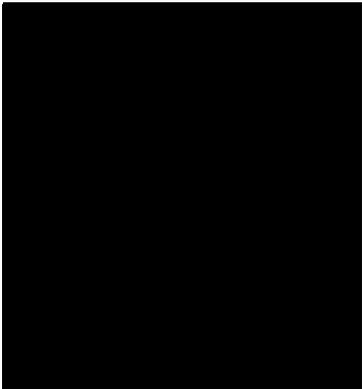
Judson W. Tolman
Hearing Officer

NOTICE

Any party aggrieved by the findings and decision herein has the right to bring a civil action with respect to the due process complaint notice requesting a due process hearing under 20 U.S.C. §1415(i)(1). The action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. (See 20 U.S.C. §1415(1)(2)). 20 U.S.C. §1415(i)(2)(a) provides that: Time limitation: The party bringing the action shall have 90 days from the date of this decision to file a civil action, **or if the State has an explicit time limitation for bringing civil actions under Part B of the Act, in the time allowed by State law. (Emphasis Added).** IDAPA 08.02.03.109.05(g) provides that “An appeal to civil court must be filed within forty-two (42) calendar days from the date of issuance of the hearing officer’s decision.”

CERTIFICATE OF SERVICE

I DO HEREBY certify that on the 6th day of November, 2015, I caused to be served on the following a true and correct copy of the foregoing document by the method indicated below:



- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

Lyndon Nguyen
 Elaine Eberharter-Maki
 Moore Smith Buxton & Turcke, Chtd.
 950 Bannock Street, Suite 520
 Boise, Idaho 83702
lpn@msbtlaw.com

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

Dispute Resolution Coordinator
 Special Education Division
 Idaho State Department of Education
 P.O. Box 83720 Boise ID 83720-0027

- U.S. Mail, postage prepaid
- Overnight Mail
- Facsimile
- Email

By: 
 Hearing Officer