

STATE OF SOUTH CAROLINA)
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COUNTY OF RICHLAND)
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In the Matter of:)
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LT, on behalf of JT,)
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Appellant)
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)
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V.)
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Richland County School District Two,)
)
Respondent.)

This matter is before me pursuant to an appeal by the Parent on behalf of J.T. from a decision by Douglas Dent, the Local Hearing Officer (“LHO”), dismissing the Parent's October 23, 2017, Due Process Complaint against Richland County School District Two (“the District”) as *res judicata*.

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October 24, 2017. J.T.'s Parents appealed aspects of the LHO's decision, and I served as the State Review Officer, issuing a decision on December 5, 2017. My decision found that the District had provided a Free Appropriate Public Education ("FAPE") in the Least Restrictive Environment ("LRE") for J.T. and that the IEP team's decision to place J.T. at Condor Elementary's Behavior Support Program was appropriate.

On October 23, 2017, the Parent submitted a subsequent complaint and request for a due process hearing. The LHO dismissed the matter with prejudice as *res judicata* on November 13, 2017. The Parent appealed this decision on December 1, 2017, and I was assigned to serve as the State Review Officer. I held a short phone conference with both parties to clarify the relief requested, and both parties agreed to a briefing schedule.

1. Factual Background

This appeal involves a due process complaint filed by the Parent contending the District had not adequately followed J.T.'s individualized education program ("IEP") dated September 27, 2017. Specifically, he claimed the District did not use a parent communication calendar called for in the IEP, and also the District did not contact him when J.T. posed a danger to his self or others, as called for in the behavioral intervention plan ("BIP"). The LHO found this complaint, filed before the LHO decision in the previous complaint had been issued, was barred by the doctrine of *res judicata*. The Parent appealed, claiming this issue was different from the previous case, as the facts surrounding the issue relate to a time period beginning after he filed the first complaint. He asked for a hearing to present evidence that arose after the October 16 & 17, 2017 hearing.

I incorporate the facts from my December 5, 2017, decision here, but highlight and add to the facts related to the September 27, 2017 IEP below.

J.T. began the 2017-2018 school year in the pre-school classroom at Forest Lake Elementary School, a result of a “stay put” order from the LHO. Because J.T. was 5 years old, on September 15, 2017, the IEP team decided to try having J.T. go to the kindergarten classroom for a few hours a week to see how the transition would go. (District Exhibit 5). On September 27, 2017, the IEP team created a new IEP that placed J.T. in the general education kindergarten classroom. J.T. transitioned to that classroom on October 3, 2017, and was pulled out for two 30 minute blocks of time for special education instruction, plus a check in and check out each day with the special education teacher. Members of the District staff testified that they agreed to this plan to compromise with the Parent while the legal proceedings were taking place, and that they believed this plan to be only temporary. (See, e.g., Tr. p. 222, p. 400, p. 439-440, p. 451). These staff members clarified that they still believed the Behavior Support Program at Condor Elementary would provide a more appropriate placement for J.T. (See, e.g. p.452).

At the hearing on the first complaint (October 16 & 17, 2-17), the teacher testified that J.T. required constant support in her classroom and that she had called the administration two times a day for support with J.T.’s behavior. The special education testified that J.T. needed regular support to stay on task, but that she had only had two significant incidents. On one of those incidents, she called the Parent for support. The assistant principal at Forest Lake has been called to intervene 18 times since September 7, 2017. (Tr. p. 122). She has a log that details when she contacted the Parent regarding these behaviors but that log was not submitted as part of the record. The Parent sees the teacher each day after school (Tr. p. 402).

2. Standard of Review

Federal and state regulations provide that a party aggrieved by a LHO decision may appeal to a state review officer (“SRO”) and that the SRO must “[e]xamine the entire hearing record” and “[m]ake an independent decision on completion of the review.” 34 C.F.R. § 300.514(b)(2)(i) and (v)(2014). The state review officer must also consider the hearing officer’s advantage of examining the demeanor of the witnesses when credibility determinations are at issue. *Id.*; *Shore Reg’l High Sch. Bd. Of Educ. V. P.S. ex rel. P.S.*, 381 F.3d 194, 199 (3d Cir. 2004). In doing so, the findings of fact of the local hearing officer are entitled to great deference and are considered prima facie correct. *M.S. ex rel. Simchick v. Fairfax Cnt. Sch. Bd.*, 553 F.3d 315, 326 (4th Cir. 2009); *Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 105 (4th Cir. 1991). However, the state review officer must still determine the weight of the evidence and questions of law independently. *Springer v. Fairfax County School Bd*, 134 F. 3d 659 (1998), 663, differentiating itself from *Doyle*.

Note that no hearing has been held in regards to the present complaint. However, I did review the hearing record for the first complaint to determine whether the issues raised by the Parent were addressed during the October 16 & 17, 2017 hearing. Where my decisions turn on the hearing record, I used the standard above in providing weight to the evidence. However, as noted above, I review the questions of law independently.

3. Hearing Officer’s Findings

The LHO dismissed the present complaint and denied a hearing on this matter saying that he could not “litigate the same issues on the same facts once the matter has been decided.” (LHO 11.13.2017 Decision p. 1). He had already made a determination that the parents were provided meaningful participation in the disability determination and education services provided. In this

case, the LHO says, “the Petitioner raises the very same issue based on the very same facts.” (LHO 11.13.2017 Decision p.1).

4. Discussion

As I enter into a discussion of this case, it is important to note the differences between the two complaints. The first complaint and subsequent decision focused on whether J.T.’s parents were meaningful involved in the creation of the IEPs during the 2016-2017 school year, and whether the placement and plan provided in the resulting IEP was appropriate for J.T. While that complaint was pending, J.T. was in a stay put placement, and to accommodate the stay put placement, the IEP team created a new IEP on September 27, 2017. The current complaint questions whether the District implemented this new IEP appropriately after that date. The two complaints thus relate to different time periods.

Section 1: Should the complaint have been barred as *res judicata*?

The LHO has discretion to determine the sufficiency of and the hearing officer’s jurisdiction over the issues raised in a due process complaint. (*See Dispute Resolution Procedures under Part B of the Individuals with Disabilities Education Act (Part B)*, 61 IDELR 232 (OSEP 2013, referencing 34 CFR §§ 300.508(d) and 300.513.) However, *res judicata* is a legal determination and thus subject to review by the SRO. Further, courts are somewhat split on how to apply the doctrine of *res judicata*’s application to cases brought under IDEA involving the same child over different time periods. *See, e.g. Capuano v. Fairfax County Public Board*, 62 IDELR 81, 1:13-cv-00568-GBL=TRJ (E.D. Va. 2013), *not reported in F.Supp.2d*. (citing split decisions in *Theodore v. District of Columbia*, 772 F.Supp.2d 287 (D.D.C.2011), *M.C.G. v. Hillsborough Cnty. Sch. Bd.*, 927 So.2d 224 (Fla.Dist.Ct.App.2d Dist.2006), and *T.G. ex rel. Gutierrez v. Baldwin Park Unified Sch. Dist.*, 443 F. App’x 273 (9th Cir. 2011)).

In determining whether a claim is barred under *res judicata*, the court in *Capuano* distinguished between claim preclusion and issue preclusion. Regarding claim preclusion, *Capuano* holds “Because IDEA seems to create a statutory right to a new cause of action each time an IEP is reevaluated, claim preclusion will not apply where the claim relates to a new school year.” *Capuano*, 62 IDELR at 6. *Capuano* finds support in this finding in *M.C.G.*, 927 So.2d at 226-28, and *Baldwin Park Unified*, 443 F. App’x 273, 276. *Id.*, at 5. They discuss the fact that *Theodore* did bar a claim that took place over two school years, but the court spent significant time discussing the spread across the years and ended up barring the claim not because of the spread of years, but because the issues at hand were substantively identical. *Id.*, at 6. Issue preclusion requires a factual or legal issue not already decided, or a material change in circumstances. *Id.* We must look at the “factual nucleus” of the cases, and if the factual nucleus is the same, then the issue is barred. *Theodore*, 772 F. Supp.2d at 294. However, if this case hinges on a different factual nucleus or on a different legal matter, then the issue is not barred.

Claim Preclusion: In the present appeal, the Parent raises questions only about the time period after September 27, 2017, and the implementation of the IEP developed on that date. The October 24, 2017, LHO decision included a statement of facts that did not reference any events after the summer of 2017. (See LHO 10.24.2017 Decision, p. 2). The LHO’s discussion of issues referenced only J.T.’s 2016-2017 teachers and events that occurred during the 2016-2017 school year. The September 27, 2017 IEP therefore allows for a new cause of action and the Parent's complaint is not barred on the basis of claim preclusion.

Issue Preclusion: To determine whether the claim is barred due to issue preclusion, we must look back at the specific issues of the first complaint. The LHO’s first decision had four findings: 1) The IEP and placement in a Behavior Support Program at Condor Elementary was

an appropriate placement, 2) The Parent had meaningful participation in the IEP process, 3) The District provided appropriate transition services to J.T. as he moved into kindergarten, and 4) The placement at Condor's Behavior Support Program constitutes the least restrictive placement for J.T.

This decision turns on a set of facts that took place between 2016-2017, and ultimately answers the question of whether the May, 2017 IEP was properly designed and whether the placement recommended at that time was appropriate.

The Parent's present complaint is not about the design of the IEP that placed J.T. at Condor Elementary, but it is about the implementation of the IEP written to implement the LHO's stay put order at Forest Lake Elementary. His questions about parent involvement are not related to the development of the IEP, an issue that was heard and resolved in the first complaint. Instead, he argues that parent involvement is a part of the plan to support J.T. in school and that the District had not been appropriately communicating and thus not implementing the IEP. The BIP states that the parent should be contacted if J.T. becomes a danger to himself or others, and the IEP references a parent communication calendar. The Parent claims the District was not contacting him, nor were they using a calendar. (Please note, I am not making a determination on whether the District was indeed following the IEP. I am simply noting the difference in the issues raised in the two complaints).

This IEP was developed to accommodate a stay put order due to litigation. That procedural fact does not relieve the District of the duty to implement the IEP with fidelity, nor does it take away the Parent's right to bring a due process complaint should he feel the IEP is not being followed. The "nucleus of facts" at issue in this complaint is significantly different than the "nucleus of facts" in the first complaint. Issue preclusion does not bar this case.

This case was improperly dismissed on the grounds of *res judicata*. The Parent's claims arise from a different set of facts and pertain to a different legal matter than those raised in the August, 2017 complaint.

Section 2: Is a second hearing required?

If the complaint is not barred as *res judicata*, the next question to determine is whether the Parent is entitled to a second hearing to determine the validity of his complaint.

The District argues that the witnesses and evidence that would be presented on this issue have already been presented at the first hearing. (District Brief, p. 6). All the teachers and administrators involved in J.T.'s education during this time testified at the hearing. The Parent cross-examined them and specifically questioned them on whether they communicated with him in October 2017. (See Tr., testimony of District personnel). The September 27, 2017 IEP and the related BIP are part of the evidentiary record. (Petitioner's Exhibits #6 and #7).

The Parent's pleadings assert that he has evidence that arose in an IEP meeting after the October 16-17 hearing on his first complaint that would affect a decision on his second complaint. (Parent's December 1, 2017 Appeal Notice, Parent's Reply Brief). I do not know what that evidence is, nor do I judge that evidence in any way, but a parent would generally have a right to present such evidence in a hearing.

Section 3: Is the issue at hand now moot?

The Parent's complaint, filed before the LHO decision or my subsequent decision were issued, asked to have the September 27, 2017 IEP followed at Forest Lake Elementary. The LHO held, and I affirmed, that placement at the Behavior Support Program at Condor Elementary is the appropriate placement for J.T., not the kindergarten classroom at Forest Lake Elementary.

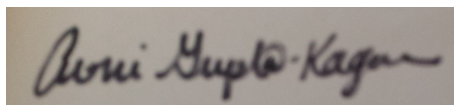
The Parent may be completely correct in stating that the September 27, 2017, IEP was not followed. But that IEP was created as a result of a stay put placement, and that placement was only in effect during the pendency of litigation on the first complaint. That litigation is now complete, so the September 27 IEP, is no longer in effect. It follows, then, that a hearing on whether the now-moot September 27 IEP was followed would be moot. Moreover, the Parent's request for relief did not request compensatory education or other injunctive relief. Such a request would have required a hearing and decision. Rather, the Parent seeks only an order that the District communicate with him as required by the IEP. Since the underlying IEP is now moot, the requested relief that the District comply with it is also moot.

5. Conclusion

The claim is not barred by *res judicata* and the Parent would have a right to a hearing but for the fact that the issue is now moot. The District's original placement proposal, at Condor Elementary School, provides J.T. with a FAPE in the LRE and should be upheld.

6. Notice of Appeal Rights

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B) and 34 C.F.R. § 300.516.



Avni Gupta-Kagan
Administrative State Review Officer

Columbia, South Carolina

December 30, 2017