

OCT 12 2012

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES
OFFICE OF DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

Dispute Resolution &
Administrative Services

CASE CLOSURE SUMMARY REPORT

School Division: County Public Schools

Name of Child: _____
Name of Parents: _____

Party Initiating Hearing: _____

Counsel Representing LEA: John F. Cafferky and Patricia Amberly Minson, Attorneys

Address for Counsel: 4020 University Drive, Suite #300, Fairfax, VA 22030

Counsel Representing Parent/Child: None

Hearing Officer's Determination of Issue(s): Whether the parent's due process hearing should be dismissed based on res judicata and collateral estoppel.

Hearing Officer's Order: The due process hearing is dismissed.



Richard M. Alvey, Hearing Officer

Dated 9th day of October, 2012

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Dispute Resolution & Administrative Services

VIRGINIA DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION AND STUDENT SERVICES OFFICE OF
DISPUTE RESOLUTION AND ADMINISTRATIVE SERVICES

School Division: County Public Schools

Name of child: _____

Name of Parents: _____

Party initiating hearing: Susan Capuano Torda

Counsel representing LEA: John F. Cafferky and Patricia Amberly Minson, Attorneys

Address for counsel: 4020 University Drive, Suite #300, Fairfax, VA 22030

Counsel representing parent/child: None

DECISION

filed a Motion to Dismiss, asserting that the Parent's due process hearing request should be dismissed as to some or all of the issues raised by the Parent in her initial Request for Due Process Hearing. At a prehearing telephone conference the Parent was instructed to file a response to the LEA's Motion to Dismiss and, if so inclined, an Amended Request for Due Process Hearing (herein Amended Request). The Parent filed those documents.

The LEA arguments for dismissal are based on the legal principles of res judicata and collateral estoppel and address each issue raised by the Parent separately. As to issue (a) raised in the Parent's amended request, that the Hearing Officer should find the Student to have autism, the LEA asserts this issue was raised in a previous due process hearing, with evidently the same evidence as proffered in her current amended request. The previous Hearing Officer found that the student "has never received a diagnosis of autism and none was presented in the evidence" and the student "was not denied [a Free Appropriate Public Education] on the basis he was denied autism... services".

The Parent filed a Complaint with the United States District Court for the District of Virginia as an appeal from the previous Hearing Officer's decision. The Parent did not raise the issue of autism in that Complaint. Within Judge Gerald Bruce Lee's Memorandum Opinion, he describes the only two issues raised and decided upon are whether violated IDEA in

failing to evaluate the student for Auditory Processing Disorder and, thereby overlooking an area of the student's disability and whether and violated IDEA in failing to provide an educational program that addresses the student's auditory processing deficits. The issue of autism was not raised or decided upon in the U. S. District Court.

The Parent included the issue of multiple disabilities in both the previous due process hearing and the appeal to the U.S. District Court. As stated earlier, the U.S. District Court narrowed the issues to only two. However, the Memorandum Opinion expressly concluded "The preponderance of the evidence in the record does not support a finding that ... *the student*... has multiple disabilities or any APD that is not primarily the result of his intellectual disability. Thus, any auditory processing problems that ...*the student*...has cannot justify an order that amend ...*the student's*... educational records to reflect APD."

Parent has appealed the decision of the U.S District Court to the U.S. Court of Appeals for the Circuit. In her Appellant's Informal Opening Brief, the parent states: "We ask the court to make a finding that ...*student's*... special education should include (sic) have included recognition of his auditory processing disorder and that ...*the student*... did not receive FAPE in 2007-2008 as a result of this FCPS failure."

The parent does not ask the U.S. Circuit Court of Appeals to rule whether the District Court erred in finding the preponderance of the evidence in the record does not support a finding that the student has multiple disabilities or any APD that is not primarily the result of his intellectual disability; that any auditory processing problems that the student has cannot justify an order that amend that student's educational record to reflect APD; or that the administrative officer did not err in finding that did not overlook any areas of disability for the student; and that provided a free and appropriate public education. She simply asks that the Court of Appeals rule the District Court and the hearing officer should have recognized her son's APD and the failure to do so constitutes a failure to provide FAPE.

Without including these issues in her U.S. Circuit Court appeal, isn't the parent conceding these points, that is, that any auditory processing problems have been considered, that no areas of disability have been overlooked and that the student has received FAPE? If so, then the fact that the student has received an appropriate education is settled.

The question of whether the student has an auditory processing disorder is one that possibly should be answered. But with a finding that the student's auditory processing problems have been considered and with that consideration, FAPE has been provided, even a finding of APD would only result in a possible change in delivering FAPE. It appears that both the original hearing officer and the U.S. District Court found that the student was receiving FAPE with consideration of the student's auditory processing problems. It appears, to quote the original hearing officer, that "Viewed in a broad picture, what becomes apparent is that and [the parent] simply disagree in objectives and methodologies for educating [the student]."

Applying the principles of res judicata, I find there is a final judgment on the merits of the parent's claims (due process hearing as to autism and the U.S. District Court decision as to the remaining issues) and that she should not be permitted to re-litigate these issues, particularly since she intends to rely on the same evidence.

Applying the principles of collateral estoppel, I find the parent has already fully litigated the issues in the previous due process hearing and subsequent U.S. District Court hearing; that those issues constitute a final judgment on the merits; and that the same parties litigated those issues.

For the above stated reasons, I grant _____'s motion to dismiss.

ORDER

IT IS HEREBY ORDERED that this matter be dismissed.

RIGHT OF APPEAL NOTICE

This decision is final and binding unless either party appeals in a federal district court within 90 calendar days of the date of this decision, or in a state court within 180 calendar days of the date of this decision.

Date: _____


Richard M. Alvey, Hearing Officer