

**STATE OF CONNECTICUT
DEPARTMENT OF EDUCATION**

Student v. East Lyme and Salem Boards of Education

Appearing on behalf of the Parents and the Student: Attorney Gordon Kirkman, 6 Cove Landing, Old Saybrook, CT 06475

Appearing on behalf of the East Lyme Board: Attorney Frederick Dorsey, Siegel, O'Conner, O'Donnell & Beck, P.C., 150 Trumbull Street, Hartford, CT 06103

Appearing on behalf of the Salem Board: Attorney Mark Sommaruga, Sullivan, Schoen & Connon, LLC, 646 Prospect Avenue, Hartford, CT 06105-4286

Appearing before: Attorney Elisabeth Borrino, Hearing Officer

FINAL DECISION AND ORDER

ISSUES:

1. Whether the Student is being denied FAPE in the least restrictive environment as a result of changes to the IEP which were reportedly made on August 24, 2007 by the BOE;
2. Whether the August 24, 2007 changes to the IEP should be voided;
3. Whether the Student is entitled to two years of compensatory education;
4. Whether the September 18, 2007 Decision in Case No. 07-224 is controlling and the matter should be dismissed;
5. Whether the Hearing Officer lacks jurisdiction.

PROCEDURAL HISTORY:

On August 30, 2007, the Parents and Student filed a request for a due process hearing. On September 24, 2007, a prehearing conference was held and the matter was set for hearing on November 6 and 7, 2007. During the prehearing conference, the Boards indicated that they intended to file a Motion to Dismiss and a briefing schedule was set for such filing. Thereafter, on October 12 and 17, 2007, the East Lyme and Salem Boards, respectively, filed Motions to Dismiss. Opposition thereto was filed on October 23, 2007.

The Boards claim that the Hearing Officer lacks jurisdiction on the basis that (1) the complainant seeks the provision of the accommodation of captioning for the Morning Show, which is the subject of a prior due process hearing and, thus, barred by the doctrines of *res judicata* and *collateral estoppel*, (2) the complaint resides within the ambit of the State Department of Education's compliance/complaint procedures, and (3) no relief can be granted against the Salem Board of Education.

DISCUSSION

On July 13, 2007, the Parents and Student filed a claim for due process, Case No. 07-224, which was fully adjudicated between these same parties. On September 18, 2007, Hearing Officer Deborah R. Kearns issued a Decision and Order. The Boards contend that the complainant sought the same relief requested in the instant matter. The Hearing Officer agrees.

The doctrine of *res judicata* "precludes parties from litigating issues that were or could have been decided in a prior proceeding. Perez v. Danbury Hospital, 347 F.3d 419, 426 (2d Cir. 2003). In order to establish *res judicata* "a party must show that (1) the previous action involved an adjudication on the merits, (2) the previous action involved the complainant, and (3) the claims asserted in this action were or could have been raised in the prior action." Monahan v. N.Y. City Dep't of Corr., 214 F.3d 275, 284-85 (2d Cir. 2000).

The doctrine of *collateral estoppel* precludes the parties from litigating "a legal or factual issue already decided in an earlier proceeding." Perez v. Danbury Hospital, 347 F.3d 419, 426 (2d Cir. 2003). In order for the doctrine of *collateral estoppel* to apply, the Board must establish that (1) the identical issue is raised in a previous proceeding, (2) the issue was 'actually litigated and decided' in the previous proceeding, (3) the party had a "full and fair opportunity' to litigate the issue, and (4) the resolution of the issue was 'necessary to support a valid and final judgment on the merits." Boguslavsky v. Kaplan, 159 F. 3d 715, 720 (2d Cir. 1998).

Although the complainants assert that the Student is being denied FAPE due to the alleged "changes" on the IEP, they are seeking the same accommodation that was litigated in the above due process hearing.

Additionally, the only act complained of herein is the addition to the IEP of the East Lyme Board's refusal of the Parents' request for the same accommodations. The East Lyme Board's refusal to provide such accommodations was the subject of the prior proceeding and, as stated on the instant request for due process hearing "the date of the IEP meeting at which the parties failed to reach agreement: 4/2/07." On August 24, 2007, the East Lyme Board wrote to the complainant and advised that "page 3 of the 4/2/07 PPT minutes were not fully filled out. Enclosed is an "updated " copy of those PPT minutes." (Attachment E to Motion to Dismiss of Salem Board of Education). This was not a change in position by the East Lyme Board and occurred while the prior proceeding was still pending.

During the prehearing conference, counsel for the complainants indicated that the Decision in Case no. 07-224 was being appealed.

The Hearing Officer does not need to reach the remaining two grounds for the Motion to Dismiss. Since the issue herein is the same one already heard and decided by a hearing officer in a prior due process hearing, this matter must be dismissed.

FINAL DECISION AND ORDER

1. The matter is dismissed.