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| **Before The**  **State Of Wisconsin**  **DIVISION OF HEARINGS AND APPEALS** |

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| In the Matter of In the Matter of [Student] v. [District]  v.  [District] | DHA Case No. DPI-17-0020  DPI Case No. LEA-17-0015 |

**DECISION**

The PARTIES to this proceeding are:

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|  | [Student], by  [Parent] | [District], by  Attorney Mary S. Gerbig  Davis & Kuelthau, S.c.  318 South Washington Street, Suite 300  Green Bay, WI 54301-4242 |

PROCEDURAL HISTORY

On September 25, 2017 the Department of Public Instruction (DPI) received a request for a due process hearing under Wis. Stats. Chapter 115 and the federal Individuals with Disabilities Education Improvement Act (IDEA) from [Parent] (the Parent) on behalf of his son, [Student] (the Student), against the [District] (the District). A prehearing conference was set for October 23, 2017 but the hearing was adjourned my mutual agreement of the parties in order to allow the parties to participate in mediation. A mediation occurred on October 26, 2017 and resulted in a written mediation agreement. That same date the Student’s mother and ex-wife of [the parent] contacted the Division of Hearings and Appeals indicating her desire that the Due Process hearing request be withdrawn. No similar withdrawal request was received from the Student’s father, [Parent]. Instead, on November 6, 2017 [the parent] sent an email to the Division of Hearings and Appeals, which read:

Judge Fredrick, although I am unable to have representation for Due Process it is my desire to have opportunity to have a Due Process hearing to bring light and awareness on all that has transpired with [District]. The actions of administration were not only breaches of [the student’s] IEP were neglectful, endangering, and violations of [the student’s] civil right's. The fabricated IEP, drafted by director of pupil services is just tip of iceberg. Perjury, falsification of records, intimidation of witnesses', obstruction of law enforcement through false statements and even lying to their own medical staff. This is only beginning of what I can Prove transpired in [district]. I can also prove multiple counts of direct physical abuse of children, yes plural. This started as offering to let superintendent turn over an employee I outed due to evidence I brought back to superintendent directly and requested she turn over to DA. Instead superintendent had the employee waiting in same lobby with her spouse as my son [the student] and I exited administration office, of [the] assistant superintendent of [the district]. Which is not only a violation of our states whistle blower policy. They not only endangered me but my son [the student] who attended meeting with [district staff] and I. The actions of this district are not only ethically wrong but are illegal. They have blocked me from school grounds at points, used law enforcement agencies to intimidate my family, and blocked me from access to the elected officials (school board) who are designed to oversee my sons district. Reason for Due Process hearing at this point is to prove and prevent all the staff, especially administration will go to hide the actions of a few of their own at the expense of [the student], my son and reason for trying to stop this from happening to any other students in future. All I seek is oversight to see exactly who is in charge, the lengths they will go to protect administration rather than the children they are responsible to serve. I do request, to move forward with Due Process hearing.

The petitioner agreed to an extension of the deadline for hearing and decision in the matter and a telephonic conference was subsequently held on November 28, 2017. At that time a briefing schedule was set to address the District’s request for dismissal of the petitioner’s Due Process hearing request and a Decision due date set for January 22, 2018. Consistent with the briefing schedule, on December 18, 2017 the District filed a Notice and Motion to Dismiss along with Memorandum in Support of Motion to Dismiss and four supporting Affidavits. The petitioner had until January 8, 2018 to file a response to the District’s motion. However, nothing was received by the Division of Hearings and Appeals by the deadline.

DISCUSSION

The District’s motion to dismiss must be treated as a motion for summary judgment because it included evidentiary material for consideration. See *Rabideau v. City of Racine*, 2001 WI 57, ¶ 12, 243 Wis. 2d 486, 627 N.W.2d 975 (when matters outside the pleadings are considered, the motion should be treated as a summary judgment motion pursuant to Wis. Stat. §802.06). 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). Further, when a motion for summary judgment is made and supported as provided in this section, an adverse party may not rest upon the mere allegations or denials of the pleadings but the adverse party’s response, by affidavits or as otherwise provided in this section, must set forth specific facts showing that there is a genuine issue for trial.” 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.

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 dispute 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).

Under Wisconsin law, the parent of a student who has been identified as a child with a disability under the IDEA “may file a written request for a hearing within one year after 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…” Wis. Stat. §115.80(1); see also, 34 CFR §300.503(a)(1) and (2) and 34 CFR §300.507(a)(1).

In his Due Process hearing request, the Student’s father in the present matter alleged the following:

* + - Director of Pupil Services falsified IEP,
    - Principal @ [the district] falsified attendance records to get truancy Hearing.
    - [The district] Principal, and other administration have not replied to numerous requests for home bound instruction, or to speak with school psychologist.

(Request for Due Process hearing dated September 25, 2017). The Due Process hearing request set forth the following proposed resolution: “Give all information, emails, statements, recordings, hearings, statements from DHS, 2 LE agencies, police Report from last Nov. when I removed [the student] from [the district] escorted by [county] Deputies. Address School board of [the district] + DPI oversight.” *Id*. The District filed its response to the Due Process hearing complaint on October 2, 2017.

The parties reached a settlement at mediation on October 26, 2017. When the Student’s father failed to withdraw the Due Process hearing request pursuant to the parties’ October 26, 2017 written mediation agreement but instead requested that the Due Process hearing request move forward, the District filed this Motion seeking dismissal on the following grounds:

(1) The due process hearing request is insufficient, outside the jurisdiction of the ALJ and moot based on the material determinative facts;

(2) The Present Dispute is Rendered Moot by the Parties’ actions creating a binding Agreement on October 26, 2017 and implementation of the revised IEP; and

(3) The Additional Parent Claims Raised after the initial Due Process Hearing Request are Barred.

Wisconsin Statute §115.80 does not grant me authority to either enforce or invalidate the parties’ written mediation Agreement nor has either party cited any legal authority establishing same. A written settlement agreement is governed by contract law and therefore within the jurisdiction of a civil circuit court of law. See e.g., *D.R. v. East Brunswick Board of Education*, 109 F.3d 896 (3rd Circ. 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 mediated settlement agreement).

However, I am in agreement with the District that the petitioner’s Due Process hearing request is insufficient and that under Wisconsin law, I do not have jurisdiction over the claims asserted by the Student’s father. Specifically, any claims related to whether records were falsified or whether a request to speak to school staff has been denied are not matters subject to due process hearing under the IDEA or Wis. Stat. Ch. 115. Moreover, any additional allegations raised by the Student’s father beyond those issues identified in the September 25, 2017 Due Process hearing request are barred from consideration in the present matter unless the parties have agreed to an amendment of the original complaint. 34 CFR §300.508(d)(3); *Unknown District*, LEA-06-0015 (WI SEA 2017).

The District has set forth a prima facie case for summary judgment on the remaining issue of whether a request for homebound instruction was denied. The affidavits submitted in support of the District’s motion establish that the Student was previously receiving homebound instruction and that the Student’s parents failed to submit sufficient documentation in support of continued homebound instruction until September 27, 2017. It is undisputed that the Student has received homebound instruction during the 2017-2018 school year as agreed to by the parties. The Student’s father did not submit any response refuting the District’s motion or the facts contained therein. Although [the parent] did submit untimely emails to the Division of Hearings and Appeals on January 19, 2018, these emails did nothing to refute the District’s prima facie case for summary judgment nor raise any genuine issues of material fact to justify a due process hearing in this matter. Accordingly, I find that the District is entitled to summary judgment as a matter of law dismissing the due process hearing request in this matter due to an insufficient due process hearing request and lack of jurisdiction over the subject matter.

ORDER

IT IS HEREBY ORDERED that the Student’s due process hearing request filed on September 25, 2017 against [the district] is dismissed with prejudice.

Dated at Madison, Wisconsin on January 22, 2018.

STATE OF WISCONSIN

DIVISION OF HEARINGS AND APPEALS

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By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Kristin P. Fredrick

Administrative Law Judge

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| **NOTICE OF APPEAL RIGHTS** |
| APPEAL TO COURT: Within 45 days after the decision of the administrative law judge has been issued, either party may appeal the decision to the circuit court for the county in which the child resides under §115.80(7), Wis. Stats., or to federal district court pursuant to U.S.C. §1415 and 34 C.F.R. §300.512.  A copy of the appeal should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.  **The Division will prepare and file the record with the court only upon receipt of a copy of the appeal. It is the responsibility of the appealing party to send a copy of the appeal to the Division of Hearings and Appeals. The record will be filed with the court within 30 days of the date the Division of Hearings and Appeals receives the appeal.** |

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| c: | [District] |