IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

BERNIE DALIEN and DENISE DALIEN, individually and DENISE DALIEN as limited Guardian ad Litem for C.D., Appellants, v. PUYALLUP SCHOOL DISTRICT NO. 3, a municipal corporation, Respondent.	No. 41343-4-II UNPUBLISHED OPINION

Penoyar, J. – The trial court applied collateral estoppel to dismiss Bernie and Denise Dalien's claims that the Puyallup School District No. 3 discriminated against their son, CD, based on his neurological disorder. In prior administrative proceedings, the Daliens claimed that teachers ignored instances when several students harassed CD and that the District discriminated against CD by improperly sending him to a time-out room and failing to provide adequate bathroom facilities. After a 14-day hearing, the administrative law judge (ALJ) rejected each of their claims, finding that the harassment did not occur and that the teachers acted appropriately. In the instant case, the Daliens also claim that the District discriminated against CD because of the same alleged instances where teachers ignored several students harassing CD, where teachers improperly sent him to a time-out room, and where the District failed to provide adequate bathroom facilities.

The Daliens argue that the trial court erroneously applied collateral estoppel because the issue in the administrative proceeding was not identical to the issue in the instant case and

because applying the doctrine would work an injustice. But the issues are identical where they rely on the same necessary facts and the Daliens had a full and fair opportunity to present their case to the ALJ. We affirm.

FACTS

CD has a rare neurological disorder called Landau-Kleffner syndrome (LKS), as well as attention deficit hyperactivity disorder and obsessive compulsive disorder. A child with LKS develops speech at the proper time in development but then regresses significantly. CD's disabilities make him particularly sensitive to loud or repetitive noises, and even normal background sounds can bother him. CD has received special education services, including an Individualized Education Plan (IEP), from the District since 1994.

I. The Alleged Harassment and Discrimination

In several proceedings, the Daliens alleged that CD suffered years of peer harassment, beginning in seventh grade and continuing through ninth grade. Specifically, they claimed that the following harassment occurred:

- An unidentified general education student bothered CD while in common areas or before school started. Once, two students clapped and called out CD's name. After a security officer investigated another incident, no discipline resulted.

- During the 2005-06 school year, a special education student (Student A) acted to bother CD, including pouring hot sauce on some of CD's belongings, tapping his pencil, or kicking a chair leg.

- During the same year, another student (Student B) sometimes sang out loud. Another student (Student C) imitated Student B on a few occasions.

- Several students upset CD by singing on the bus, and an unidentified student allegedly snapped his fingers to irritate CD.

The Daliens also alleged that the District discriminated against CD on the basis of his

disability in the following ways:

- The District allowed CD to use the nurse's restroom at the Daliens' request, which was discriminatory because (1) the District did not offer to let him use the teachers' restroom and (2) the nurse's restroom contained cleaning supplies.

- Staff placed CD in a time-out or quiet room several times during the ninth grade when he was upset and unable to calm down in the classroom.

- The District had CD participate in a District recycling collection program.

II. The Administrative Proceedings

In 2006, the Daliens filed a complaint with the U.S. Department of Education's Office for Civil Rights (OCR), alleging that the District subjected CD to disability discrimination during his eighth and ninth grade years based on alleged peer harassment. OCR investigated the claims and dismissed the complaint as unfounded.

In 2008, the Daliens requested a due process hearing under the federal Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400, and corresponding federal and state regulations. The Daliens alleged that the harassment and discrimination described above prevented CD from receiving a free, appropriate public education (FAPE). They also alleged several statutory and tort causes of action for discrimination, negligence, outrage, and intentional torts. Prior to the hearing, the ALJ dismissed these non-IDEA causes of action and requests for monetary damages for lack of jurisdiction, but the ALJ allowed the Daliens to present all evidence of harassment and discrimination as it related to the IDEA claims.

After a 14-day administrative hearing, in which the ALJ heard testimony from 29 witnesses, including parents, staff, and other students, the ALJ concluded that the Daliens failed to meet their burden on any claim. The ALJ found that the allegations were essentially the same

allegations OCR investigated and found meritless.

Regarding the specific challenges, the ALJ found "no harassment or discrimination has been shown based on student A's actions. The District took appropriate and immediate action to limit student A's behavior, and disciplined him repeatedly." Clerk's Papers (CP) at 252. Although the ALJ found that Student A targeted CD, "he did not just act out toward [CD], but was generally problematic in the class." CP at 250. Teachers did not tolerate Student A's acts, "but took immediate steps to stop the behavior." CP at 251. When those interventions did not work, staff moved Student A to a separate classroom and used other measures to separate CD from Student A. Staff disciplined Student A over the hot sauce incident and another incident where Student A yelled at CD following a school assembly.

The ALJ ruled that "the preponderance of the evidence shows that the singing by student B was not a significant problem" for CD and that it "was not any kind of harassment, teasing, or bullying which the District ignored." CP at 254. The ALJ found that staff acted appropriately, particularly by taking steps to stop Student B from singing during class, to counsel and redirect him about CD's sensitivities, and to teach CD appropriate interventions. The evidence did not support the Daliens' allegation that Student B's singing was "tormenting" and "driving him nuts." CP at 253.

The ALJ found that despite an educator's report that several students whistled at CD in a common area before school, a security officer investigated the matter and warned students against harassment. Staff instructed bus drivers to not drop off CD early to avoid further incidents. The ALJ found that "the District acted appropriately, and there is no persuasive proof that the District's staff tolerated harassment, bullying, or teasing." CP at 254.

The ALJ rejected claims that general education students laughed at CD several times a day, finding that the testimony was not credible, and that, even if true, there was no evidence that the staff knew and failed to take appropriate actions. The ALJ also rejected allegations that CD had an ulcer caused by harassment at school.

The ALJ concluded that "[t]he above Findings, based on the evidence presented at hearing, reflect that no harassment, bullying, or teasing of [CD] . . . occurred, and certainly none that was ignored or covered up by the District's staff." CP at 262. The ALJ noted that the Daliens had to prove three sets of facts: that actual harassment occurred, that the District was indifferent, and that harassment deprived CD of benefiting from his educational program. The ALJ concluded that the Daliens "clearly" failed to establish the first two facts, so the claims failed. CP at 262.

Regarding the Daliens' claim that staff placed CD in the time-out room or quiet room as a form of punishment, the ALJ found the allegations not credible. The rooms were only used as a quiet area and the Daliens' own experts concurred with using the room.

Regarding the claim that CD should have been allowed access to the teachers' restroom instead of the nurse's, the ALJ found that the accommodation was not discriminatory and that nothing showed that either the bathroom or the school was inferior, or that CD was subjected to a "bad" school because he was disabled. CP at 259. Additionally, the ALJ rejected the Daliens' allegation that by participating in a program in which special education students and staff collected recyclable paper from bins outside classrooms and deposited the paper in a central recycling dumpster on school grounds, the school discriminated against CD. The ALJ found that the evidence failed to show that the activity was intentionally demeaning.

The Daliens filed a civil action in federal district court challenging the ALJ's decision. The Daliens claimed that CD was subjected to ongoing harassment and aversive interventions in violation of state law. The Daliens also claimed that the use of the quiet room violated state law. The district court affirmed, noting that "The findings and conclusions of the ALJ are thorough and careful[,] . . . well supported by the record." CP at 274, 276-77. The district court also rejected the state law claims. The Daliens appealed, and the Ninth Circuit Court of Appeals affirmed. *B.D. v. Puyallup Sch. Dist.*, 456 Fed. Appx. 644 (9th Cir. 2011).

III. The Instant Lawsuit

In 2009, the Daliens sued the District, alleging violations of the Washington Law Against Discrimination (WLAD)[1] because of peer harassment, inappropriate use of a time-out room, and allegedly unequal bathroom facilities. During discovery, the Daliens could not identify any allegation concerning the harassment or discriminatory treatment of CD that was not raised in the administrative hearing. Their list of proposed witnesses consisted almost entirely of District staff who were either available to testify or did testify at the administrative hearing.

The District moved for summary judgment, arguing that the claims were barred by collateral estoppel. The Daliens at first conceded that the prior findings barred the claims but argued that injustice would result if collateral estoppel applied. The court granted the District's motion and dismissed the case. The Daliens hired new counsel and sought reconsideration, arguing that dismissal was improper because the elements of res judicata/claim preclusion had not been met. The trial court denied reconsideration, and the Daliens appealed.[2]

[1] Chapter 49.60 RCW

[2] The Daliens moved on the merits to reverse, but Commissioner Schmidt denied the motion.

ANALYSIS

The Daliens argue that their claims should not have been barred by collateral estoppel because (1) the facts and the legal standards between the due process hearing and the superior court action are not identical and (2) application of collateral estoppel would work an injustice. But their argument fails because the ALJ adjudicated the facts necessary to the Daliens' current claims against the District and the Daliens had ample opportunity to present their case to the ALJ. We affirm.

I. Legal Background

We review a summary judgment decision de novo, engaging in the same inquiry as the trial court. *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). We also review de novo whether collateral estoppel bars a particular legal claim. *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305, 96 P.3d 957 (2004). To establish that collateral estoppel bars a particular claim, four elements must be met:

> (1) the issue decided in the earlier proceeding was identical to the issue presented in the later proceeding; (2) the earlier proceeding ended in a judgment on the merits; (3) the party against whom collateral estoppel is asserted was a party to, or in privity with a party to, the earlier proceeding; and (4) application of collateral estoppel does not work an injustice on the party against whom it is applied.

Christensen, 152 Wn.2d at 307. Further, the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the earlier proceeding. *Christensen*, 152 Wn.2d at 307; *Nielson v. Spanaway Gen. Med. Clinic, Inc.*, 135 Wn.2d 255, 264-65, 956 P.2d 312 (1998).

Collateral estoppel promotes judicial economy and serves to prevent inconvenience or harassment of parties and implicates principles of repose and concerns about the resources

expended in repetitive litigations. *Christensen*, 152 Wn.2d at 306-07. It may only preclude those issues that have been actually litigated and necessarily and finally determined in the earlier proceeding. *Christensen*, 152 Wn.2d at 307; *Shoemaker v. City of Bremerton*, 109 Wn.2d 504, 507, 745 P.2d 858 (1987).

Courts often apply collateral estoppel to an issue adjudicated by an administrative agency in an earlier proceeding. *Christensen*, 152 Wn.2d at 307. In explaining the policy behind such applications, our Supreme Court noted, "'To hold otherwise would, as a general matter, impose unjustifiably upon those who have already shouldered their burdens, and drain the resources of an adjudicatory system with disputes resisting resolution.'" *Christensen*, 152 Wn.2d at 308 (quoting *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107-08, 111 S. Ct. 2166, 115 L. Ed. 2d 96 (1991)). Accordingly, there are three additional factors that must be considered when seeking to apply collateral estoppel to an administrative decision:

> (1) whether the agency acted within its competence, (2) the differences between procedures in the administrative proceeding and court procedures, and (3) public policy considerations.

Christensen, 152 Wn.2d at 308. The mere fact that choosing an administrative proceeding may ultimately preclude a later tort claim due to an agency's factual findings does not prevent the application of collateral estoppel. *Christensen*, 152 Wn.2d at 312-13. As our Supreme Court explained, "[T]his is the essence of collateral estoppel. There is nothing inherently unfair about this result provided the party has the full and fair opportunity to litigate, there is no significant disparity of relief, and all the other requirements of collateral estoppel are satisfied." *Christensen*, 152 Wn.2d at 313.

Here, of the four elements and three factors, the Daliens argue that two were not met: the

issues were not identical and applying collateral estoppel would result in an injustice. We hold that the trial court correctly applied collateral estoppel because the controlling facts and applicable legal rules are unchanged between the Daliens' claims to the ALJ and their claims in superior court and because collateral estoppel would not result in an injustice.

II. The Issues in the Two Proceedings Are Identical

The Daliens first argue that the issues of fact between the claims before the ALJ and the claims before the superior court were not identical because the ALJ determined only whether harassment occurred under FAPE, while the WLAD claims involved a different standard: whether CD was treated as not welcome, accepted, desired, or solicited.[3] The Daliens' argument fails because they ultimately rely on the same necessary facts in superior court as in the administrative proceeding. Following a lengthy hearing, the ALJ found against the Daliens on those facts, so those facts have a preclusive effect in the superior court matter.

To conclude that the issues are identical between the prior proceeding and the subsequent proceeding, the controlling facts and applicable legal rules must remain unchanged:

> [A]pplication of collateral estoppel is limited to situations where the issue presented in the second proceeding is identical in all respects to an issue decided in the prior proceeding, and "where the controlling facts and applicable legal rules remain unchanged." Further, issue preclusion is appropriate only if the issue raised in the second case "involves substantially the same bundle of legal principles that contributed to the rendering of the first judgment," even if the facts and the issue are identical.

Lopez-Vasquez v. Dep't of Labor & Indus., 168 Wn. App. 341, 345-46, 276 P.3d 354 (2012) (quoting *LeMond v. Dep't of Licensing*, 143 Wn. App. 797, 805, 180 P.3d 829 (2008) (quoting

[3] The Daliens argue only that collateral estoppel should not apply to their WLAD claims. They do not challenge or address the dismissal of their claims based on other legal theories.

Standlee v. Smith, 83 Wn.2d 405, 408, 518 P.2d 721 (1974)).

In the administrative proceeding, the ALJ had to determine whether CD was denied a FAPE. The Ninth Circuit has explained that "[i]f a teacher is deliberately indifferent to teasing of a disabled child and the abuse is so severe that the child can derive no benefit from the services that he or she is offered by the school district, the child has been denied a FAPE." *M.L. v. Federal Way Sch. Dist.*, 394 F.3d 634, 650 (9th Cir. 2005). Thus, to prevail, the Daliens had to demonstrate that actual harassment occurred, that the District was indifferent, and that harassment deprived CD of benefiting from his educational program. In concluding that the Daliens failed to meet their burden, the ALJ did more than simply conclude that no actual harassment occurred or that the District was not indifferent. The ALJ went through each of the Daliens' asserted instances of harassment and found that no harassment occurred and that the teachers acted appropriately.

The Daliens' claims in the instant WLAD lawsuit are identical to those in the administrative hearing. The WLAD recognizes a right to be free from discrimination based on the presence of any sensory, mental, or physical disability. RCW 49.60.030. This includes the right to the full enjoyment of public accommodation. RCW 49.60.030(1)(b). This means that such disabled persons are not "to be treated as not welcome, accepted, desired, or solicited." RCW 49.60.040(14). To demonstrate a prima facie case of discrimination in public accommodation, the plaintiff must prove:

> (1) they have a disability recognized under the statute; (2) the defendant's business or establishment is a place of public accommodation; (3) they were discriminated against by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities by or at the place of public accommodation; and, (4) the disability was a substantial factor causing the discrimination.

Fell v. Spokane Transit Auth., 128 Wn.2d 618, 637, 911 P.2d 1319 (1996) (quoting former RCW 49.60.215 (1993)).

Here, the ALJ's findings preclude a conclusion that the third element could be met—that CD was discriminated against by receiving treatment provided to individuals without disabilities. *See Fell*, 128 Wn.2d at 637. Under their WLAD claims, the Daliens have to prove that the teachers treated CD inappropriately by using a time-out room and providing unequal bathroom facilities. These are the identical issues that the ALJ determined by a preponderance of the evidence—after a 14-day hearing—when rejecting the Daliens' FAPE claim. While the FAPE claims and WLAD claims have different legal elements, they rely on the same underlying dispositive facts. Put simply, in both cases, the Daliens claimed the teachers acted inappropriately, resulting in CD's harassment. Since the ALJ determined facts that are essential to both its ruling and to the claims in the instant case, they are identical issues. And the ALJ applied the same legal rules as those that apply here.[4] The trial court correctly ruled that the issue

[4] The Daliens posit that the fourth element's substantial factor test means that the WLAD standard is lower than the IDEA and FAPE claims and that the superior court should not be precluded from determining whether CD was treated as not welcome, accepted, desired, or solicited. Even if the Daliens were correct, which they might not be, their argument fails because the ALJ's findings go to the third element—that CD suffered discrimination by receiving treatment that was not comparable to the level of designated services provided to individuals without disabilities—and not the fourth element. *See Fell*, 128 Wn.2d at 637. Because the ALJ's findings are based on the preponderance of the evidence, the Daliens are factually unable to substantiate their claims based on harassment or discrimination.

in the administrative proceeding is identical to the issue presented in the instant case.[5] We reject the Daliens' argument.

III. Applying Collateral Estoppel Would Not Result in an Injustice

The Daliens next argue that applying collateral estoppel would work an injustice because it would prevent them from having their day in court to prove that they need to be free from discrimination because of a disability. Because the Supreme Court has rejected a similar argument and because the Daliens had a full and fair opportunity to litigate the issue in the administrative proceeding, we reject their argument.

While courts should not apply collateral estoppel if it would work an injustice, this "component is generally concerned with procedural, not substantive irregularity." *Christensen*, 152 Wn.2d at 309. Our Supreme Court has explained that "the party against whom the doctrine is asserted must have had a full and fair opportunity to litigate the issue in the first forum," so "applying collateral estoppel may be improper where the issue is first determined after an informal, expedited hearing with relaxed evidentiary standards." *Christensen*, 152 Wn.2d at 309.

The injustice factor "'recognizes the significant role of public policy,'" but the mere fact that an administrative proceeding may ultimately preclude a later tort claim due to the agency's factual findings does not prevent courts from applying collateral estoppel. *Christensen*, 152 Wn.2d at 309 (quoting *State v. Vasquez*, 148 Wn.2d 303, 309, 59 P.3d 648 (2002)). When

[5] At oral argument, the Daliens contend that the ALJ could not address claims of discrimination occurring before 2005. This argument does not appear in their opening brief or their reply brief, and it is too late to raise the issue at oral argument. In any event, the Daliens at no time pleaded that discrimination occurred prior to 2005 in their complaint, and they provided no facts or allegations separate from those the ALJ heard. Further, the ALJ made findings regarding alleged harassment and discrimination occurring before 2005, finding that none occurred. The Daliens' argument lacks merit.

courts have concluded that public policy considerations preclude applying collateral estoppel, there was evidence of legislative public policy determination, including that the purposes of the two proceedings were completely different. *Christensen*, 152 Wn.2d at 309-10 (discussing cases). While the right to a jury trial is an important consideration in examining the injustice prong, the fact that a party would be denied the right to a jury trial is not alone dispositive. *See Christensen*, 152 Wn.2d 308-09.

Here, although the Daliens argue that they have been denied their day in court, they were not denied a full and fair hearing before the ALJ: they had a 14-day hearing in which they examined and cross-examined witnesses, called witnesses of their own, and presented their own evidence. The ALJ provided a lengthy decision addressing each claim and analyzing the many facts and legal theories presented. Applying collateral estoppel would not work an injustice because of any procedural irregularity at the administrative proceedings.

Nor would applying collateral estoppel work an injustice based on public policy considerations. In *Carver v. State*, Division Three of this court examined whether the Legislature has barred applying collateral estoppel to WLAD claims. 147 Wn. App. 567, 573-74, 197 P.3d 678 (2008). After examining another statute, RCW 50.32.097, which provides that an administrative decision in an employment security dispute is not binding or admissible in a separate action, the court held that, "[t]he Legislature knows how to bar issue preclusion when it wants to do so. It has not chosen to do so in the WLAD." *Carver*, 147 Wn. App. at 574. That reasoning applies equally to the Daliens' WLAD claims here.[6]

[6] The *Carver* court went on to hold that applying collateral estoppel in that case would result in an injustice because the plaintiff appeared pro se at the administrative hearing while suffering from the effects of dementia. *Carver*, 147 Wn. App. at 575. But here, although the Daliens appeared

Further, while the Daliens are correct that CD has a right to be free from discrimination based on his disability, they have had an opportunity to present their theory and arguments to the tribunal of their choice—the ALJ. Like in *Christensen*, the Daliens essentially complain that collateral estoppel should not apply because the administrative findings preclude their later tort claim. 152 Wn.2d at 309. We conclude that no injustice results from applying collateral estoppel and reject the Daliens' argument.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Penoyar, J.

We concur:

Quinn-Brintnall, J.

Johanson, A.C.J.

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at the administrative proceedings pro se, they do not argue that they suffered some sort of mental disability during those proceedings, nor is there any evidence that they were "mentally incompetent . . . [and] left to [their] own devices." *Carver*, 147 Wn. App. at 575.