The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-095

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Christina Golkin, Esq.

Legal Aid Society, attorneys for respondent, by Marie Mombrun, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's tuition at the Cooke School and Institute (Cooke) for the 2022-23 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student in this case has continuously attended Cooke since the 2015-16 school year (see Tr. p. 65; Parent Exs. M ¶ 11; N ¶ 4).[1] On November 23, 2021, a CSE convened to conduct the student's annual review and to develop an IEP (see Dist. Ex. 1 at pp. 1, 28). The November 2021 IEP reflected a projected implementation date of December 7, 2021 and a projected annual review date of November 23, 2022 (id. at pp. 1, 21-22). Finding that the student remained eligible for special education as a student with an intellectual disability, the November 2021 CSE

[1] The Commissioner of Education has not approved Cooke as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

recommended a 12-month school year program in a 12:1+1 special class placement for the student within a district specialized school, together with related services of counseling, occupational therapy (OT), and speech-language therapy (id. at pp. 1, 21-23).[2]

Subsequent to the November 2021 CSE meeting, the parent filed a due process complaint notice alleging, in part, that the November 2021 IEP failed to offer the student a free appropriate public education (FAPE) (see Parent Ex. N ¶ 5).[3]

On June 17, 2022, the parent executed a reenrollment contract with Cooke for the student's attendance during the 2022-23 school year (10-month school year program) (see Parent Ex. E at pp. 1, 3; see also Tr. p. 127).

In a prior written notice dated June 27, 2022, the district summarized the special education program recommendations for the student that resulted from the CSE meeting held on November 23, 2021 (see Dist. Ex. 3 at pp. 1-2). In a school location letter of the same date, the district identified the specific public school site within which the November 2021 IEP would be implemented (id. at p. 5).[4]

On or about August 18, 2022, an IHO issued a decision with respect to the parent's allegations concerning, in part, the November 2021 IEP, which determined that the November 2021 IEP was "not substantively appropriate nor reasonably calculated to enable [the student] to receive an education[al] benefit" (Parent Ex. D at p. 2; see Parent Ex. N ¶ 7). In that decision, the IHO ordered the district to fund the costs of the student's tuition at Cooke for the 2020-21 and 2021-22 school years (see Parent Ex. D at p. 2).[5]

In an undated, 10-day notice of unilateral placement letter to the district, the parent notified the district of her intentions to unilaterally place the student at Cooke for the 2022-23 school year and to seek direct funding of the costs of the student's tuition from the district (see Parent Ex. A at p. 1). The parent noted in the letter that an IHO had found that the student's November 2021 IEP failed to offer the student a FAPE and that Cooke was an appropriate unilateral placement for the student (id.).

In an email to the parent's attorney, dated August 26, 2022, the district acknowledged receipt of the parent's 10-day notice letter of unilateral placement (see Parent Ex. B).

---

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[a][6]; 8 NYCRR 200.1[zz][7]).

[3] Evidence in the hearing record indicates that in or around November 29, 2021, the parent challenged the student's May 2020, December 2020, and November 2021 IEPs in the same administrative proceeding by filing a due process complaint notice (see Parent Motion to Preclude at pp. 2-3).

[4] At the impartial hearing, the parent testified that she never received the school location letter from the district (see Tr. pp. 60-61, 76-78).

[5] Neither party entered the August 2022 IHO decision into the hearing record as evidence (see generally Feb. 16, 2023 Tr. pp. 1-11; Tr. pp. 1-171; Parent Exs. A-N; Dist. Exs. 1-6).

The evidence in the hearing record reflects that, for the 2022-23 school year, the student began attending Cooke on or about September 12, 2022 (see Parent Ex. F; see generally Parent Exs. K-L).

In a letter dated September 16, 2022, the district informed the parent that it had received her letter on August 26, 2022, which had advised the district of her "disagreement with the program and/or placement recommendations" for the student and her intention to unilaterally place the student at Cooke for the 2022-23 school year (Parent Ex. C). The district also acknowledged the parent's request for public funding of the student's unilateral placement at Cooke (id.). According to the September 2022 letter, the district determined that the parent's "unilateral placement claim [wa]s not appropriate for settlement" and advised her that if she wished to pursue her claims, she must file a due process complaint notice (id.).

A. Due Process Complaint Notice

By due process complaint notice dated January 13, 2023, the parent alleged that the district failed to offer the student a FAPE for the 2022-23 school year (see Parent Ex. D at p. 1). As relevant to this appeal, the parent explained in the due process complaint notice that, after paying for the student's tuition at Cooke via settlements for the 2015-16 through the 2019-20 school years, the district denied her request for tuition reimbursement for the 2020-21 and 2021-22 school years at Cooke, which resulted in the parent seeking an impartial hearing (id. at p. 2). According to the due process complaint notice, in a decision dated August 18, 2022 (August 2022 IHO decision), another IHO had concluded that the student's November 2021 IEP was "not substantively appropriate nor reasonably calculated to enable [the student] to receive an education[al] benefit" (id.). In light of the August 2022 IHO decision, the parent asserted that, since the November 2021 IEP would have been the IEP in effect at the start of the 2022-23 school year, in September 2022, the "question of whether a valid IEP was in place on the first day of school ha[d] already been litigated in the [p]arents favor"—noting further that "no IEP meeting ha[d] been held thus far in the school year" (id.). As relief, the parent requested an order directing the district to fully fund the costs of the student's tuition at Cooke for the 2022-23 school year (id. at p. 3).

B. Impartial Hearing Officer Decision

On February 16, 2023, the parties proceeded to an impartial hearing before the Office of Administrative Trials and Hearings (OATH), and the IHO conducted a prehearing conference (see Feb. 16, 2023 Tr. pp. 1-11; Pre-Hr'g Conf. & Summary Order).[6] The impartial hearing resumed on March 15, 2023, and prior to witness testimony, the parties and the IHO discussed the parent's motion to preclude, which sought to prevent the district from arguing that the student's November 2021 IEP offered the student a FAPE because previous litigation had already determined that the November 2021 IEP failed to offer the student a FAPE (see Tr. pp. 1, 6-15; see generally Parent

[6] The transcript from the prehearing conference held on February 16, 2023 was not consecutively paginated with the remaining transcripts from the impartial hearings held in March 2023; for clarity, any transcript citations related to the prehearing conference in this decision will refer to the date of the impartial hearing and the page number, such as "Feb. 16, 2023 Tr. p. 1." However, transcript citations to the remaining impartial hearing dates held in March 2023 will refer only to the transcript page, such as "Tr. p. 25," as these transcripts were consecutively paginated.

Mot. to Preclude; Dist. Br. in Opp'n to Collateral Estoppel). At that time, the IHO indicated that he would hold a ruling on the parent's motion to preclude in abeyance and the impartial hearing proceeded (see Tr. pp. 15-104). On March 20 and March 27, 2023, the parties completed the presentation of their respective cases at the impartial hearing (see Tr. pp. 106-171).

In a decision dated April 21, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, Cooke was an appropriate unilateral placement, and equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 7-11). With regard to the IHO's finding that the district failed to offer the student a FAPE, and as relevant to the appeal, the IHO factually determined that the student's "most recent IEP meeting was held on November 23, 2021," which indicated a projected annual review date of November 23, 2022, and that "[n]o review was held" (id. at p. 5). Next, although the IHO found that the district's evidentiary case focused on the recommendations in the November 2021 IEP and whether the district was capable of implementing the November 2021 IEP, the IHO indicated that it was "unnecessary to evaluate the IEP in depth as the [d]istrict was required to review the [s]tudent's IEP annually and failed to do so" (id.).

Turning to the conclusions of law, the IHO briefly addressed the parent's motion to preclude and the parties' respective arguments thereto (see IHO Decision at pp. 7-8). The parent contended that the unappealed, August 2022 IHO decision—which found that the November 2021 IEP failed to offer the student a FAPE—collaterally estopped the district from relitigating the same IEP (id. at p. 7). In opposition, the district asserted that collateral estoppel did not preclude it from "arguing the appropriateness of the IEP for this school year, merely because it was found to be inappropriate for the prior school year" (id.). The IHO ultimately concluded that it was "unnecessary to reach a decision as it relate[d] to collateral estoppel" because the district, in its brief, had noted that it was "'only obligated to develop an IEP for each student on an annual basis,'" which, according to the IHO, the district failed to do (id. at pp. 7-8). As a result, the IHO found that the district's arguments with regard to whether it offered the student a FAPE failed (id. at p. 8).

Next, the IHO more fully addressed whether the district offered the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 8-9). The IHO specifically turned to the district's statutory obligation to review the student's IEP "periodically, but not less frequently than annually, to determine whether the annual goals for the [student] [we]re being achieved" (id. at p. 8 [emphasis in original]). The IHO determined that the student's projected annual review date for his IEP was November 23, 2022, and based on the evidence in the hearing record, the district—to date—had not yet conducted the student's annual review (id.). In addition, the IHO found that "[n]ot only ha[d] the [d]istrict failed to annually review the [s]tudent's IEP—the [d]istrict, following an [IHO decision] identifying the IEP as inadequate, failed to take any action whatsoever related to this [s]tudent's IEP" (id.). According to the IHO, the district's "lack of action" rose "above the level of a harmless procedural error and deprive[d] the [s]tudent of a FAPE" (id.). The IHO further noted that, at the impartial hearing, the district attempted to foist blame on the parent for "not requesting an IEP meeting," however, the IHO determined that "case law [wa]s plain on this issue—and educational agency c[ould not] eschew its affirmative duties under the IDEA by blaming the parents" (id. at pp. 8-9). As a result, the IHO found that the district failed to offer the student a FAPE (id. at p. 9).

Having concluded that the district failed to offer the student a FAPE, the IHO turned to examine whether Cooke was an appropriate unilateral placement for the student and whether equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 9-11). The IHO found in favor of the parent on both issues, and ordered the district to directly fund the costs of the student's tuition at Cooke for the 2022-23 school year (id.). In addition, the IHO ordered the district to convene a CSE meeting within 30 days to determine whether the student required updated evaluations and to develop an updated IEP for the student (id. at p. 11).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding that it failed to offer the student a FAPE for the 2022-23 school year. Generally, the district contends that the evidence in the hearing record demonstrated that the district had an appropriate IEP in place at the start of the school year and the district sent the parent a school location letter. In addition, the district argues that the November 2021 IEP constituted the student's operative IEP for the purpose of determining whether the district offered the student a FAPE, and the IHO erred by finding that the district's failure to develop an IEP after the expiration of the November 2021 IEP resulted in the failure to offer the student a FAPE. Relatedly, the district asserts that it was not obligated to schedule a CSE meeting or develop an IEP for the student prior to the start of the 2022-23 school year because the November 2021 IEP was already in place. The district further asserts that any IEP developed after the parent unilaterally placed the student at Cooke would have been irrelevant to any analysis of whether the district offered the student a FAPE, as the district was "under no obligation to defend subsequent IEPs after an operative IEP [wa]s in place."

Next, the district contends that the IHO functionally applied equitable estoppel to the facts of this case even though the IHO indicated in the decision that it was unnecessary to reach a conclusion with respect to the parent's motion to preclude based on collateral estoppel. According to the district, the IHO applied equitable estoppel because the IHO awarded tuition reimbursement for the entire 2022-23 school year, and in order to make this award, the IHO accepted as fact that the November 2021 IEP denied the student a FAPE based upon the finding in the August 2022 IHO decision. The district argues that, regardless of whether the IHO accepted the parent's collateral estoppel argument, it does not apply to this case, and as a result, the district seeks to annul the IHO's decision. As a final point, the district contends that the IHO erred by finding that the district failed to take any actions with regard to the November 2021 IEP after the August 2022 IHO decision, noting that the IHO in that case did not order the district to take any actions other than funding the student's unilateral placement at Cooke.[7]

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety.

[7] To the extent that the district does not appeal the IHO's determinations that Cooke was an appropriate unilateral placement for the student for the 2022-23 school year and that equitable considerations weighed in favor of the parent's requested relief—findings that were adverse to the district—these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

The evidence in the hearing record reflects that, in this instance, the parent moved to preclude the district from relitigating the appropriateness of the student's November 2021 IEP based on collateral estoppel by arguing that another IHO previously found that the same IEP failed to offer the student a FAPE in an August 2022 IHO decision (see Parent Mot. to Preclude at pp. 2-3). According to the parent's motion, the district "attempted to defend the sufficiency of the relevant IEP" at the impartial hearing in this case, and the parent objected based on collateral estoppel (id. at p. 3). In addition, the parent asserted that the district failed to conduct a CSE meeting or develop an IEP for the student at any time subsequent to the CSE meeting held to develop the November 2021 IEP in November 2021 (id.). Based on the principles of collateral estoppel, the parent argued that the issue in the current case, that is, "whether the November 2021 IEP, which was in effect at the start of the 2022-2023 school year, was sufficient to offer a FAPE to the student," was the same issue that had been "'litigated and decided' after the parties had a 'full and fair opportunity' to make their arguments at the prior impartial hearing" (id. at p. 5). According to the parent's motion, the district's assertion that the November 2021 IEP could be "resurrected to apply" to the 2022-23 school year because it was still in effect at the start of the school year was unsupported by either the facts or the law (id. at pp. 5-6). Additionally, the parent asserted that the district's attempt to "rehabilitate" the November 2021 IEP through the presentation of witness and documentary evidence at the impartial hearing "arrive[d] too late," noting that the district "declined to defend" the November 2021 IEP "via the SRO appeal process" (id. at p. 6).

In its motion papers, the district argued that the August 2022 IHO decision determined that the student's November 2021 IEP failed to offer the student a FAPE for the 2020-21 school year, and therefore, no determination had been made regarding whether the November 2021 IEP offered the student a FAPE for the school year at issue in this matter, the 2022-23 school year (see Dist. Br. in Opp'n to Collateral Estoppel at pp. 2-5). In addition, the district admitted that, in the previous administrative proceeding, the district failed to present evidence or otherwise defend itself with respect to whether the November 2021 IEP offered the student a FAPE (id. at p. 3). The district also asserted that, in the previous administrative proceeding, it "strategically chose to waive its [FAPE] case and proceed[ed] on challenges" to the parent's unilateral placement (id. at pp. 3-4). With respect to the 2022-23 school year, the district argued that it provided the student with a "valid and appropriate IEP, at the start of the 2022-2023 school year" with an assigned public school site that could implement the November 2021 IEP (id. at p. 4). As a result, the district contended that precluding the district from defending the November 2021 IEP in the instant matter would deprive the district of its due process rights, and thus, collateral estoppel was inapplicable (id.). As a final point, the district attempted to analogize the facts of the current case to a prior SRO decision by arguing that the student's November 2021 IEP remained in effect for "approximately twelve (12) months and expired after the start of the 2022-2023 school year," on or about November 2022, which extended through two school years (2021-22 and 2022-23), and that based on the "SRO's reasoning from [Appeal No. 15-075], it follow[ed] that the [August 2022 IHO decision] relating to the prior school year d[id] not have any preclusive effect" on the 2022-23 school year at issue in this case (id. at pp. 4-5).

On appeal, the district contends that regardless of whether the IHO actually considered the collateral estoppel arguments submitted via the parties' motion papers, the IHO functionally applied the doctrine by awarding the parent with reimbursement for the costs of the student's tuition

at Cooke for the entire 2022-23 school year. As noted, the district continues to assert on appeal that collateral estoppel does not apply to this case. However, as explained below, the district's arguments are without merit and thus, there is no reason to disturb the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that

> (1) the identical issue was 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

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]). Generally, the party seeking to invoke collateral estoppel—here, the parent—must demonstrate that the issues are "identical and were necessarily decided in the prior action," and the opposing party—the district—bears the burden to establish that it did not have a "full and fair opportunity to litigate the issue[]" in the prior proceeding (Green v. McKoy, 2023 WL 2742143, at *11 [N.D.N.Y. Mar. 31, 2023], citing Davis v. Proud, 2 F. Supp. 3d 460, 481 [E.D.N.Y. 2014]).

Initially, while the August 2022 IHO decision was not entered into the hearing record as evidence, the district does not dispute that the August 2022 IHO decision included a determination that the student's November 2021 IEP failed to offer the student a FAPE (see generally Dist. Br. in Opp'n to Collateral Estoppel; Req. for Rev.). In addition, the district admits that the November 2021 IEP offered the student a special education program that spanned two separate school years, namely, for the 2021-22 school year from December 2021 through June 2022, and for the 2022-23 school year from July 2022 through November 2022 (based on a 12-month school year program) when the IEP would have expired based on the district's admitted obligation to "develop an IEP for each student on an annual basis" (Dist. Br. in Opp'n to Collateral Estoppel at p. 4; see Req. for Rev. ¶ 9).[9]

Contrary to the district's arguments, and regardless of whether the IHO functionally applied the doctrine of collateral estoppel without formally addressing the parent's motion to preclude, collateral estoppel bars the district's defense of the November 2021 IEP here. This is so because the issue of whether the November 2021 IEP offered the student a FAPE was the identical issue

[9] As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]).

raised in the previous administrative proceeding, the issue was actually litigated and decided in the previous administrative proceeding, the district had a full and fair opportunity to litigate the issue, and the resolution of the issue was necessary to support a valid and final judgment on the merits.

With respect to the first, second, and fourth elements, there is no dispute that the August 2022 IHO decision determined that the November 2021 IEP failed to offer the student a FAPE, and it is also undisputed that the district sought to defend the same IEP—and the identical issue of whether the IEP offered the student a FAPE—in this case. In addition, neither party disputes that the issue of FAPE was actually litigated and decided, or that the resolution of whether the November 2021 IEP offered the student a FAPE was necessary to support a valid and final judgment on the merits, which resulted in the previous IHO awarding the parent reimbursement for the costs of the student's tuition at Cooke for both the 2020-21 and 2021-22 school years.

Contrary to the district's assertions, collateral estoppel applies to the facts of this case regardless of the fact that the November 2021 IEP overlapped two separate school years, because the issues subject to collateral estoppel attached to those arising from the November 2021 IEP, and not, as argued by the district, to the school year(s) being litigated. Although the district points to SRO decisions in support of this assertion, the district misconstrues the SRO decisions, which dealt with different IEPs for different school years, rather than, as in this case, the same November 2021 IEP that spanned portions of two different school years. Moreover, although the district correctly asserts that the November 2021 IEP may have been the operative IEP in effect at the start of the 12-month school year, that is, in July 2022, the November 2021 IEP was subsequently invalidated on or about August 18, 2022 by the previous IHO's determination in the August 2022 IHO decision, prior to the parent's decision to unilaterally place the student at Cooke and prior to informing the district on August 26, 2022 of her intentions to unilaterally place the student at Cooke for the 2022-23 school year and to seek public funding for that placement. Therefore, contrary to the district's contentions, the district was on notice—as of August 26, 2022—that the student's November 2021 IEP had been found inappropriate and it is also true that the November 2021 IEP was invalidated by the August 2022 IHO decision by finding that the IEP failed to offer the student a FAPE—a point that the district ignores and fails to address. Therefore, when the student began attending Cooke in September 2022, he effectively had no IEP in place, let alone an IEP that was appropriate to meet his needs.

Finally, with respect to the third element of collateral estoppel, the doctrine may be applied against a party—here, the district—'"where the party again whom preclusion is sought appear[ed] in the prior action, yet wilfully (sic) and deliberately refuse[d] to participate in those litigation proceedings, or abandon[ed] them, despite a full and fair opportunity to do so'" (Claridge Assoc., LLC v. Schepis, 2020 WL 6505210, *7 [S.D.N.Y., Nov. 5, 2020], citing In re Abady, 22 A.D.3d 71, 83-84 [1st Dept. 2005] [noting that, with respect to default judgments, the "Court ha[d] carved out a limited exception where the party against whom collateral estoppel [wa]s sought to be in invoked ha[d] appeared in the prior action or proceeding and ha[d], by deliberate action, refused to defend or litigate the charge or allegation that [wa]s the subject of the preclusion request"]). Here, the district cannot sustain its burden to establish that it did not have a full and fair opportunity to litigate the issue of whether the November 2021 IEP offered the student a FAPE in the previous administrative proceeding based on the allegation in its motion papers that the district made a

strategic decision to not defend the November 2021 IEP or to not present any evidence thereto in the prior proceeding.

VII. Conclusion

Having found that the evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 30, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER