The University of the State of New York

The State Education Department
State Review Officer
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No. 23-158

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Westhampton Beach Union Free School District

Appearances:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, 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 parent) appeals from a decision of an impartial hearing officer (IHO) which found that respondent (the district) did not deny a free appropriate public education (FAPE) to the parent's son for a portion of 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). 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 been the subject of 20 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 23-138; Application of a Student with a Disability, Appeal No. 23-093; Application of a Student with a Disability, Appeal No. 23-022; Application of a Student with a Disability, Appeal No. 22-168; Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability , Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability , Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability , Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19- 021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student

with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

As set forth in previous appeals, due to the nearly continuous nature of the administrative due process proceedings and State-level administrative appeals—and related federal district court proceedings—involving this student, he has been receiving his special education program under various pendency placements since approximately the 2015-16 school year (see generally Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102).

The subject of this appeal relates to a recommendation contained in an October 13, 2022 IEP developed for the 2022-23 school year which recommended a 12:1+1 special class for the student in an out-of-district program (Dist. Exs. 1; 2). Ultimately, the parent disagreed with the October 2022 IEP and filed four separate due process complaint notices relating to the 2022-23 school year prior to initiating this matter (see Dist. Ex. 14 at pp. 5-8).[1, 2]

Thereafter, on January 23, 2023, the out-of-district program recommended in the October 2022 IEP revoked its offer to the student due to the "verbal aggression from the parent demonstrated at the [October 2022] CSE" meeting (Dist. Ex. 4 at p. 1). On January 25, 2023, the district's director of pupil personnel services (PPS director) sent screening packets to twelve programs in an effort to locate a suitable placement for the student (Dist. Exs. 10; 20 ¶ 27). Out of the twelve programs, only a district Board of Cooperative Educational Services (BOCES) program responded that it had an appropriate placement available for the student for the remainder of the 2022-23 school year (see Dist. Ex. 13; 20 at ¶ 32).

On February 14, 2023, the district emailed the parent to schedule a CSE meeting to review placement options for the remainder of the 2022-23 school with the suggested dates of either March 17, 2023 or March 24, 2023 (Dist. Exs. 11; 12 at p. 1). The parent responded stating that the CSE should take place in February 2023 but was subsequently informed by the district that it

[1] All four prior due process complaint notices were consolidated into one proceeding (see Dist. Ex. 14 at pp. 7-8).

[2] By petition dated October 10, 2021, the parent filed an Article 78 proceeding in the New York State Supreme Court (Albany County) to annul New York State Education Department's (NYSED) earlier denial of a chronological age variance application (see Dist. Ex. 16 at p. 1 n. 1). In an August 17, 2022 Decision and Order, the Supreme Court annulled NYSED's denial of a chronological age variance application, which, if granted, would have permitted the CSE to recommend that the student be placed in the district's 12:1+1 special class where the chronological age range of students with disabilities would have exceeded 36 months (Dist. Ex. 16 at p. 1). In a decision dated December 13, 2022, the court denied NYSED's motion to reargue the prior August 17, 2022 decision and order (id.). The December 2022 decision also noted that the student's application was effectively renewed as of the August 2022 decision and order (Dist. Ex. 8 at p. 2). In a letter dated January 3, 2023, NYSED requested submissions from the parties on the renewed chronological age variance application for the 2022-23 school year (Dist. Exs. 8; 21 at pp. 11, 30-31).

was unable to meet in February given that the school would be closed the following week for the school holiday (Dist. Ex. 12).

A. Due Process Complaint Notice

By due process complaint notice dated February 14, 2023, the parent alleged that "no viable education program and placement recommendation" existed as a result of the out-of-district program revocation on January 23, 2023 (Dist. Ex. 1). As a proposed remedy, the parent requested an order compelling an "Annual Review" CSE to convene for purposes of establishing an appropriate educational program and placement recommendation for the 2022-2023 school year and a judgment for back-end compensatory education accruing from January 23, 2023, in the event the out-of-district program placement was ultimately deemed to have been violative of the IDEA (id.).[3]

B. Events Subsequent to the Due Process Complaint Notice

On March 3, 2023 the district emailed the parent indicating that the district's BOCES program had a spot open for the student and that the parent needed to set up a student interview as part of the intake process prior to the CSE meeting so the CSE could consider the option.

On March 6, 2023, the district filed a combined verified answer and motion to dismiss (Dist. Ex. 21). Further, on March 6, 2023, the New York State Education Department (NYSED) granted a chronological age variance for the student for the 2022-23 school year (Dist. Ex. 16).

C. Impartial Hearing Officer Decision and Intervening Events

On March 24, 2023, the parties convened for a pre-hearing conference and clarified the hearing issues, discussed the potential consolidation of this case with other then-pending matters involving the same student, and discussed the status of related litigation in federal and State courts (Tr. pp. 1-39). The parties agreed to keep this matter separate from the other then-pending matters (Tr. pp. 7-8). Additionally, in response to NYSED's approval of a chronological age variance for the student, the parent moved for an interim order directing the district to immediately place the student in the 12:1+1 special class available at the district high school (see Tr. pp. 18-20). The district opposed the parent's motion and stated that a CSE meeting was scheduled for April 4, 2023 to discuss the impact of the chronological age variance on the educational recommendations for the student (Tr, pp, 20-23).[4]

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[3] In a recent matter, the parent clarified that in his opinion a "back-end compensatory education award must be prospective in nature, and therefore must be issued in the form of a monetary judgment capable of facilitating a year's worth of tuition at a post-secondary learning institution." (Application of a Student with a Disability, Appeal No. 23-093 at p. 21).

[4] The IHO decided to withhold his determinations on both of the parties' cross-motions until after the April 2023 CSE convened (Tr. p. 30). In reserving his determination until after the CSE convened in April the IHO essentially denied the parent's interim motion to immediately place the student in the district's 12:1+1 special class. Based on the nature of the motion, rather than reserving judgment, a more appropriate action by the IHO may have been for him to have denied the motion with leave for the parent to renew it after the completion of the

A CSE convened on April 4, 2023 to discuss the program options available to the student, which included the BOCES program and the district 12:1+1 special class (see Dist. Ex. 19). The CSE recommended the district 12:1+1 special class with related services (id. at pp. 103-08). The parent stated that he "would be okay with the recommendation" (id. at p. 108).

On April 13, 2023, the parties proceeded to a status conference where the IHO was informed that the CSE did convene on April 4, 2023 and recommended that the student be placed in the district's 12:1+1 special class commencing on April 19, 2023 (Tr. pp. 46-48, 50). Based on this information, the IHO advised the parties that the only remaining issues to be determined in this matter were whether the district failed to offer the student a free appropriate public education (FAPE) during the time between January 23, 2023 and April 4, 2023 and whether the student would be entitled to compensatory education (Tr. pp. 65-67).

An impartial hearing convened on May 15, 2023 and concluded on June 9, 2023, after two days of proceedings (Tr. pp. 77-352). In a decision dated July 13, 2023, the IHO determined that the out-of-district program revocation did not deny the student a viable educational program and placement, and that the district's PPS director took reasonable and timely actions to ensure the student received a FAPE following the revocation (IHO Decision at p. 17). Regarding the parent's request for "back-end compensatory education," the IHO determined that the parent did not allege what services the student did not receive during the time period at issue, and further, that the student continued to receive related services and instruction pursuant to the 2019 pendency agreement thus compensatory education would not be warranted (id. at p. 19). As a result, the IHO granted the district's motion to dismiss the due process complaint notice (id. at p. 20).

IV. Appeal for State-Level Review

The parent appeals. The parent's main argument is that the IHO erred in granting the district's motion to dismiss and dismissing his due process complaint notice. The parent argues that the IHO failed to consider his motion for an interim order directing the district to place the student in the district's 12:1+1 special class immediately upon NYSED's approval of the age variance application, also failed to consider "the import[ance] of the NYSED's age variance approval on March 6, 2023" and asserts that the placement of the student should have happened as soon as the age variance was granted. The parent also alleges that the IHO erred in finding that the district took reasonable measures to implement NYSED's age variance approval in a timely manner.

Further, the parent alleges that the IHO erred by not awarding compensatory education for the district's alleged FAPE denial because the parent failed to allege what services or instruction the student did not receive during the time period at issue (January 23, 2023 to April 4, 2023). Lastly, the parent argues that the IHO should have determined that the event of the out-of-district program revoking its placement offer and/or the event of NYSED's approval of the parent's age variance application constituted pendency-terminating events pursuant to which the district "could have simply agreed to alter the terms of 'pendency' pending the procedural formality of convening a CSE." More specifically, the parent argues the IHO should have determined that the CSE meeting

CSE meeting.

was not needed to place the student in the district's 12:1+1 special class once NYSED approved the age variance application.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district also argues that the parent's request for review should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review.[5]

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"

[5] In the request for review, the parent numbers and identifies the IHO's rulings with which he takes exception (i.e., that his claims were precluded by res judicata or collateral estoppel and that he did not set forth a cognizable claim under the IDEA) and sets forth reasons as to why he believes the findings should be reversed (see 8 NYCRR 279.4[a]; 279.8[c][2]). Accordingly, the parent generally complies with State regulations governing form requirements for pleadings by setting forth issues presented for review, by numbering each issue and using bold text to highlight the specific issue, which distinguishes the issue presented from the argument in support of each issue (see generally Req. for Rev.). Next, the parent also complies with the State regulation for stating the relief sought in the underlying proceeding (8 NYCRR 279.8[c][1]). The parent requested for the IHO's decision to be reversed and that the student be awarded "appropriate compensatory education damages necessary to address the educational deprivation that he suffered by virtue of not being placed in the appropriate educational setting" ((Req. for Rev.). Finally, the parent's request for review contains multiple citations to pages in the IHO's decision (Req. for Rev. at pp. 1-2, 4-9). Based on the foregoing, dismissal of the parent's request for review for failure to comply with State regulations governing the form requirements for pleadings is unwarranted.

(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]).[6]

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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).

VI. Discussion

A. Preliminary Matters

1. Res Judicata – FAPE and Compensatory Education

In its answer the district argues that the parent's allegations that the district violated the student's rights by delaying approval of the age variance and that the district failed to offer the student a FAPE for the 2022-23 school year are barred by res judicata and collateral estoppel as both issues were addressed in prior proceedings.

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 res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6). Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative

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).

fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. Apr. 1, 2013]).[7]

The related 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, 347 F.3d at 426; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

Turning first to the claim that the IHO failed to hold the district liable for its complicity in delaying the parent's age-variance approval, the issue was fully and fairly determined at the state administrative level as demonstrated by the facts and findings reached by the district court (see Killoran v. Westhampton Beach Sch. Dist., 2023 WL 2760773, at *1-*5 [E.D.N.Y. Mar. 31, 2023]). According to the court, the IHO, in a prior matter resulting in a March 9, 2022 decision and order, correctly found that the district's age variance request "was prepared in a manner consistent with the implementation directions given" (id. at *2). The district argues that the parent's due process complaint notice related to that case either raised or could have raised this arguments alleged in the matter now on appeal and, as such, the parent should be precluded from litigating this issue further (District Mem. of Law at p. 15).

With respect to the elements of res judicata identified above, I find that the district sufficiently met each element as to this issue. Though the evidence in the hearing record does not include the parent's prior due process complaint notices relating to claims concerning the age variance application, the student has been the subject of continuous litigation in which the issue of the age variance has been an issue, and after an independent review of the prior appeals at the administrative and district court level, I find that the parent had a full and fair opportunity to litigate the issues of whether the district was liable for its complicity in delaying the parent's age-variance approval in the previous administrative proceeding (see generally Killoran, 2023 WL 2760773, at *2; Application of a Student with a Disability, Appeal No. 23-093; Application of a Student with a Disability, Appeal No. 23-010). Moreover, there is no dispute as to whether the parties to this

[7] "In determining whether the same nucleus of facts is at issue," relevant considerations include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011] [internal quotations omitted]; see Dutkevitch v. Pittston Area Sch. Dist., 2013 WL 3863953, at *3 [M.D. Pa July 24, 2013] [identifying relevant considerations including whether the acts complained of and relief demanded were the same, whether the theory of recovery was the same, whether the material facts were the same, and whether the same witnesses and documentation would be required to prove the allegations]; see also Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 42 [D.D.C. 2013] [finding that a parent's claim that a school could not implement a student's IEP arose from the same nucleus of facts as a previously adjudicated claim that the school did not offer groups and minimal distractions]).

litigation have been the same parties as in the prior matters or that the claims pursued by the parent in this matter could have been raised at a prior proceeding, as nearly identical claims were actually raised in prior proceedings as discussed above.[8]

Turning to the second claim that the IHO erred by not considering that the district was found to have denied the student a FAPE already for the 2022-23 school year by failing to have an IEP in place at the beginning of the school year, just by the language used by the parent, it is evident that this issue was previously litigated on its merits and should not be relitigated or considered on appeal in this matter. Further, it is undisputed that the 2022-23 school year was already litigated by the parties in multiple hearings and resulted in a State-level appeal, in which an SRO determined that the district failed to offer the student a FAPE for the 2022-23 school year (see IHO Decision at pp. 4-11; Dist. Exs. 3; 7; 14; Application of a Student with a Disability, Appeal No. 23-093). In Application of a Student with a Disability, Appeal No. 23-093, an SRO found that the district denied the student a FAPE for the entire 2022-23 school year and reversed the IHO but found that equitable considerations warranted a full denial of the parent's requested relief (see Application of a Student with a Disability, Appeal No. 23-093 at pp. 18, 23). This was a final determination on the issue of FAPE for the 2022-23 school year, subject only to an appeal of that decision to the district court. Moreover, the issue of whether the parent was entitled to any relief, including compensatory education, was largely addressed in Appeal No. 23-093 and to the extent similar claims were raised by the parent in the proceeding at issue here, such claims are similarly barred on res judicata and collateral estoppel grounds. Based on the foregoing, I find that the parent's claims related to the denial of FAPE and remedy of compensatory education for the 2022-23 school year which he continues to raise in his request for review are barred by the doctrine of res judicata and collateral estoppel and will not be addressed further herein.

2. Interim Order

The parent contends that the IHO erred in denying his request for an interim order directing the district to place the student in the district's 12:1+1 special class immediately upon NYSED's approval of the age variance application. The parent argues that he was seeking to terminate the terms of the pendency agreement and place the student within the district 12:1+1 class "as soon as possible" rather than allow the district to "slow-roll[]" the process of the student's inclusion in the 12:1+1 class until the CSE could convene (Req. for Rev. at pp. 1-2). The district claims that the IHO did not have jurisdiction to grant the parent's interim order arguing that it was the CSE who possessed the authority "in the first instance" to recommend an educational placement for the student (Answer ¶ 28).

As correctly identified by the district in its answer, there are ways a pendency program can be altered, none of which are present in this matter. As identified above, the student has been in the same pendency program since the parties agreed to a pendency placement pursuant to a 2019 pendency agreement (see Dist. Ex. 7).

Accordingly, once a student's "then-current educational" placement or pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed

[8] The parent did not submit a reply to the district's answer in this matter to dispute the district's contentions that some of his claims should be barred by the doctrines of res judicata and collateral estoppel.

IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Schutz, 290 F.3d at 483-84; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington, 421 F. Supp. 2d at 697; Murphy, 86 F. Supp. 2d at 366; Letter to Hampden, 49 IDELR 197). Absent one of the foregoing events, once a pendency placement has been established, it "shall not change during those due process proceedings" (S.S., 2010 WL 983719, at *1 [emphasis in the original]). And upon a pendency changing event, such changes apply "only on a going-forward basis" (id.). With that said, it has been held that in certain circumstances a court may, on equitable grounds, retroactively adjust a student's pendency placement if a State-level administrative decision in a parent's favor was not issued in a timely manner (see Mackey, 386 F.3d at 164-66; Arlington, 421 F. Supp. 2d at 701; O'Shea, 353 F. Supp. 2d at 457-58; Murphy, 86 F. Supp. 2d at 366-67).

The parent argues that because NYSED approved the age variance application for the 2022-23 school year, the student's pendency should have automatically changed to the district's 12:1+1 special class. The parent does not offer any authority that would establish that a NYSED determination is a court decision that would necessitate a change in a student's pendency. Further, the evidence in the hearing record supports the determination that it was the CSE who had the ultimate authority to recommend the 12:1+1 district special class and that the IHO was correct to deny the parent's interim order.

According to the letter from NYSED granting the parent's age variance application for the 2022-23 school year "NYSED ha[d] no authority to consider and make written determinations concerning whether a recommended special education program and services constitutes a FAPE in the LRE. The [IDEA] vests that authority with the District by its CSE; not in the context of a variance application" (Dist. Ex. 16 at p. 3). Further, the letter indicated that "[i]n the event the District is made aware of other viable placement options, those options should be referred to the District's CSE for its consideration" (id. at p. 4). Accordingly, while NYSED's grant of the age variance application effectively provided the CSE with authority to consider the 12:1+1 district class during its development of the student's IEP going forward, it did not order or otherwise require that the student be recommended for that placement. Rather, it explicitly affirmed that it was the CSE, not the IHO or NYSED, which had the authority to place the student in the district's 12:1+1 special class pursuant to the usual IEP development process.

As a result, based on my independent review of the impartial hearing record, there is insufficient evidence to support the parent's contention that the IHO erred by not issuing an interim order directing the district to immediately place the student in the district's 12:1+1 special class if NYSED approved the age variance application. Moreover, as indicated, NYSED may not have approved the age variance application and thus the CSE would have had to convene to consider other viable options for the student due to the fact that the out-of-district program revoked its offer. Further, the evidence showed that once the out-of-district program revoked its offer on January 23, 2023, within two days, the director of PPS sent screening packets to twelve programs in an attempt to locate a viable program for the student for the remainder of the 2022-23 school year (see Dist. Exs. 4; 9; 10; 20 ¶ 27). The evidence shows that prior to receiving responses from the program, the director took actions to schedule a CSE meeting with the parent to review any potential placements for the 2022-23 school year (see Dist. Exs. 11; 12 at p. 1). The director

proposed scheduling a CSE meeting on either March 17 or March 24, 2023 but the parents indicated that they were unable to attend so a subsequent CSE meeting was scheduled for April 4, 2023 (Tr. p. 282; Dist. Ex. 11). The director of PPS received one affirmative response from the district's BOCES program which the director relayed to the parent on March 3, 2023 by letter (Dist. Ex. 11). A CSE meeting did convene on April 4, 2023 at which time it recommended that the student attend the district's 12:1+1 special class with related services for the remainder of the 2022-23 school year and the parent indicated he agreed with the CSE's recommendations (see Dist. Ex. 19 at pp. 103-08). Accordingly, I find that the IHO acted within his discretion in declining to issue an interim order directing the district to place the student in the district's 12:1+1 special class immediately upon NYSED's approval of the age variance application.

B. Additional 2022-23 School Year Findings by the IHO

Upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly reached certain conclusions on claims raised by the parent relating to the 2022-23 school year and properly dismissed the parent's due process complaint notice.

I have determined that the issue of the district's denial of FAPE to the student for the 2022-23 school year has been previously litigated and determined in the parent's favor and, accordingly, the parent's FAPE claims in this matter are barred by res judicata and collateral estoppel; moreover, the parent cannot demonstrate that he was aggrieved by any further acts of alleged malfeasance on the part of the district that would also result in a (largely redundant) FAPE denial finding given that he already prevailed on that issue. Similarly, the availability of compensatory education as a remedy for the district's denial of a FAPE to the student for the 2022-23 school year has also been previously litigated and resolved against the parent and the renewal of any claim here based on similar facts and argument is also barred by res judicata and collateral estoppel. However, in an abundance of caution, I find that the following determinations by the IHO were well-reasoned and supported by the evidence in the hearing record: that the out-of-district program had no legal obligation to hold a spot for the student in its 12:1+1 special class after the parent rejected the program via a due process complaint notice; that the revocation by the out-of-district program did not deny the student a "viable educational program and placement"; that the director of PPS took reasonable and timely actions to ensure that the student was offered a FAPE following the out-of-district's program revocation; and that the student was not entitled to compensatory education (see IHO Decision at pp. 16-20). As to these issues, the IHO accurately recounted the relevant facts of the case and set forth the proper legal standards to determine whether the district offered the student a FAPE in the LRE for the 2022-23 school year and applied those standards to the facts as presented in this proceeding (id. at pp. 7-20). A review of the IHO decision shows that, for these issues, the IHO carefully considered the testimonial and documentary evidence presented by both parties and, further, that he weighed the evidence and properly supported his conclusions (id.). Furthermore, an independent review of the entire hearing record reveals that the impartial hearing was conducted in a manner consistent with the requirements of due process and that there is not a sufficient basis presented on appeal to modify these determinations of the IHO (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]). Accordingly, even if the parent's claims on appeal were not barred by res judicata and collateral estoppel, I would adopt the conclusions of the IHO as described above.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's decision in its entirety, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 31, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER