The University of the State of New York

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

No. 23-234

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 Nate Munk, Esq.

Gulkowitz Berger LLP, attorneys for respondent, by Shaya M. Berger, 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 ordered it to reimburse respondent (the parent) for the cost of transporting the student to and from special education services for the 2021-22 school year. The appeal must be sustained and the matter must be remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited in detail. Briefly, a CSE convened on October 5, 2021, to formulate the student's IESP for the 2021-22 school year (see generally Parent Ex. B). The October 2021 CSE found the student eligible for special education services as a student with a speech or language impairment and recommended five periods per week of direct,

group special education teacher support services (SETSS) (Parent Ex. B at pp. 1, 12).[1, 2] Also, the October 2021 CSE recommended one 40-minute session per week of group speech-language therapy; two 40-minute sessions per week of individual speech-language therapy; one 40-minute session per week of individual counseling services; and one 40-minute session per week of group counseling services (id. at p. 12).

Prior to the present proceedings, in a due process complaint notice, dated October 25, 2021, the parent alleged that the district failed to provide SETSS to the student for the 2021-22 school year and requested funding by the district of five periods per week of SETSS at an enhanced rate (IHO Ex. I at pp. 27-28).[3] The parent and district resolved the October 25, 2021 due process complaint notice by agreement dated January 28, 2022 executed by the parent on April 12, 2022 and the district on April 18, 2022 (id. at pp. 31-32). The resolution agreement provided that the district would pay a set rate for the student to receive five sessions/hours per week of SETSS for the 2021-22 school year (id. at pp. 31-32).

Next, turning back to this proceeding, in a due process complaint notice, dated June 27, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year by failing to provide transportation to and from the SETSS that the student received during the 2021-22 school year (see Parent Ex. A).

After a prehearing conference on August 1, 2023, the parties appeared before an IHO with the Office of Administrative Trials and Hearings (OATH) and reviewed evidence for admission into the hearing record. A status conference was held on August 23, 2023and the impartial hearing convened on August 31, 2023 and concluded on September 8, 2023, after two days of proceedings (Tr. pp. 1-72). On August 18, 2023, the district made a written motion to dismiss the parent's due process complaint notice based on the doctrines of res judicata and mootness (see IHO Ex. I). The parent submitted written opposition to the district's motion to dismiss (see IHO Ex. II). In a decision dated September 18, 2023, the IHO agreed with the district that the parent's claim for transportation was barred by the doctrine of res judicata; however, the IHO determined that the district was responsible for the cost of transportation of the student to the agency providing the student with STESS during the 2021-22 school year because the parent incurred transportation costs "as a result of [the] [s]tudent's attendance at [district]-funded essential special education services, [it] is simply a matter of holding [the district] responsible for costs it should have borne

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] The IHO entered the district's "Motion and Memorandum of Law in Support of the New York City Department of Education's Motion to Dismiss the Due Process Complaint Notice" into the administrative record (IHO Ex. I). The motion included two documents that were not included elsewhere in the hearing record: the October 2021 due process complaint notice (IHO Ex. I at pp. 27-30) and the resolution agreement (IHO Ex. I at pp. 31-33). The remainder of the documents attached to the district's motion were included elsewhere in the hearing record.

in the first instance" (IHO Decision at p. 11).[4] As relief, the IHO ordered the district to reimburse the parent a specified amount for the cost of transporting the student to and from the special education services during the 2021-22 school year (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The district appeals from the IHO's decision focusing on the contention that the parent's claim for transportation expenses is barred by the doctrine of res judicata and arguing that the IHO erred in granting the parent reimbursement for transportation costs for the 2021-22 school year. The parent asserts that res judicata is not applicable in this case and the decision of the IHO awarding reimbursement for the transportation costs incurred for the student traveling to and from SETSS for the 2021-22 school year should be upheld.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that

[4] It should be noted that the IHO issued three decisions on September 18, 2023: findings of fact and decision, amended findings of fact and decision, and second amended findings of fact and decision. The differences of the decisions were the addition of certain exhibits and to correct the page count for certain exhibits. For purposes of this appeal, I shall refer only to the second amended findings of fact and decision.

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

The sole issue raised on appeal by the district is whether the IHO erred in failing to dismiss the matter under the doctrine of res judicata. Upon review of the entire hearing record and caselaw applicable thereto, I find the IHO misapplied the law with respect to res judicata and the matter must be remanded for further proceedings consistent with this decision.

At the outset, prior to addressing the arguments related to res judicata, the parties' and the IHO must be reminded as to the differences between the legal framework for dual enrollment under State law and the federal law as applicable to students enrolled in nonpublic schools, as the IHO appears to have applied the federal standards related to transportation rather than State standards applicable when a student is dually enrolled (see IHO Decision at pp. 6, 11). The Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). For requests pursuant to § 3602-c, the CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.). Thus, the State law dual enrollment option confers an individual right to have the CSE design a plan to address the student's individual needs (see Educ. Law § 3602-c[2][b][1]; Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 293 [2010]). This provision is separate and distinct

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

In keeping with the State's legal framework for dual enrollment, the district developed the October 2021 IESP for the student, recommending five periods per week of SETSS, along with speech-language therapy and counseling services (Parent Ex. B). Nevertheless, in addressing the parent's claims related to transportation, the IHO focused on the federal standards for transportation for students placed in public schools, rather than State law as applicable to dually enrolled students.

However, I make no findings as to the IHO's transportation findings as the sole issue before me is whether the claim for transportation as set forth in the parent's June 2023 due process complaint notice was barred under the doctrine of res judicata, thus precluding any relief. In particular, it is worth noting that the IHO found that although the parent's claim for transportation raised in this proceeding was separate and apart from the prior claim for payment for SETSS, the IHO found that the parent should have known of her claim for transportation for SETSS as part of the prior proceeding and the IHO determined that the "[p]arent's claim in the instant case is barred by res judicata" (IHO Decision at pp. 10-11). Despite this conclusion, the IHO went on to find that "ordering [the district] to reimburse [the parent] for the costs she incurred as a result of [the student's] attendance at [district] funded essential special education services, is simply a matter of holding [the district] responsible for costs it should have borne in the first instance" (id.). However, res judicata is a threshold matter and the IHO's findings as to res judicata must be reviewed first, as such a finding could have a preclusive effect.[7]

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

[7] The effect of the IHO's reasoning in this case was essentially to hold that an obligation created by a statute overrides any notion of res judicata or similar doctrines such as collateral estoppel. That is error, because if accepted as valid reasoning, the application of those doctrines would be entirely eviscerated from most modern legal proceedings that are based on claims alleging violations of statutory requirements imposed upon private parties and/or public entities, and the resulting effect would be duplicative litigation that would quickly cripple an adjudicatory system that would repeatedly rehash the same factual events and violations.

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]).[8]

Initially, in reviewing the IHO's finding and the hearing record as submitted, it is unclear if the prior matter resulting in a settlement agreement was an adjudication on the merits. On appeal, the district asserts that the first factor in the res judicata analysis has been met because the resolution agreement was considered an "adjudicated" matter, referring to case law that states a "dismissal, with prejudice, arising out of a settlement agreement would operate as a final [judgment]" (Req. for Rev. ¶¶ 8, 9). In response to the district's arguments, the parent asserts that the prior proceeding was not "dismissed with prejudice" as asserted by the district (id. ¶ 6). Review of the IHO's decision shows that the IHO relied on a similar analysis as that used by the district, referencing a dismissal with prejudice as operating as a final judgment for the purpose of res judicata (see IHO Decision at p. 9).

Pertinently, while "a stipulation of settlement withdrawing a complaint or cause of action with prejudice" can have preclusive effect under the doctrine of res judicata, where "a stipulation did not constitute a final judgment or a stipulation of discontinuance with prejudice" the matter "is not entitled to res judicata effect" (Vehifax Corp. v Georgilis, 205 AD3d 973, 976 [2d Dept 2022]).

Accordingly, it appears that the IHO incorrectly concluded that the resolution agreement was an adjudication on the merits without undertaking the necessary analysis (IHO Decision at p. 9). The IHO cited to Marvel Characters, Inc. v Simon, 310 F3d 280 [2d Cir 2002] for the proposition that "a dismissal, with prejudice, arising out of [a] settlement agreement operates as a final judgment" for purposes of res judicata (IHO Decision at p. 9). However, the IHO failed to further elaborate on the specifics of how the January 28, 2022 resolution agreement contained in the hearing record precluded the instant claim for transportation reimbursement, more specifically, there is no explanation as to why the district and IHO appear to consider the settlement agreement to be a withdrawal of the parent's claims with prejudice. Furthermore, the underlying claims of violation of law in the due process proceedings related to this student appear related to special education services called for under the State's dual enrollment statute, which is distinct from the IDEA's requirements when it comes to matters of providing special education services to students who have been placed in private schools by their parents (see Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 736 [2d Cir. 2007]). In reviewing State law it is clear that "[a]n action is not automatically terminated with prejudice merely because the parties reached a settlement" Clerico v Pollack, 148 AD3d 769, 771 [2d Dept 2017] [citations omitted]). Here, there is no evidence in the hearing record that the parent withdrew the October 25, 2021 due process complaint notice or

[8] "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]).

that such withdrawal was "with prejudice" (IHO Ex. I at pp. 27-33). The Court in Clerico went on to further state that:

> "Generally, a valid release constitutes a complete bar to an action on a claim that is the subject of the release" (Nucci v Nucci, 118 AD3d 762, 763 [2014]). "'However, a release may not be read to cover matters which the parties did not intend to cover'" (id. at 763, quoting Desiderio v Geico Gen. Ins. Co., 107 AD3d 662, 663 [2013]). "[I]ts meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given" (Cahill v Regan, 5 NY2d 292, 299 [1959]; see Matter of Mercer, 141 AD3d 594, 597 [2016])"

(Clerico, 148 AD3d at 771 [emphasis omitted]).

Returning to the specific facts in this matter, the resolution agreement states as follows: "[t]his agreement is the complete settlement of all claims contained in the impartial hearing request dated 10/25/2021 and filed by the parent" (IHO Ex. I at p. 31). Additionally, other language that could be considered as a "release" of claims as set forth in the January 28, 2022 resolution agreement was the statement that it was an "agreement in full" between the district and parent "[r]egarding the 2021-[22] educational program for [the student]" (IHO Ex. I at p. 31). Unfortunately, there was no discussion during the impartial hearing between the parties or analysis by the IHO as to whether the language in the resolution agreement was intended to bar all claims pertaining to the 2021-22 school year or just those claims raised in the October 2021 due process complaint notice.

Thus remand is necessary because the IHO needs to develop the hearing record with evidence as to the parties' intent in entering into the settlement agreement, particularly as to the parties' intent regarding the language as to the student's educational program for the 2021-22 school year (id.). In the event that the IHO determines the prior proceeding constituted an adjudication on the merits using the standards as set forth above, it is worth noting that the parent's request for transportation costs associated with their privately-obtained services appears to be additional relief sought to remedy the alleged failure by the district to implement equitable services as settled in the prior matter rather than a separate violation by the district of Education Law § 3602-c (see GV v. Bd. of Educ. of W. Genesee Cent. Sch. Dist., 2017 WL 3172417, at *3 n.6 [N.D.N.Y. July 25, 2017] [noting that, even if the IHO in the prior matter could not have awarded the relief the plaintiff sought in the action before the court, "'[a] party cannot avoid the preclusive effect of res judicata by asserting . . . a different remedy'"], quoting Brown Media Corp. v. K&L Gates, LLP, 854 F.3d 150, 157 [2d Cir. 2017]; see also Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] ["[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'"], quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]).

Finally, the IHO must also further develop the hearing record with respect to the parent's claim for transportation reimbursement. The October 2021 IESP does not contain special

transportation as a related service and the hearing record lacks any evidence that the student required special transportation; however, in the initial due process complaint notice in the prior proceeding, the parent did not raise any allegations as to the sufficiency of the student's programming contained in the October 2021 IESP and instead raised claims regarding implementation of the IESP (Parent Ex. B at p. 14; IHO Ex. I at pp. 27-28). The hearing record also lacks evidence as to whether the parent attempted to arrange for transportation services through the district, as a general education student, or why such services were not sufficient for the student.

According to the evidence in the hearing record, the SETSS were provided to the student at the agency providing the service and not at the nonpublic school attended by the student for the 2021-22 school year (Parent Ex. C at pp. 1-11). It is unclear from the hearing record if the student traveled from the nonpublic school to the agency and, if so, the distance between the nonpublic school and the agency providing SETSS (see Parent Exs. D; G). The parent testified that the agency providing the student with SETSS was "a few avenue blocks and streets" from their home (Tr. p. 58). The SETSS started at various times including 9:00 a.m.; 9:10 a.m.; 10:00 a.m.; 11:00 a.m.; 12:00 p.m.; 12:15 p.m.; 1:00 p.m.; 1:30 p.m.; 2:00 p.m.; 2:45 p.m.; 3:00 p.m.; 3:15 p.m.; 4:15 p.m.; or 5:15 p.m., and lasted for one hour (Parent Ex. C at pp. 1-11). However, it is noted in the October 2021 IESP that the student's "[s]ecular studies" at the nonpublic school were from approximately 3:45 p.m. to 5:30 p.m. Monday through Thursday, and, therefore, the student would miss those secular studies during the time the student received the SETSS services (Parent Ex. B at p. 3). Other than what was already discussed, the issues of whether the student traveled from the nonpublic school, if a parent accompanied the student to SETSS, whether the student shared the car service with other students attending SETSS at the same or a different location, other transportation options, i.e., bus, or the district's policy pertaining to transportation were not made a part of the hearing record.[9]

In addition, the hearing record contained transportation reimbursement vouchers for the SETSS provided to the student during the 2021-22 school year (see Parent Ex. E). These transportation vouchers were on preprinted district forms that included the date of the transportation service, total cost, and attendance verification for the dates of September 1, 2021 through June 30, 2022 (Parent Ex. E at pp. 1, 3, 5, 7, 9, 11, 13, 15, 17, 19).[10] Curiously, the transportation vouchers were signed by the parent on March 22, 2023 and the transportation provider on March 23, 2023 (id. at pp. 2, 4, 6, 8, 10, 12, 14, 16, 18, 20). During the impartial hearing, parent's counsel confirmed that the transportation vouchers had not been presented to the district for payment and only offered in the "context" of the impartial hearing (Tr. pp. 67-69).

[9] School districts in this jurisdiction are already required to comply with the minimum transportation requirements of nonpublic school students set forth in state law regardless of whether a student is disabled or not (see, e.g., Educ. Law § 3635), and local school officials often further extend transportation to all students in a manner that exceed the State requirements through locally promulgated policies (see Pupil Transportation: General Information For Parents and Others, available at http://www.p12.nysed.gov/schoolbus/Parents/htm/general_info_intro.htm).

[10] Of note, the resolution agreement states that the "SETSS [a]re [t]o [b]e [c]ompleted [b]etween" September 13, 2021 through June 30, 2022 (IHO Ex. I at p. 31). However, the district did not dispute the transportation services that were provided outside of this time period.

However, the form makes clear that to obtain reimbursement the voucher form together with receipts must be submitted to a CSE representative (id. at pp. 1-20). Again, the IHO failed to elicit testimony with respect to the dates on the vouchers and why the vouchers were not submitted to the district at an earlier date.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Accordingly, having found that the IHO did not apply the correct standards with respect to res judicata, the IHO's decision must be reversed, and, as the hearing record lacks sufficient information to make that determination at this juncture, or to properly address the parent's request for transportation, the matter is remanded to the IHO for further proceedings as discussed above. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon.

VII. Conclusion

Having determined that the IHO incorrectly applied the doctrine of res judicata to this matter, the IHO's decision is vacated and will be remanded for further proceedings consistent with this decision.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated September 18, 2023 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO who issued the September 18, 2023 decision for further proceedings and to develop the hearing record on the issues of res judicata and transportation.

Dated: **Albany, New York**
November 29, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER