The University of the State of New York

The State Education Department
State Review Officer
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No. 24-233

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 New York City Department of Education

Appearances:
The Arkontaky Law Group, PC, attorneys for petitioner, by Simone James, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. Macleod, 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 dismissed his due process complaint notice with prejudice on the basis of res judicata. The district cross-appeals from the IHO's decision which awarded home-based applied behavior analysis (ABA) services as the student's pendency placement. The appeal must be dismissed. The cross-appeal must be sustained.

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 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 here in detail.

Briefly, the student has received diagnoses including autism spectrum disorder (ASD); generalized anxiety disorder; persistent depressive disorder; oppositional defiant disorder; learning disorder with impairments in reading, written expression, and mathematics; and attention deficit hyperactivity disorder (ADHD)–combined type (Parent Exs. C at p. 12; G at pp. 1-2; H at p. 1; K at pp. 3-4; Q at pp. 1, 6; T at p. 8). The student attended a private school, Atlas School for Autism (Atlas), beginning in September 2019 (Parent Ex. L at p. 2).

A CSE convened on June 6, 2023, and, finding the student eligible for special education as a student with autism, developed an IEP for the 2023-24 school year (see generally Parent Ex. C).[1] The June 2023 CSE recommended that the student attend a 12-month program consisting of a 6:1+1 special class in a district specialized school for all subjects, three periods per week of adaptive physical education, and related services as follow: three 30-minute sessions per week of individual counseling; two 40-minute sessions per week of individual occupational therapy (OT); one 40-minute session per week of individual physical therapy (PT); three 30-minute sessions per week of individual speech-language therapy; one 30-minute session per week of speech-language therapy in a group of three, and parent counseling and training once a month for 60-minutes (Parent Ex. C at p. 32). The June 2023 CSE also recommended supplementary aids and services in the form of an individual, full-time, daily paraprofessional for behavior support and assistive technology in the form of a cloud based laptop with e-text reader, digital books/library, PDF annotator, graphic organizer and math programs which the student could use through the day at school and at home (id. at pp. 32-33). The June 2023 CSE also recommended a behavioral intervention plan (BIP) and identified target behaviors (id. at p. 15).

In a prior proceeding, the parent filed a due process complaint notice on or about August 8, 2023 alleging that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. B at p. 2).[2] Around the same time, the student underwent a neuropsychological reevaluation which took place on four dates between July 3, 2023 until August 16, 2023 (see generally Parent Ex. L at p. 1).[3] The private neuropsychologist recommended that the student be place in a program that provided 1:1 instruction and clinical intervention throughout the school day (id. at p. 21).

In a decision dated December 7, 2023, the IHO who presided over the prior proceeding (IHO I) found that the district failed to meet its burden to prove that it offered the student a FAPE for the 2023-24 school year; that the student's unilateral placement at Atlas was appropriate; that the equitable considerations weighed in favor of the parent, and that the parent was entitled to the relief sought including district funding of additional services going forward (Parent Ex. B at pp. 4-9).[4] IHO I also determined that, even if the district had appeared for the impartial hearing, she would have found a denial of a FAPE on the basis that the district failed to timely send a school location letter as the evidence showed the district sent a school location letter on September 21,

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

[2] Parent Exhibit B is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see Parent Ex. B at pp. 1-15).

[3] The private neuropsychological reevaluation report is undated but contains four dates of testing with the last testing date being August 16, 2023 (see Parent Ex. L). For purposes of this decision, the evaluation report will be referred to as the "August 2023 neuropsychological reevaluation."

[4] IHO I noted in the decision that the parties appeared at a status conference on September 28, 2023 and selected for the impartial hearing to take place on November 3, 2023 but that, when such date arrived, the district informed IHO I it would not be present (Parent Ex. B at pp. 2-3). The district did not appear at the November 3, 2023 impartial hearing which appears to have been the one and only impartial hearing date held for the matter (see generally Parent Ex. B; IHO Ex. V).

2023, after the beginning of the 10-month 2023-24 school year (id. at p. 4; see Parent Ex. M at p. 7). As relief, IHO I ordered the district to: (1) fund the student's tuition at Atlas for the 2023-24 school year; (2) provide a full-time behavioral paraprofessional to accompany the student during travel to and from Atlas; (3) purchase the student an assistive technology laptop with certain features and accessories; (4) fund twenty hours of assistive technology training, including parent and support staff training, provided by an independent contractor of the parent's choosing; (5) fund ten hours per week of home-based ABA therapy delivered by a provider of the parent's choosing; (6) fund two hours per week of BCBA supervision delivered by a provider of the parent's choosing; (7) fund two hours per week of parent counseling and training delivered by a provider of the parent's choosing; (8) fund a functional behavior assessment (FBA) conducted by a provider of the parent's choosing; (9) fund a BIP, if deemed necessary by the FBA, developed by a provider of the parent's choosing; and (10) fund an ABA skills assessment conducted by a provider of the parent's choosing (Parent Ex. B at pp. 11-12). The decision was not appealed by either party.[5]

On December 29, 2023, the parent signed an enrollment contract with Saint Paul's Autism Research & Training Academy (SPARTA) to provide "therapy services," including home-based ABA therapy and BCBA supervision during the 2023-24 school year from January 17, 2024 until June 30, 2024 (Parent Ex. R).

On January 2, 2024 the parent sent a letter to the district that indicated his disagreement with the June 2023 IEP recommendations and the district's failure to recommend an appropriate school location for the student to attend for the 2023-24 school year (Parent Ex. D). The parent also indicated that, "as a result of a prior order, [the student] was mandated to received weekly behavioral services" including home-based ABA therapy, BCBA supervision, and parent counseling and training services, which were being provided to him through SPARTA (id. at p. 2). The parent also stated "[i]n the absence of an appropriate program and placement for [the student]," he "intend[ed] to send [the student] to SPARTA" and seek public funding or reimbursement for the costs of the student's tuition and related costs for the 2023-24 school year (id.).

A. Due Process Complaint Notice

On January 17, 2024, the parent filed the due process complaint notice underlying the present matter, alleging the district denied the student a FAPE for the 2023-24 school year (see Parent Ex. A). The parent alleged the district failed to provide a timely school location letter or assign the student to attend a particular public school prior to the start of the 2023-24 school year; failed to recommend an appropriate program that provided appropriate supports and services to the student that allowed him to make progress; failed to recommend research-based teaching methodologies during the June 2023 CSE meeting; and failed to provide appropriate assistive technology services (id. at pp. 5-7). The parent also alleged that SPARTA was an appropriate program for the student and that equitable considerations weighed in favor of his request for relief (id. at pp. 7-8). The parent requested an order on pendency based on IHO I's December 2023 decision consisting of 10 hours per week of home-based ABA therapy, two hours per week of home-based BCBA supervision, and two hours per week of home-based parent counseling and

[5] According to the list of evidence appended to IHO I's decision, the parent did not introduce the August 2023 neuropsychological reevaluation into evidence during the impartial hearing in the prior matter (see Parent Ex. B at p. 14).

training (id. at pp. 1, 8). As relief, the parent requested, among other things, a finding that the district denied the student a FAPE for the 2023-24 school year; direct funding and reimbursement for the cost of the student's program at SPARTA including home-based services for the 2023-24 school year; direct funding for special transportation services to and from SPARTA; and a finding that the district's "failure to immediately appoint a hearing officer impeded the [p]arent's access to her due process rights, and caused unreasonable delay to the resolution of this matter" (id. at pp. 8-9).

B. Impartial Hearing Officer Decision

An IHO from the Office of Administrative Trials and Hearings (OATH) (hereinafter referred to as "the IHO") was assigned to preside over the present matter and held a prehearing conference on February 20, 2024 and a hearing date devoted to addressing the student's pendency placement on March 19, 2024 (Tr. pp. 1-28). During the pendency hearing, the parent introduced six documents into the hearing record; the district did not introduce any evidence or witness testimony but the district representative did argue that, because the parent was requesting pendency for only the home-based services and not the "day program" at Atlas that IHO I determined to be the student's appropriate program, the district could not agree to "a piecemeal version of pendency" (Tr. pp. 21-23). In an interim decision dated March 19, 2024, the IHO determined that the parent's request for home-based program during the pendency of the matter was appropriate and ordered the district to fund 10 hours per week of home-based ABA therapy, two hours per week of home-based BCBA supervision, and two hours per week of home-based parent counseling and training at certain rates to be provided by a provider of the parent's choice (see IHO Ex. I).

On March 25, 2024, the parties proceeded to an impartial hearing on the merits, which concluded on the same day (Tr. pp. 29-75). The district representative in her opening stated the district's position that the parent filed a previous claim contending the district denied the student a FAPE for the 2023-24 school year that was fully adjudicated and thus the parent's claims in the present matter were barred by the principles of res judicata and should be dismissed (Tr. p. 35). The parent's attorney argued during his closing statement that res judicata did not apply because the standard for filing a due process complaint notice was what the party knew or should have known at the time of filing and that, at the time of the August 2023 due process complaint notice in the prior matter, the parent did not have the "recent neuropsychological evaluation, or the recent ABA SETSS evaluation report that informed the [p]arent that the student needed one-to-one specialized instruction as a result of all of his academic, behavioral, and communication challenges" and further that, except for refiling a new due process complaint notice, there was no other option other than "have the student linger in a placement that the [f]ather no longer thought was appropriate" (Tr. pp. 54-55). The IHO instructed the parties to submit a post-hearing brief on the limited issue of res judicata which both parties did on or around April 18, 2024 (Tr. pp. 64-74; see IHO Exs. III-IV). The district also requested that the transcript from the prior proceeding before IHO I be admitted into the hearing record as an IHO exhibit which the IHO allowed over the parent's attorney's objection (Tr. pp. 70-73; see IHO Ex. V).

In a decision dated May 2, 2024, the IHO found that the parent's claims had already been litigated and thus were barred by res judicata (IHO Decision at pp. 4-7). As such, the IHO dismissed the parent's January 2024 due process complaint notice with prejudice (id. at p. 8).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer with cross-appeal, and the parent's reply and answer to the cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here.

The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred in determining res judicata barred the parent's claims relating to the 2023-24 school year;

2. If so, whether the IHO erred in denying direct funding for the student's program at SPARTA for the 2023-24 school year from January 17, 2024 to June 30, 2024; and

3. Whether the IHO erred in awarding only home-based services as pendency in this matter.

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]).[6]

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

[6] 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).

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. Res Judicata

First, it must be determined whether the IHO erred in dismissing the parent's due process complaint notice with prejudice on the basis of res judicata. Upon review of the entire hearing record and caselaw applicable thereto, I find the IHO, in a well-reasoned and well-supported decision, correctly dismissed the parent's due process complaint notice with prejudice (see IHO Decision at pp. 5-8). The IHO accurately recounted the facts of the case, addressed the issues identified in the parent's due process complaint notice, and set forth the proper legal standards when determining that the parent did not assert cognizable claims and that his request for direct funding for the student's program at SPARTA was barred by the doctrine of res judicata (id. at pp. 1-8).

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

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]).

Here, the facts underlying the parent's claims that the district denied the student a FAPE for the 2023-24 school year were already litigated and decided in the parent's favor when, in the prior matter, IHO I found the district denied the student a FAPE by failing to timely provide a school location letter to notify the parent of the particular school location for the student to attend to receive the program and services mandated in the student's June 2023 IEP prior to the start of the 2023-24 school year and ordered the district to fund the student's program at Atlas, including home-based ABA and BCBA therapy services (Parent Ex. B at pp. 4, 11-12). While the parent now seeks a different unilateral placement for the student at SPARTA, the January 2024 due process complaint notice asserts a claim based on the same transaction or series of transactions but based on a different theory and seeking a different remedy (see M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *9 [N.D.N.Y. Mar. 29, 2019] ["In New York, '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]).

More specifically, as the IHO correctly determined, the first element of res judicata was met because the parent's allegations in his January 2024 due process complaint notice were the same as the ones raised in his prior August 2023 due process complaint notice and addressed in IHO I's December 2023 decision – i.e., the June 2023 IEP developed by the district failed to offer an educational placement reasonably calculated to address the student's specific needs and failed to timely notify the parent of the assigned public school site for the student for the 2023-24 school

[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]).

year (IHO Decision at p. 5; compare Parent Ex. A at pp. 5-7, with Parent Ex. B at p. 4). The IHO also correctly determined, and neither party disagreed, that the previous matter involved the same parties and thus the second element of res judicata was met (IHO Decision at p. 5; see IHO Exs III-IV). Turning to the third element, the IHO also correctly determined that the claims alleged in this action were, or could have been, raised in the prior proceeding.

The IHO in her decision compared the parent's January 2024 due process complaint notice and prior December 2023 IHO decision and determined the allegations were the same because the parent made "no distinction between the allegations" since the current due process complaint notice alleged a denial of FAPE based on the district's failure to recommend an appropriate program, citing to the IEP created on June 6, 2023, and the district's failure to provide a school location assignment for the 2023-24 school year, citing to a prior written notice dated September 21, 2023 (IHO Decision at p. 6; compare Parent Ex. A at pp. 5-7, with Parent Ex. B at p. 2; see generally Parent Exs. C, M).

The IHO then addressed the parent's argument that he suffered a "new injury" as a result of the school district's failure to respond to the parent's January 2024 10-day letter and determined that parent failed to show what injury he suffered as a result of finding his own unilateral placement inappropriate (IHO Decision at p. 6). The IHO found that the purpose of the 10-day notice was to provide the district with "an opportunity to develop a FAPE within the district's own schools - thus saving the cost of reimbursement," but indicated the January 2024 letter did not serve that purpose (id.). The IHO noted that the parent's January 2024 letter did not mention any "new information" and did not request that the CSE reconvene to consider the "new" evaluations (id.). In addition, she determined that there was no evidence to suggest that the parent provided the district with the neuropsychological evaluation and the ABA-SETSS assessment prior to providing disclosures in the case (id.). Based on the foregoing, the IHO determined that the parent failed to show what injury he suffered as a result of finding his own unilateral placement inappropriate (id.).

Additionally, the IHO noted that the "timing of the evaluations [wa]s by far the most important and concerning factor in considering whether the claims alleged in the instant due process complaint notice could have been raised in the prior proceeding and found that the parent's argument that it could not have introduced the neuropsychological evaluation and the ABA-SETSS assessment at the prior impartial hearing was not support by the evidence in the hearing record (IHO Decision at pp. 6-7). Here, the evidence shows that last day of testing for the neuropsychological revaluation was August 16, 2023, and the ABA-SETSS assessment was completed October 21, 2023 but the parent alleges he did not receive the neuropsychological revaluation until October 2023 and the ABA-SETSS assessment until November 2023, after the first proceeding was complete (Parent Exs. L at p. 1; Q at p. 1; W ¶ 26; see Parent Memo. of Law at pp. 6, 14). The last day of the impartial hearing on the merits for the prior proceeding relating to the parent's August 2023 due process complaint notice took place on November 11, 2023 (Parent Ex. B at p. 3; IHO Ex. V). The IHO noted that the only evidence regarding the timing of the parent's receipt of the neuropsychological evaluation was the parent's testimony via affidavit, which the IHO found was self-serving (IHO Decision at p. 6 & n.37). The IHO also noted and expressed concern that neither the neuropsychological evaluation nor the neuropsychologist's unsigned affidavit statement addressed the date the evaluation was issued to the parent stating:

> [the date of the evaluation was a] critical piece of information that [wa]s missing from the evaluation because the [p]arent [wa]s relying on this "new information" to form the basis of their current [due process complaint notice]. I also find it concerning that the [p]arent received new information, prior to the previous hearing on the merits and prior to the previous IHO issuing their [decision] because these evaluations were directly related to the appropriateness of [Atlas] and could have affected the outcome in the previous case.

(id. at p. 7). The IHO went on to further state "The [p]arent had the opportunity to . . . provide the evaluations at the November 3, 2023 hearing" and that, therefore, "the [p]arent had all the necessary information to raise the claims at the previous proceeding" and the "element three of res judicata [wa]s met" (IHO Decision at p. 7).

More detrimental to the parent's argument than the failure to present the evaluative information in the prior proceeding is the lack of an allegation that the parent provided the district with the evaluations to give the district an opportunity to respond to the information in the first instance, and no allegation that the district failed to convene a CSE to consider the new evaluations (see Parent Ex. A). There is no evidence in the hearing record or an allegation that the parent provided the district or the CSE with copies of such private assessment or requested the CSE to reconvene to consider new evaluative information (see generally Parent Exs. A-X; IHO Exs. I-V; Parent Memo. of Law). Moreover, the IHO noted that the parent conceded in his post-hearing brief that the proper recourse for the parent was to have the CSE reconvene to consider the new information (IHO Decision at p. 6; see IHO Ex. III at p. 4). The parent points to his January 2, 2024 sent letter to the district notifying it of his intent to unilaterally place the student at SPARTA, but even that letter does not refer to new evaluations, state the parent's concern that Atlas was no longer appropriate for the student, or request that the CSE reconvene (Parent Ex. D). Rather, the letter reiterates the parent's disagreement with the June 2023 IEP and the timing of the school location letter (id.). Further, while the parent argues on appeal that the district failed to respond to the January 2023 letter, the parent did not assert this in the due process complaint notice as a new injury (Parent Ex. A).

Based on all of the foregoing, the evidence supports the IHO's determination the parent's due process complaint notice was barred by res judicata.[8]

B. Pendency

Turning now to the district's cross-appeal, the IDEA and the New York State Education Law require that a student remain in his or her then current educational placement, unless the

[8] The parent also alleges that the IHO erred in considering the defense of res judicata. In her decision, the IHO addressed the parent's argument that the district did not timely raise the issue of res judicata, finding that the district properly raised it and noting that, even if it was not timely raised, she allowed the parties additional time to provide closing briefs on the issue and thus neither party was unduly prejudiced (IHO Decision at p. 7). As noted above, the district raised the defense of res judicata in its opening statement and, as the IHO found, the parent had an opportunity to and did respond (Tr. pp. 35, 54-55; IHO Ex. III). Accordingly, I do not find the IHO abused her discretion in considering the district's defense.

student's parents and the board of education otherwise agree, during the pendency of any proceedings relating to the identification, evaluation or placement of the student (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[9] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]).

[9] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171). However, if there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; Evans, 921 F. Supp. at 1189 n.3; Murphy v. Arlington Central School District Board of Education, 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; see also Letter to Hampden, 49 IDELR 197 [OSEP 2007]). Moreover, a prior unappealed IHO decision may establish a student's current educational placement for purposes of pendency (Student X, 2008 WL 4890440, at *23; Letter to Hampden, 49 IDELR 197).

Here, there is no dispute that the student's pendency program was based on the unappealed December 2023 IHO decision that ordered district funding for the student's unilateral placement at Atlas and district funding on a prospective basis of 10 hours per week of home-based ABA therapy, two hours per week of home-based BCBA supervision, and two hours per week of parent counseling and training (see Parent Ex. B). However, the parent removed the student from Atlas and unilaterally placed the student at SPARTA, yet still sought the home-based services as pendency. During the impartial hearing, the district did not agree with the parent's request for the home-based services as pendency because it was a "piecemeal version of pendency" (Tr. pp. 20-23). Nevertheless, the IHO indicated that, "[u]nder these circumstances," the parent was allowed to reject some of the pendency services and request others, but he was not allowed to "determine that the [student]'s pendency placement would be better provided somewhere else" (IHO Ex. I at p. 4).

Here, there is no dispute that the student is not entitled to pendency at SPARTA as parents may not transfer a student from one nonpublic school (Atlas) to another nonpublic school (SPARTA) and simultaneously transfer a district's obligation to fund that pendency (see Ventura de Paulino, 959 F.3d at 532-36). In addition, however, the student is also not entitled to the home-based aspects of the pendency program, as pendency is not a divisible, a-la-carte program that may change at any given time as such a practice would undermine the "status quo" concept so prevalent in stay-put jurisprudence (see Application of the Dep't of Educ., Appeal No. 19-039; Application of a Student with a Disability, Appeal No. 18-139). IHO I found the home-based components warranted based on testimony by a private psychologist, but the recommendations for the home-based services could not have been based in a vacuum: the student was attending Atlas at the time (Parent Ex. B at p. 9), which the parent essentially concedes is not substantially similar to SPARTA (see Answer to Cr.-Appeal ¶ 12). Thus, IHO I did not order "two programs, a school-based program and a home-based program" as the parent argues (Answer to Cr.-Appeal ¶ 10; see Parent Ex. B at p. 9; see also Y.D. v. New York City Dep't of Educ., 2017 WL 1051129, at *8 [S.D.N.Y. Mar. 20, 2017] [noting that home-based services would be required for a FAPE only if needed to ensure a student made progress in the classroom]).

Based on the foregoing, the IHO erred when she stated the parent was allowed to reject some of the pendency services and request others. Ultimately, however, putting aside pendency, since the prior December 2023 IHO decision is unappealed and IHO I's decision contained an order

for district funding of services on a prospective basis for the 2023-24 school year, including home-based ABA and BCBA services, the district is obligated to fund such services for the 2023-24 school year.

VII. Conclusion

For the reasons set forth above, the evidence in the hearing record supports the IHO's determination to dismiss the parent's due process complaint notice with prejudice on the basis of res judicata. However, as discussed above, the IHO erred in her interim pendency order by awarding the home-based services.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim order on pendency dated March 19, 2024, is vacated.

Dated: **Albany, New York**
July 10, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER