The University of the State of New York

The State Education Department
State Review Officer
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No. 24-354

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 Law Office of Andrew Weisfeld, PLLC, attorneys for petitioner, by Andrew Weisfeld, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily A. McNamara, 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 her due process complaint seeking, in pertinent part, an order requiring respondent (the district) to fund the costs of her son's tuition at the Shirley Aninias School (Shirley Aninias) from April 1, 2024 to June 30, 2024 of the 2023-24 school year on the basis of res judicata with prejudice. The appeal must be sustained in part.

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, on May 4, 2023, the CSE convened, found the student eligible for special education as a student with an other health-impairment, and developed an IEP for the student with a projected

implementation date of September 1, 2023 (Parent Ex. F at pp. 1, 28).[1] The CSE recommended that the student receive 11 periods per week of integrated co-teaching (ICT) services for English language arts (ELA), 11 periods per week of ICT services for math, and two periods per week of ICT services for social studies (id. at p. 23). The May 2023 CSE also recommended related services of one 30-minute session per week of individual occupational therapy (OT), one 30-minute session per week of group OT, two 30-minute sessions per week of individual physical therapy (PT), two 30-minute sessions per week of group speech-language therapy, and one 30-minute session per week of group speech-language therapy (id. at pp. 23-24). The district provided the parent with written notice of the March 2023 CSE's recommendations in a notice dated May 12, 2023 (Parent Ex. L).

According to the parent, she informed the district on June 16, 2023 of her intention to unilaterally place the student at the Gillen Brewer School (Gillen Brewer) for the 2023-24 school year (Dist. Ex. 3 at p. 6).

By due process complaint notice dated July 15, 2023, the parent initiated an impartial hearing seeking, in pertinent part, an order directing the district to reimburse the parent for the Gillen Brewer tuition costs that the parent had paid for the 2023-24 school year and for the district to prospectively fund the costs of the student's attendance at the school that the parent did not pay during the school year (Dist. Ex. 3 at pp. 9-10).[2]

An impartial hearing took place on September 28, 2023 and October 27, 2023 before an IHO appointed by the Office of Administrative Trials and Hearing (OATH) (Parent Ex. C at p. 3). The presiding IHO (IHO I) issued a decision, dated November 28, 2023 (IHO I Decision), finding that the district had failed to provide the student with a free appropriate public education (FAPE), the unilateral placement at Gillen Brewer was appropriate, and equitable considerations favored the parent (Parent Ex. C at pp. 5-8). IHO I ordered, as relevant here, the district to reimburse the parent $30,000 for monies she had paid to Gillen Brewer and for the district to directly fund the $67,800 remaining tuition costs, such payments to be made within 30 days of submission of documentation to the district including an invoice (id. at p. 9).

Several months later, in a letter to the district dated March 15, 2024, the parent related that the student would no longer be able to attend Gillen Brewer and that in ten days after the district's receipt of the letter, she intended to place the student at Shirley Aninias for the remainder of the 2023-24 school year (Parent Ex. M. at p. 1). The parent further advised the district that she would be seeking public funding and prospective payment for the costs for Shirley Aninias and that she intended to bring forth an impartial hearing to secure such funding (id. at pp. 1-2). The parent asserts that the CSE failed to reconvene after its receipt of the ten-day notice (IHO Ex. V at p. 3).

[1] The student's eligibility for special education as a student with an other health impairment is not in dispute (8 NYCRR 200.1 [zz][11]).

[2] The parent had previously filed a due process complaint for the 2023-24 school year seeking, among other things, funding for student evaluations and a functional behavioral analysis. Following an impartial hearing, a decision granting the requested was issued on August 22, 2023 (Parent Ex. B).

On March 22, 2024, the parent executed an enrollment contact for the student's attendance at Shirley Aninias from April 1, 2024 to June 30, 2024 (Parent Ex. Q).[3]

A. Due Process Complaint Notice

The parent commenced a second proceeding related to the 2023-24 school year by filing a due process complaint notice dated April 10, 2024 (Parent Ex. A). Among other things, the parent alleged that the district had failed to appropriate programming for the student in the student's May 2023 IEP and recounted IHO I's rulings against the district regarding the proposed public school programming for the 2023-24 school year and relief in favor of the parent related to Gillen Brewer (id. at pp. 5-11). The parent asserted that while Gillen Brewer provided a school-wide behavior plan, sensory gymnasiums, small classrooms, and low student to teachers ratios in the classroom, Gillen Brewer staff and the parent had decided that Shirley Aninias was a more appropriate and necessary placement for the student because it provided one-on-one support, applied behavior analysis (ABA) instruction, and a strict behavioral approach to learning throughout the day whereas Gillen Brewer did not (Parent Ex. A at p. 10). The parent asserted that the district had failed to offer the student a FAPE and requested that it reimburse the parent for the costs of Shirley Aninias for the remainder of the 2023-24 school year (id. at 13). The district served a due process response containing a general denial of the allegations set forth in the due process complaint notice (IHO Ex. V at pp. 208-211; Due Proc. Resp. dated April 24, 2024).

B. Impartial Hearing Officer Decision

The parties proceeded to a prehearing conference on May 14, 2024 before a different IHO also appointed by OATH. The IHO noted that the matter involved a second unilateral placement within the 2023-24 school year and raised concerns over the possible implications of res judicata, collateral estoppel, and the election of remedies (Tr. pp. 7-8). The attorney for the parent objected to the IHO raising these potential defenses because they had not been raised by the district in its due process response (Tr. pp. 11-15). The IHO ordered a scheduling of briefing on the issues (Tr. pp. 7-15; IHO Ex I). Thereafter, the attorney for the parent directed emails to the IHO repeating the objections raised at the prehearing conference and requesting that the IHO recuse herself (IHO Ex. III at pp. 2-5). The IHO denied the request for recusal (IHO Ex. I at p. 3). The district submitted its brief (IHO Ex. IV). The parent's attorney then submitted a responsive brief (IHO Ex. V) and renewed the objections to the consideration of the legal issues raised by the IHO along with the request that the IHO recuse herself (IHO Ex. III at p. 1). The IHO noted the continued objections of parent's attorney for the record and denied the renewed request of recusal (id. at p. 2).

In a decision dated July 22, 2024, the IHO, citing K.B. v. Pearl River Union, Free Sch. Dist. (2012 WL 23492 at *4 [S.D.NY 2012]), identified that 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 (IHO Decision at p. 6). The IHO determined that IHO I had previously ruled that the district failed to develop an appropriate IEP

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

and educational program, satisfying the first element of res judicata (IHO Decision at p. 6; Parent Ex. C at p. 5). The IHO further concluded that the previous mater was adjudicated on the merits, involved the same parties, and the claim raised in the instant proceeding was previously raised and litigated in the prior proceeding, which met the second and third elements of res judicata (IHO Decision at pp. 6-7).

The IHO addressed the parent's argument that the due process complaint underlying IHO I's decision and the due process complaint underlying this matter involved separate time periods and consequently did not assert the same claims (IHO Decision at pp. 6-7). While recognizing that Gillen Brewer was no longer an available placement for the student, the IHO held that the claims in both due process complaints were nearly identical, concerned the same school year and the same IEP, and that the parent had made no distinction between the allegations (id. at p. 7). Specifically, the IHO found that the parent's prior due process complaint for the 2023-24 school year had alleged a denial of a FAPE based on the district's failure to recommend an appropriate program, citing to the IEP dated May 4, 2023 for the 2023-24 school year (id.). According to the IHO, these were the same allegations made in the due process complaint underlying this matter (id.).

The IHO also ruled on the parent's attempt to distinguish the issues raised in the previous matter from those raised in present proceeding (IHO Decision at p. 8). According to the IHO, the parent asserted that the claims were different because the present proceeding included an assertion that the CSE had failed to reconvene in response to the parent's March 15, 2024 to ten-day notice to the district of the parent's intent to unilaterally place the student at Shirley Aninias (id.). The IHO ruled that she would not consider this allegation because it was first raised by the parent in the prehearing conference brief and then repeated during the hearing (id.). The due process complaint underlying the present matter did not assert a failure by the CSE to reconvene, nor did the parent seek the district's agreement to expand the scope of the impartial hearing to include that claim (id.). The IHO further ruled that the district had not "opened the door" in its prehearing brief (id.). According to the IHO, the district had raised the issue only as a hypothetical argument that the "[p]arent may argue" in her responsive brief (id.).

Based on the foregoing, the IHO dismissed the due process complaint underlying this matter with prejudice (IHO Decision at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO inappropriately applied res judicata in dismissing the due process complaint with prejudice. In addition, as relevant here, the parent asserts that the IHO inappropriately raised res judicata sua sponte and inappropriately refused to recuse herself.

As relief, in pertinent part, the parent seeks a declaration that res judicata does not apply to the instant matter, and review by an SRO of the evidence in the hearing record and findings that the district failed to offer the student a FAPE, that Shirley Aninias was an appropriate unilateral placement for the student, and that equitable considerations favored the parent. Further, the parent requests an order directing the district to fund the costs of the student's tuition at Shirley Aninias from April 1, 2024 through the remainder of the 2023-24 school year, or in the alternative, that the

SRO remand the matter to an IHO other than the one that presided over this proceeding for determination of the issues based on the hearing record.

In an answer, the district responds to the parent's claims with denials of the material allegations and argues that it was permissible for the IHO to raise res judicata sua sponte, and that res judicata barred the parent's requested relief.

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]).[4]

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

[4] 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).

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

The parent argues that the IHO erred in applying res judicata sua sponte to dismiss due process complaint. Initially, 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]).[5]

While res judicata is generally available in this type of proceeding, it must first be determined whether the IHO erred in raising res judicata sua sponte when the district did not assert it as an affirmative defense in its response to the due process complaint. As the Second Circuit has recently made clear, "A court may apply res judicata sua sponte." Trivedi v. General Electric Co., 2024 WL 3286663 (2d Cir. July 3, 2024), citing Scherer v. Equitable Life Assurance Soc'y of U.S., 347 F3d 394, 398 n. 4 (2d Cir. 2003). Likewise, the IHO did not err in raising the issue of res judicata.

[5] "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]).

Turning next to the IHO's application of res judicata, the IHO correctly determined that the first two elements of res judicata were met. The parent's prior proceeding involved an adjudication on the merits and involved the same parties (IHO Decision at p. 6). As to the third element; however, the IHO incorrectly determined that the claims alleged in this proceeding were, or could have been, raised in the prior proceeding, the latter arising from the parent's unilateral placement of the student at Gillen Brewer and resulting in IHO I's November 2023 decision. To the contrary, it was not until March 2024, that the parent gave the district notice of her intention to unilaterally place the student at Shirley Aninias (Parent Ex. M). Thereafter, the parent executed an enrollment contract with Shirley Aninias for the student's attendance from April 1, 2024 to June 20, 2024 (Parent Ex. Q at p. 1).[6] The parent then submitted a due process complaint notice on April 10, 2024, which initiated the present proceeding seeking funding for the student's unilateral placement at Shirley Aninias for the remainder of the 2023-24 school year (Parent Ex. A). As evidenced above, the parent was requesting a new form of relief—funding for a unilateral placement at Shirley Aninias for the remainder of the 2023-24 school year. The request for that relief could not have been asserted in the prior due process complaint notice, nor could it have been asserted prior to the IHO I's November 2023 decision.[7]

Regarding the parent's requests for tuition reimbursement for two unilateral placements over the course of one school year, such a factual scenario is not unprecedented (see, e.g., Application of the Dep't of Educ., Appeal No. 20-147 [upholding an IHO order of tuition reimbursement to two unilateral placements during the same school year after finding the student's needs had changed during the school year and each unilateral placement was appropriate at the time the student attended]). Just as if the student had been attending a program and placement recommended by the CSE, once the unilateral placement seemed to become inappropriate for the student, the parent's recourse was to seek the CSE's review and that is what she did (see 8 NYCRR 200.4[e][4]). As such, this is not an instance where the district's path for going forward was unclear (see Application of a Student with a Disability, Appeal No. 19-018 [same]; rather, the district had an opportunity to respond to the parent's request for a CSE meeting or, at the very least, present a defense as to the limited issue in this proceeding, but it declined to do so.

Based on the foregoing, the parent's claims were not precluded by res judicata.

B. Collateral Estoppel

The parent argues on appeal that the IHO inappropriately rendered a final decision that failed to address any of the merits of the case, including whether the district offered the student a

[6] The district is only responsible for any unpaid tuition costs to Gillen Brewer incurred from September 1, 2023 to March 31, 2024 upon presentation by the parent to the district of documentation, including invoices. To hold otherwise would allow the parent a double recovery which is more "belatedly pay[ing] expenses that [the district] 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).

[7] Having concluded that res judicata was not applicable based on the fact that the parent could not have raised issues arising from the placement of the student at Shirley Aninias at the time of the prior proceeding, the issue of whether the IHO was correct in not considering the parent's argument, raised for the first time in its prehearing brief, that the CSE's failure to reconvene in response to the March 15, 2024 ten day notice constituted new relief and thereby precluded the application of res judicata, need not be reached.

FAPE, whether the parent's unilateral placement of the student was appropriate for the time period asserted in this matter, and whether equitable considerations favor the parent's request for relief.

Collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). 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 IHO correctly identified that the issue of the district's denial of a FAPE to the student during the 2023-24 school year was raised in each of the due process complaints (IHO Decision at p. 7). Moreover, the particular denial of a FAPE—that is, whether the student's May 2023 IEP was appropriate for the student—was actually litigated and decided in the earlier proceeding and the district had a full and fair opportunity to litigate the issue (id. at p. 6; Parent Ex. C at p. 5).[8]

Finally, the finding of a denial of a FAPE in the prior proceeding was necessary to support a valid and final judgment on the merits of the prior proceeding and the resultant order that the parent receive reimbursement and funding for tuition costs incurred at Gillen Brewer.

Based on the foregoing, I find that the adequacy of the May 2023 IEP was previously decided in the prior proceeding and resulted in a finding of a denial of a FAPE to the student that was not appealed. Accordingly, the parties are precluded from re-litigating that issue.

C. IHO Bias

With respect to the parent's request that this matter be remanded to a different IHO, it is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and

[8] IHO I concluded that the district failed to offer the student a FAPE for the 2023-24 school year. She found that the district's witness, the school psychologist, lacked credibility given her "extremely limited" knowledge and familiarity with the student (IHO I Decision at p. 5). Further, her testimony tended to support a finding that the May 2023 IEP was not appropriate for the student and consequently a denial of a FAPE (id.).

shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12064).

Here, there is no factual basis to support the parent's request. As established above, it was appropriate for the IHO to raise the issue of res judicata sua sponte. As such, there was no bias in favor of the district in doing so. Further, prior to the hearing the IHO provided both sides with an opportunity to brief the issues relating to res judicata, collateral estoppel, and the election of remedies. Finally, a review of the hearing record reveals that the IHO's interaction with the parties was patient, courteous, and respectful. Accordingly, the parent's argument that the IHO acted with bias is rejected as wholly without merit.

D. Remand

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 erred in dismissing the parent's claims in her due process complaint notice dated April 10, 2024 under the doctrine of res judicata, but that the IHO correctly determined that the issue of whether the district offered the student a FAPE for the 2023-24 school year has previously been determined, the IHO's decision dismissing the parent's complaint in its entirety must be reversed. Therefore, I find it is appropriate to remand this matter to the IHO for further proceedings, develop the hearing record to the extent necessary to ensure that it is adequate for a well-supported decision, render determinations with respect to the appropriateness of the parent's unilateral placement of the student at Shirley Aninias, and, if necessary, determine whether equitable considerations favor the parent's request for tuition funding.

VII. Conclusion

For the reasons set forth above, this matter is remanded to the IHO for further development of the hearing record and render determinations upon whether the student's unilateral placement at Shirley Aninias for the remainder of the 2023-24 school year was appropriate and whether equitable considerations favor the parent's request for tuition funding.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated July 22, 2024, is modified by reversing that portion which dismissed the parent's due process complaint notice dated April 10, 2024 based upon res judicata;

IT IS FURTHER ORDERED that relitigation of the denial of a FAPE to the student during the 2023-24 school year is barred by collateral estoppel; and

IT IS FURTHER ORDERED that this proceeding is remanded to the IHO to render determinations on the remaining elements of a Burlington/Carter analysis, namely whether the parent's placement of the student at Shirley Aninias was appropriate and whether equitable considerations favor the parent, and whether direct funding paid by the district to Shirley Aninias for tuition costs from April 1, 2024 to June 30, 2024 is appropriate equitable relief.

Dated: **Albany, New York**
October 21, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER