The University of the State of New York

The State Education Department
State Review Officer
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No. 15-123

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:
Aaronson Rappaport Feinstein & Deutsch, LLP, attorneys for petitioner, Allison Landwehr, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Cynthia Sheps, Esq., of counsel

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 determined that the parent's claims concerning the 2013-14 school year were moot and that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2014-15 school year were appropriate. The appeal must be sustained in part and the matter remanded to the IHO for further administrative proceedings.

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

According to descriptions of the student's needs and abilities in the hearing record, the student demonstrated deficits in expressive and receptive language, particularly written expression, and had difficulty staying focused and organized (Tr. p. 32; Dist. Exs. 12 at p. 2; 13 at p. 1; 14 at p. 1; 18 at p. 4; see Dist. Exs. 3 at pp. 1-2; 4 at pp. 1-3). The evidence in the hearing record also reflects that the student had a history of difficulty with visual motor integration, visual perception, and motor coordination, which may have negatively affected the legibility and speed of his handwriting (Tr. p. 47; Dist. Ex. 11 at pp. 5, 6; Parent Ex. S at p. 36). With regard to the

student's educational history, the hearing record indicates that the student received special education since the fourth grade and, for the 2012-13 school year (ninth grade), the student attended a district public school and received integrated co-teaching (ICT) services in a general education classroom, as well as the related services of speech-language therapy and occupational therapy (OT) (Dist. Exs. 9 at p. 2; 10 at p. 1; 14 at p. 1; 15 at p. 1). As of the commencement of the 2013-14 school year, the student no longer received OT (see Dist. Ex. 11 at p. 2; Parent Ex. S at p. 3).[1]

Turning to the IEPs at issue in this matter, the CSE convened on December 4, 2013 for a review of the student's program and to develop an IEP to be implemented commencing on December 11, 2013 (Dist. Ex. 3 at pp. 1, 14).[2] Finding that the student remained eligible for special education as a student with a speech or language impairment, the CSE recommended that the student receive ICT services in math, English language arts (ELA), and sciences, as well as speech-language therapy two times per week for 45 minutes in a group of five students (id. at pp. 8, 13; see Dist. Exs. 9 at p. 2; 10 at p. 1).[3] The December 2013 IEP included eight annual goals to address the student's needs related to math, written expression, vocabulary, and expressive and receptive language skills, as well as two postsecondary goals related to the student's plan to attend a four year college as a full time student and a set of transition activities (Dist. Ex. 3 at pp. 3-7, 10-11). The IEP also included testing accommodations and identified strategies and supports to address the student's management needs including small group instruction, extra time, tutoring in subject areas where necessary, tests read aloud during exams, and the use of a calculator (id. at pp. 2, 10).

The following year, the CSE convened on December 23, 2014 for an annual review of the student's program (Dist. Ex. 4 at p. 14; see Tr. p. 84).[4] The CSE continued to find the student eligible for special education as a student with a speech or language impairment and recommended that he receive ICT services five times per week in math and science as well as speech-language therapy twice per week in a group of five students (Dist. Ex. 4 at pp. 10, 14-15). The December 2014 IEP contained testing accommodations, a transition plan, and seven annual goals that addressed the student's needs related to receptive and expressive language skills, written expression, vocabulary, chemistry, and geometry (id. at pp. 4-9, 11-12). Strategies and supports to address the student's management needs included teacher prompts, extra time for assessments

[1] According to a June 2015 OT evaluation completed by an occupational therapist who worked with the student from November 2012 through March 2013, a March 2013 CSE declined to recommend that the student continue to receive OT, notwithstanding the occupational therapist's progress report and recommendation for the same (Parent Ex. S at pp. 3, 8, 13-14). The June 2015 OT evaluation report also sets forth concerning allegations about the district's handling of the student's records (id.).

[2] Both of the IEPs at issue in this appeal have implementation dates beginning and ending in the month of December, covering a portion of two different school years (see Dist. Exs. 3 at p. 3; 4 at p. 1; see generally Educ. Law § 2[15]). Accordingly, for purposes of clarity, this decision generally refers to the date of the challenged IEPs rather than the school years in which they were implemented.

[3] The student's eligibility for special education programs and related services 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]).

[4] Testimony by the district special education coordinator indicated that, although the IEP indicates that the date of this meeting was December 19, 2014, the actual date of the meeting was December 23, 2014 (Tr. pp. 84-85; see Dist. Ex. 4 at p. 14).

and classwork, graphic organizers, small group instruction, teacher check-ins, preferential seating toward the front of the classroom, and teacher modeling (id. at p. 3).

Prior to and during the time that the December 2013 and December 2014 IEPs were in effect, the parent filed a number of complaints with the State Education Department (SED) alleging various violations of federal and State laws and regulations pertaining to the education of the student (Parent Exs. B-E; see 8 NYCRR 200.5[*l*]).[5] In response to the parent's State complaints, the district was directed to, among other things: respond to the parent's request for mediation; comply with the parent's request for education records; respond to the parent's request to amend the student's education records; provide prior written notice to the parent a reasonable time before the district proposes or refuses to initiate or change the educational placement of the student; provide SED with a copy of the formalized directive and school policy issued by the principal to the CSE sub-committees indicating when to issue a procedural safeguards notice; ensure provision of annual goals progress reports to the parent; reconvene the CSE to develop a new IEP for the student; and provide the parent with information about where to obtain an independent educational evaluation (IEE) and the criteria for such an evaluation (Parent Exs. B-E).

The parent and the district entered into a special education mediation agreement on November 3, 2014, which, among other things, required the district to provide the student with 160 hours of special education teacher support services (SETSS) as "compensatory education for Geometry and Chemistry classes in satisfaction of the 2013-2014 school year" (Dist. Ex. 5 at p. 1; see Tr. pp. 91, 255; Dist. Ex. 6). At the time of the impartial hearing, the student had received all of the authorized hours provided for in the mediation agreement (Tr. pp. 138, 151, 175).[6]

A. Due Process Complaint Notice

By due process complaint notice dated April 17, 2015, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2013-14 and 2014-15 school years (see Parent Ex. A at pp. 1-5). In particular, the parent asserted that the December 2013 CSE failed to review or obtain evaluations of the student and that the IEP failed to include an accurate description of the student's functional and instructional levels and lacked sufficient or appropriate annual goals required to address several identified academic and skills deficits (id. at pp. 2-3). Further, the parent alleged that the December 2013 CSE failed to recommend ICT services in each of the student's "core subjects" and/or "a small structured classroom[] with an increased level of teacher support," a 12-month program, SETSS, OT, counseling, appropriate speech-language therapy, sufficient supports for management needs, test accommodations, supplementary aids or supports, assistive technology "devices," or a transition plan (id.). The parent also alleged that the district should have conducted a functional behavioral assessment

[5] The hearing record contains SED's responses to four different state complaints filed by the parent, two of which were filed in conjunction with the student's occupational therapist (Parent Exs. B-E).

[6] The SETSS hours authorized by the special education mediation agreement were provided to the student by the Huntington Learning Center (HLC) (Tr. pp. 120, 123, 138; see Parent Ex. K). In addition, HLC provided an additional 17 hours of services including testing and registration as "essentially . . . a scholarship" (Tr. pp. 138, 175).

(FBA) and developed a behavioral intervention plan (BIP) to address the student's "interfering behaviors and actions" (id.).

Pertaining to the December 2014 IEP, the parent asserted that the CSE failed to obtain or review sufficient evaluative information to formulate the student's program and failed to recommend appropriate or adequate ICT services, SETSS, OT, counseling, speech-language therapy, testing accommodations, management needs, supplementary aids or supports, or assistive technology (Parent Ex. A at pp. 3-4). Further, the parent alleged that the December 2014 CSE failed to recommend a 12-month program, appropriate or sufficient annual goals, modified promotion criteria, or an appropriate transition plan (id. at pp. 4-5). The parent also alleged that the district should have conducted an FBA and developed BIP (id. at p. 4).

Asserting that the flaws in the December 2013 and December 2014 IEPs resulted in the student's lack of sufficient progress during the 2013-14 and 2014-15 school years, the parent requested 955 hours of 1:1 compensatory tutoring at Huntington Learning Center (HLC) to remedy the denial of a FAPE (id. at pp. 3, 5-7). In addition, the parent requested: that the district reimburse HLC for the cost of diagnostic testing and registrations fees; a metro card for the student's transportation; "make-up" counseling and OT; independent OT, speech-language and neuropsychological evaluations; and a reconvene of the CSE after completion of the requested evaluations (id. at p. 7).

B. Impartial Hearing Officer Decision

On July 30, 2015, the parties proceeded to an impartial hearing, which concluded on August 6, 2015, the second day of proceedings (see Tr. pp. 1-267). In a decision dated November 24, 2015, the IHO concluded that the parent's claims concerning the December 2013 IEP were moot based upon the November 2014 special education mediation agreement, which authorized the student's receipt of 160 hours of SETSS as compensatory services with respect to the 2013-14 school year (IHO Decision at pp. 10-11, 13). The IHO also found that the parent's request for IEEs and a reconvene of the CSE were also moot because the requested IEEs had already been conducted and the CSE planned to reconvene for the purpose of reviewing them (id. at pp. 10-11). The IHO reasoned that "[g]iven the language of the mediation agreement, and the parent's acknowledgement at the hearing that any award of SETSS hours must be offset by the number of SETSS hours authorized in the agreement, . . . the parent's claims concerning the 2013/14 school year are now moot" (id. at p. 11).

With respect to the December 2014 IEP, the IHO denied the parent's claims and found that this IEP offered the student a FAPE (IHO Decision at pp. 11-13). The IHO found that the evaluative information available to the CSE identified the student's needs in reading, writing, and organization (id. at 12). The IHO further determined that the annual goals, ICT services, modifications, and speech-language therapy recommended by the CSE appropriately addressed the student's needs (id.). The IHO also found that, contrary to the parent's assertion, the student did not require OT in order to receive a FAPE, noting that school-based OT had not been recommended in three recent OT evaluations (id. at p. 13). The IHO disagreed with the parent's contention that the student displayed severe distractibility and failing grades during the 2014-15 school year (id.). In this regard, the IHO cited evidence of progress in the hearing record, including progress reports, evidence of passed Regents exams, and the student's grades as reflected in his

transcript (id. at pp. 12, 13). Lastly, the IHO noted that there was no allegation that there was any interruption or delay in implementing the recommended program during the 2014-15 school year (id. at p. 12). Accordingly, the IHO dismissed the parent's claims pertaining to the 2013-14 and 2014-15 school years (id. at p. 13).

IV. Appeal for State-Level Review

The parent appeals, asserting that the IHO erred in finding that her claims regarding the 2013-14 school year were moot and that the district provided the student with a FAPE during the 2014-15 school year.

Initially, the parent admits that her request for three IEEs and a reconvene of the CSE is moot, but asserts that the remaining arguments alleging a denial of FAPE based on the December 2013 IEP remain live. The parent also contends that, while the November 2014 special education mediation agreement settled the compensatory education needs stemming from inappropriate services in chemistry and geography classes during the 2013-14 school year, it did not settle the overall question of the district's provision of a FAPE during the school year or the relief the parent sought. Hence, the parent contends that the IHO erred by failing to address her claims relating to the December 2013 IEP. The parent reiterates many of the allegations set forth in her April 2015 due process complaint notice relating to both the December 2013 and the December 2014 IEPs.

With specific respect to the December 2014 IEP, the parent asserts that the IHO erred in finding that the district offered the student a FAPE and erred in denying her requested relief. In particular, the parent argues that the IHO mischaracterized her claim regarding ICT services and, therefore, failed to assess whether the CSE should have recommended ICT services in each of the student's "core" classes. The parent also asserts that the IHO failed to address her claims that the student needed individual rather than group speech-language therapy. Moreover, the parent argues that, in evaluating the appropriateness of the December 2014 IEP, the IHO failed to take into account the results of independent evaluations of the student or otherwise weigh the evidence proffered by the parent. With respect to the student's progress, the parent avers that, contrary to the IHO's determinations, the evidence shows that the student made "trivial advancement at best" (Pet. ¶ 99) and, further, that the IHO applied an incorrect legal standard.

For relief in relation to both the 2013-14 and 2014-15 school years, the parent requests payment of HLC's registration and diagnostic fees, 813 hours of 1:1 tutoring at HLC with no expiration date, and an unspecified amount of "make-up" counseling and OT services (Pet. ¶ 79).

In an answer, the district responds to the parent's allegations and argues that the IHO properly dismissed the parent's claims concerning the December 2013 IEP and correctly determined that the December 2014 IEP offered the student a FAPE. With respect to the December 2013 IEP, the district asserts that the IHO correctly determined that the parent's request for IEEs and a re-convene of the CSE were moot and correctly dismissed the remaining claims concerning the 2013-14 school year as moot—or, more accurately in the district's view, as barred by res judicata. With respect to the December 2014 IEP, the district submits that the IHO correctly found that the services provided under the IEP were appropriate and that the student demonstrated progress such that he was eligible to graduate from high school as of January 2016. Accordingly,

the district contends that no further compensatory education is warranted and the IHO's decision should be upheld in its entirety.

V. Discussion

As set forth below, the IHO erred in failing to address the parent's remaining claims concerning the December 2013 IEP as well as several claims regarding the December 2014 IEP; therefore, this matter must be remanded to the IHO for further proceedings. With respect to the December 2013 IEP, it is necessary to address two specific arguments raised by the parties concerning this issue: first, the parent's claim that the IHO erred in finding her claims regarding the 2013-14 arguments moot, and second, the district's claim that the doctrine of res judicata precludes the parent from asserting claims concerning the 2013-14 school year in this proceeding.

A. Preliminary Matters

1. Mootness

The parent asserts that the IHO erred in dismissing the entirety of the parent's claims regarding the 2013-14 school year as moot. I agree. The dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; F.O. v. New York City Dep't of Educ., 899 F. Supp. 2d 251, 254 [S.D.N.Y. 2012]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *12 [E.D.N.Y. Oct. 30, 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; see also Coleman v. Daines, 19 N.Y.3d 1087, 1090 [2012]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., V.M. v. N. Colonie Cent. Sch. Dist., 954 F. Supp. 2d 102, 119-21 [N.D.N.Y. 2013]; M.S. v. New York City Dep't of Educ., 734 F. Supp. 2d 271, 280-81 [E.D.N.Y. 2010]; Patskin, 583 F. Supp. 2d at 428-29; J.N., 2008 WL 4501940, at *3-*4). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see generally Lillbask, 397 F.3d at 87-88; Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]). However, it is generally accepted that a claim for compensatory education or additional services presents a live controversy (see S.M. v. Taconic Hills Cent. Sch. Dist., 2013 WL 773098, at *3 n.9 [N.D.N.Y. Feb. 28, 2013]; Student X, 2008 WL 4890440, at *15; see Lillbask, 397 F.3d at 89; J.M. v Kingston City School Dist., 2015 WL 7432374, at *16 [N.D.N.Y. Nov. 23, 2015]).

Here, the parent requested compensatory services (Parent Ex. A at p. 7), but the IHO determined that the parent could not recover such relief as a consequence of the effect of the special education mediation agreement (IHO Decision at p. 11). While the IHO determined that the mediation agreement foreclosed the parents' challenges to the December 2013 IEP, this conclusion is not supported by the language of the agreement (id.; see Dist. Ex. 5). Specifically, there is no statement in the mediation agreement or elsewhere in the hearing record as to what claims it intended to resolve (see Dist. Ex. 5). The mediation agreement provides that the student would receive "compensatory education for Geometry and Chemistry classes in satisfaction of the 2013-

2014 school year" (id. at p. 1). This language does not indicate whether the parties intended it as a full settlement of all claims the parent had or may have had arising out of the 2013-14 school year; at most, the agreement could be read (as the parent urges) as a partial settlement of any claims relating to the student's performance in geometry and chemistry during the 2013-14 school year. A statement in the student's December 2014 IEP supports this interpretation (see Dist. Ex. 4 at p. 3).[7] Specifically, the IEP states that, as a result of the parent's "concern[] about [the student's] academic progress in Chemistry and Geometry . . . the school participated in mediation" and provided the student with "compensatory SETSS for Chemistry and Geometry" (id.).

Moreover, the parent did not concede that the mediation agreement barred her claims at the impartial hearing, as the IHO implied (see IHO Decision at p. 11). The statement of counsel for the parent at the impartial hearing that the parent "recognize[d] . . . that [the] mediation agreement was entered in[to] with regard to the 2013/2014 school year," as well as the parent's voluntary reduction of the relief requested in her due process complaint notice based on this agreement, does not amount to a concession that the agreement barred any and all claims related to the 2013-14 school year (Tr. p. 24). This is particularly so as the parent arrived at the requested number of hours of compensatory education services based on HLC's calculations of what the student needed to "bridge his academic gap" (see Tr. p. 160). Given the stated purpose of the number of requested hours, the parent's agreement to subtract hours of tutoring at HLC received by the student may instead be viewed as an acknowledgement of the progress the student had made thus far toward "bridg[ing] the gap" (see id.).

Beyond the scope of the written agreement, other evidence in the hearing record indicates that the mediation agreement pertained to the parent's concerns with an IEP which was developed prior to the December 2013 IEP and which is not challenged in this proceeding. The evidence in the hearing record suggests—and the district acknowledges in its answer—that the mediation agreement arose from an August 21, 2013 request for mediation by the parent (Parent Ex. B at p. 3; Answer at p. 5 n.3; see Parent Ex. S at p. 4). The district's failure to respond to this request was the subject of the parent's August 11, 2014 State complaint against the district (Parent Ex. B at pp. 1, 3). According to the findings which resulted from this State complaint, the parent's requested mediation related to recommendations developed at a March 15, 2013 CSE meeting (id.). The compliance assurance plan required that the district respond to the parent's request for mediation and provide proof thereof by October 31, 2014 (id. at p. 4). Shortly after the date for compliance with this plan, the parties entered into the instant mediation agreement on November 3, 2014 (Dist. Ex. 5 at p. 2). Therefore, to the extent the mediation agreement related to the parent's concerns with a March 2013 IEP, it should not foreclose the parent's challenges to a December 2013 IEP, which was developed nine months later.

Finally, as the party seeking dismissal of the parent's claims relating to the 2013-14 school year, it was incumbent upon the district to present, or at least point to, evidence that supported its interpretation of the intended effect of the mediation agreement (see Tr. pp. 17-18, 262-63). It did

[7] The parent's petition does not offer much clarity on this question. The parent asserts that the mediation agreement awarded compensatory services for the district's failure to provide the student with his mandated SETSS "in accordance with his 10th grade IEP" and cites the December 2013 IEP and the mediation agreement (Pet. ¶ 40; Dist. Exs. 3; 5), but the December 2013 IEP did not mandate SETSS for the student (see Dist. Ex. 3).

not do so. Thus, upon consideration of the evidence in the hearing record, the IHO's finding that the mediation agreement barred the parent's claims for the 2013-14 school year is reversed.

2. Res Judicata

The district alternatively contends that the parent's claims concerning the 2013-14 school year are precluded by the doctrine of res judicata because the arguments could have been raised during a prior proceeding. I disagree. The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; 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 v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). 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.B., 2012 WL 234392, at *5; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; 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).

Although not directly stated, the district's argument appears to be that, when the parent filed the State complaint with SED—which asserted that the district had not responded to the parent's request for mediation and ultimately led to the November 2014 mediation agreement—the parent could have asserted other claims regarding the 2013-14 school year, such that any claims she did not raise in the State complaint were thereafter precluded from being raised in the present administrative proceedings (Dist. Ex. 5; Parent Ex. B at pp. 3-4; Answer ¶¶ 26-31). However, as further explained below, while findings made in a State complaint may be offered as evidence in an impartial hearing, such findings do not have preclusive effect in an impartial hearing.

Under the IDEA, its implementing regulations, and State regulations, parents have two avenues available to resolve disputes with a school district regarding the education of a student with a disability: the impartial due process hearing process and the State complaint resolution process. A parent or a district may initiate an impartial hearing 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]). Under the State complaint process, a parent may file a complaint against a district for failure to comply with the terms of an IEP, violation of the IDEA and its regulations, or failure to implement an IHO's due process decision (8 NYCRR 200.5[*l*]; see 34 CFR 300.151-153). In the event a State complaint is initiated that is also the subject of an impartial hearing or contains multiple issues of which one or more are part of the impartial hearing, the "State must set aside any part of the complaint that is addressed in the due process hearing until the conclusion of the hearing" (34 CFR 300.152[c]; 8 NYCRR 200.5[*l*][2][vii]). Where an issue raised in a State complaint has previously been decided in an impartial hearing involving the same parties, the State must notify the parent bringing the complaint that the impartial hearing decision is binding (34 CFR 300.152[c][2]; 8 NYCRR 200.5[*l*][2][viii]). Lastly, and particularly germane to the instant

case, State regulation specifies that "[n]othing in this section shall abrogate the right of an individual student with a disability to due process under Education Law section 4404, including the right to initiate an impartial hearing to address issues previously raised in a [State] complaint decided pursuant to this section" (8 NYCRR 200.5[*l*][2][viii][3]). Simply put, raising or failing to raise an issue in a State complaint does not have preclusive effect on issues that may be raised in a subsequent impartial hearing.

The United States Department of Education's Office of Special Education Programs (OSEP) has reached a similar conclusion. OSEP has opined that "a party aggrieved by [a State educational agency] decision following a complaint investigation is permitted to pursue due process on the same issues so long as those issues concern the identification, evaluation, placement, or the provision of FAPE" (Letter to Lieberman, 23 IDELR 351 [OSEP 1995]; see Lucht v. Molalla River Sch. Dist., 57 F. Supp. 2d 1060, 1065 [D. Or. 1999] [holding that, based upon Letter to Lieberman, res judicata did not attach in an impartial hearing following a State complaint process concerning the same student]). Accordingly, the district's contention that the doctrine of res judicata precludes the parent from bringing claims concerning the 2013-14 school year in the present matter is incorrect.

B. Remand

Because the IHO determined that issues concerning the 2013-14 school year were moot, he did not address any of the parent's specific claims identified in her due process complaint notice. Accordingly, bereft of any findings or conclusions of law by the IHO, I find it appropriate to remand this matter to the IHO for a determination on the merits of the remaining issues set forth in the parent's April 2015 due process complaint notice (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]).

While the IHO issued findings concerning some of the parent's claims pertaining to the December 2014 IEP, he failed to address several other claims (see Parent Ex. A at pp. 3-4). Therefore, given the overall disposition of this appeal, I decline to review the merits of the IHO's limited findings concerning the December 2014 IEP at this time and direct the IHO, on remand, to issue findings on each of the unaddressed claims in the parent's due process complaint notice.[8] If either of the parties chooses to appeal the IHO's decision after remand, the merits of all claims

[8] With regard to the legal standard to apply, the district argues that, assuming that the student graduated in January 2016 as anticipated and, therefore, no longer meets the eligibility criteria for receiving instruction under the IDEA, the Second Circuit has held that compensatory education may be awarded only if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Doe. v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 n.15 [2d Cir. 2015]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69, 75 [2d Cir. 1990]; M.W. v New York City Dept. of Educ., 2015 WL 5025368, at *3 [S.D.N.Y. Aug. 25, 2015]). To clarify this point or any others, it is left to the sound discretion of the IHO to determine whether additional evidence or legal memorandum from the parties are required in order to make the necessary findings of fact and law.

contested on appeal will be addressed at that time (cf. D.N. v. New York City Dep't of Educ., 905 F. Supp. 2d 582, 589 [S.D.N.Y. 2012] [remanding unaddressed claims to the SRO and, as a consequence, declining to reach the merits of the issues reviewed by the IHO and the SRO]).[9]

VI. Conclusion

For the reasons set forth above, the matter is remanded to the IHO for a determination on the merits of the issues set forth in the parent's April 2015 due process complaint notice which have yet to be addressed.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated November 24, 2015 is modified, by reversing those portions which determined that the parents' claims related to the 2013-14 school year were moot;

IT IS FURTHER ORDERED that this matter shall be remanded to the IHO for a determination on the issues raised in the parent's April 17, 2015 due process complaint notice. If the IHO who presided over the impartial hearing is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
March 18, 2016

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[9] The IHO is strongly encouraged to conduct a prehearing conference for the purpose of clarifying and narrowing these issues (8 NYCRR 200.5[j][3][xi]).