The University of the State of New York

The State Education Department
State Review Officer
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No. 17-038

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 Board of Education of the Massapequa Union Free School District

Appearances:
Guercio & Guercio, LLP, attorneys for respondent, Tara E. Kahn, 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 the decision of an impartial hearing officer (IHO) that granted respondent's (the district's) motion to dismiss her due process complaint notice. The appeal must be sustained and, for reasons explained more fully below, remanded to the IHO for further administrative proceedings.[1]

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

[1] In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the events at issue in this appeal occurred before the effective date of the 2016 amendments, the new provisions of Part 279 apply, as the request for review was served upon the opposing party after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The student was the subject of a prior administrative appeal relating to the same school year (see Application of a Student with a Disability, Appeal No. 17-033). Accordingly, the parties' familiarity with the facts and procedural history is assumed and will not be repeated here in detail. Briefly, regarding the procedural history, the parent filed a due process complaint notice on August 4, 2016, alleging that the district failed to offer the student a FAPE for the 2016-17 school year, which was resolved by a stipulation of settlement dated September 14, 2016 (Dist. Exs. C; D.B at

pp. 1-3, 9).[2] Pursuant to the stipulation of settlement, the district agreed to provide the student with a center-based 18:1+2 integrated program at a particular nonpublic school (the NPS), five days per week from 8:30 a.m. to 1:30 p.m., along with the related services recommended in the student's IEP, for the period of September 19, 2016 through June 23, 2017 (Dist. Ex. C at p. 3). Further, the parent waived her right to commence any action or proceeding with respect to the student's IEP, special education program, and related services relative to the student's 2016-17 school year (id. at p. 4).

The parent subsequently filed a due process complaint notice, dated December 7, 2016, primarily challenging a December 7, 2016 CPSE's refusal to develop an IEP for the student that reflected the class placement, which the student was attending pursuant to the stipulation of settlement, or that included academic annual goals (Dist. Ex. A at pp. 1-4). In the December 2016 due process complaint notice, the parent requested money damages and that the district be required to create an IEP reflecting the aforementioned placement and academic annual goals (id. at p. 17). While administrative proceedings were underway, a CPSE convened on March 22, 2017 and amended the student's IEP to reflect the student's placement in an 18:2+2 integrated class in an approved preschool special education program and included annual goals related to the student's academic needs (Dist. Ex. DDD at pp. 5, 10-11, 15, 17).

Decisions were rendered by the IHO dismissing the parent's December 2016 due process complaint notice because: the parent was barred from opening issues resolved by the stipulation; monetary damages were not an available form of relief under the IDEA; and the March 2017 IEP resolved the parent's remaining claim for relief (Dist. Exs. L at pp. 3-4; Q; see Dist. Ex. O at pp. 1-2).[3]

A. Due Process Complaint Notice

By due process complaint notice dated April 6, 2017, the parent alleged that the district did not offer the student a free appropriate public education (FAPE) for the 2016-17 school year "due to a deficient IEP for a majority of the school year" (Ex. BB at p. 4). More specifically, the parent argued that the district prohibited her, her advocate, and other members of the CPSE from developing appropriate educational goals for the student prior to the March 2017 CPSE meeting (id. at pp. 3-4). The parent further alleged that the student's IEP did not reflect a

[2] The parent appeals from a decision by the IHO that was rendered based on the parties' submissions. No hearing dates had been held and no exhibits had been admitted. For that reason, citations are to the documents as lettered in the district's letter dated May 12, 2017, transmitting the hearing record to the Office of State Review (Dist. Exs. A-FF). While the district's letter references lower case letters, most of the exhibits themselves have cover pages with capital letters. Capital letters are used in this decision. Citations to exhibits attached to one of these documents are as identified in the letter, with the exhibit letter appended thereto (e.g., Dist. Ex. D.B).

[3] In a decision dated June 26, 2017, the undersigned dismissed the parent's appeal of the IHO's decisions (Application of a Student with a Disability, Appeal No. 17-033). As relevant to this instant appeal, in Application of a Student with a Disability, Appeal No. 17-033, the undersigned held that, since the CPSE had already convened in March 2017 and developed an IEP for the student, which included the amendments sought by the parent in the December 2016 due process complaint notice, and because the CSE was due to have already developed an IEP for the student's 2017-18 school year, the issue was moot.

"placement/program" for the period of September 19, 2016 until March 24, 2017 (id. at pp. 3, 4).[4] Accordingly, the parent asserted that the student's IEP "was deficient in educational goals, benchmarks and objectives for more than 6 months" (id. at p. 4). According to the parent, due to the deficiencies in the IEP, the student failed to make "appropriate/sufficient/meaningful progress" (id. at p. 3).

The parent acknowledged the "prior filing" relating to the student but indicated that, while her prior due process complaint notice sought "educational goals and placement to be delineated on the IEP," she now sought "compensatory educational hours" (Ex. BB at p. 4). She maintained that she was "not attempting to re-litigate an issue raised in the prior hearing," but was instead "engag[ing] in an attempt to rectify damage that was done due to the district's prohibiting educational goals being created and outlined in [the student's] IEP for more than six months" (id.).

As a remedy, the parent requested an award of "compensatory educational hours for the exhaustive length of time that [the student's] IEP was deficient in the area of educational goals" (Ex. BB at p. 4). Specifically, the parent sought "637 hours of compensatory special education" (id. at p. 8). The parent also sought monetary relief (id.). Lastly, the parent purported to give the district "10 days' notice" and "reserve [her] right to file a future due process complaint" relating to the student's lack of progress in the areas of speech-language, occupational therapy, and physical therapy (id. at p. 9).

B. Impartial Hearing Officer Decision

By decision dated April 17, 2017, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at p. 4). Initially, the IHO denied the parent's request for a pendency hearing based on her determination that pendency "[wa]s not an issue in this case" (id. at pp. 2-3). The IHO reasoned that pendency would only become an issue if the student's current placement was in dispute but noted that, "in this case, it [wa]s not" (id. at p. 3).

In addressing a motion by the district to dismiss the parent's due process complaint notice, the IHO held that the parent had waived her right to commence the instant action and that she could not engage in "claim splitting" (IHO Decision at p. 3; see Dist. Ex. DD). More specifically, the IHO rejected the parent's position that the proceedings were not the same and found that the parent was "absolutely trying to re-litigate an issue which ha[d] already been raised and rectified in the prior hearing" (IHO Decision at p. 4). Finally, the IHO cautioned the parent "to take heed that she might be made to pay the district's legal fees . . . if she commence[d] any further action about this or any prior school years" (id.). Accordingly, the IHO dismissed the parent's due process complaint notice with prejudice.

IV. Appeal for State-Level Review

The parent appeals and requests that the IHO's decision be reversed in its entirety. More specifically, she asserts that the IHO erred in "finding that the parent did not have standing to bring this case forward." The parent argues that the IHO erred in dismissing the case without addressing her claim that the student-to-teacher ratio reflected in the March 2017 IEP did not match the

[4] In a separate numbered paragraph, the parent also asserted that the student's IEP did not reflect a "placement/program" for the period of March 1, 2017 through March 24, 2017 (Dist. Ex. BB at p. 4).

student-to-teacher ratio outlined in the September 2016 stipulation of settlement. The parent asserts that the district's violation of the stipulation of settlement in this manner gives the parent standing based on a breach of contract.

Next, the parent disputes the IHO's finding that she was choosing to relitigate old claims and maintains that she "is looking to receive relief based on the district's poor decisions." The parent asserts that the IHO violated her due process rights by dismissing the complaint without ever establishing an administrative hearing record or receiving testimony.[5] In addition, she contends that the IHO erred by failing to grant relief to the student who has been without a "properly created IEP for over 6 months due to the district's refusal." Moreover, the parent asserts that the IHO erred in failing to address pendency.

As a remedy, the parent requests an immediate remand to a new IHO for a ruling on the student's pendency placement and to establish an appropriate record for review.[6] In addition, the parent requests an award of compensatory special education instruction hours and "any and all relief which the new IHO deems appropriate based upon the inappropriate placement and the deficient IEP which lacked appropriate educational goals for over 6 months."

In an answer, the district generally admits or denies the parent's allegations and requests that the IHO's decision be upheld in its entirety. The district also argues that the parent's submissions on appeal do not comply with Part 279 of the practice requirements. The district next argues that the parent is attempting to raise matters outside the scope of the due process complaint notice, such as the parent's claim relating to the ratio of the class placement at the NPS. In addition, the district asserts that, pursuant to the September 2016 stipulation, the parent waived her right to pursue an impartial hearing against the district with regard to any claims surrounding the 2016-17 school year and that the parent has breached the stipulation. With regard to the stipulation, the district also asserts that an SRO does not have jurisdiction to consider the parent's claims. Next, the district argues that the IHO properly dismissed the parent's due process complaint because there is no authority allowing multiple due process complaint notices on the same issue and based on principles of claim splitting. Finally, with respect to the parent's request that this matter be remanded to a new IHO, the district asserts that the parent is engaging in "impermissible judge shopping."

V. Discussion

A. Form Requirements for Pleadings

The district requests dismissal of the parent's appeal for failure to comply with the practice requirements as set forth in State regulations. More specifically, the district argues that the request for review was defective for the following reasons: (1) the request for review was not endorsed with the parent's name, mailing address and telephone number; (2) the parent failed to verify the request for review; (3) the request for review was not accompanied by a notice of request for review and the notice filed by the parent did not contain the language set forth in 8 NYCRR 279.3;

[5] The parent further argues that, as a consequence of the IHO's dismissal of the case, the parent is "force[d] . . . to go through and exhaust[] the administrative process again."

[6] The parent's argument regarding pendency mirrors that which was decided in Application of a Student with a Disability, Appeal No. 17-033 and, therefore, shall not be further discussed.

and (4) the request for review did not contain the requisite information in that the parent failed to clearly identify the findings, conclusions, and orders to which she took exception. The district alleges that "[the parent's] failures in this matter amount to more than easily corrected procedural errors or mere technicalities." In addition, the district alleges that this was not the first time that the parent has failed to comply with the practice requirements.

Each request for review filed with the Office of State Review must contain a "Notice of Request for Review," the content of which is set forth in State regulation and generally notifies a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review (8 NYCRR 279.3).[7] State regulation further provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and order to which exceptions are taken, or the failure or refusal to make a finding, and shall indicate what relief should be granted by the [SRO] to the petitioner" (8 NYCRR 279.4[a]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]). State regulation requires, in pertinent part, that a request for review set forth:

> (1) the specific relief sought in the underlying action or proceeding;
>
> (2) a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately, and identifying the precise rulings, failures to rule, or refusals to rule presented for review; and
>
> (3) citations to the record on appeal, and identification of the relevant page number(s) in the hearing decision, hearing transcript, exhibit number or letter and, if the exhibit consists of multiple pages, the exhibit page number

(8 NYCRR 279.8[c][1]-[3]). Moreover, all pleadings and papers submitted to an SRO must "be endorsed with the name, mailing address, and telephone number of the party submitting the same or, if a party is represented by counsel, with the name, mailing address, and telephone number of the party's attorney" (8 NYCRR 279.7[a]). All pleadings must be signed by an attorney, or by a party if the party is not represented by an attorney (8 NYCRR 279.8[4]). Additionally, all pleadings shall be verified (8 NYCRR 279.7[b]).

In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or in the dismissal of a request for review by an SRO (8 NYCRR 279.8[a]-[b], 279.13; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], aff'd, C.E. v Chappaqua Cent. Sch. Dist., 2017 WL 2569701 [2d Cir. June 14, 2017], quoting Foman v. Davis, 371 U.S. 178 [1962]).

[7] This is a separate filing from the notice of intention to seek review (compare 8 NYCRR 279.2, with 8 NYCRR 279.3).

Turning to the district's specific contentions, while the request for review is not accompanied by the notice of request for review required by 8 NYCRR 279.3, the parent's notice of intention to seek review was accompanied by a notice, which contained the language required by State regulation in effect prior to January 1, 2017.[8] Thus, the notice included the wrong language and was served early with the wrong submission (i.e., with the notice of intention to seek review, rather than with the request for review as required by State regulation). Nevertheless, the district requested and was granted an extension of time to serve an answer and the district served its answer within its extended time frame consistent with the purpose of the notice of request for review, which is to notify a responding party of the requirements with respect to preparing, serving, and filing an answer to the request for review. Next, although the request for review does not include the parent's mailing address and telephone number, as required by State regulation (8 NYCRR 279.7[a]), the district has not alleged that the parent's failure in this respect impeded its ability to respond to the request for review. Additionally, while the district asserts that request for review is not verified, the parent filed an affidavit of verification of the request for review with the Office of State Review. Finally, with respect to the district's allegation that the parent fails to clearly identify the findings, conclusions, and orders to which she took exception, review of the parent's request for review belies this assertion. The parent's request for review includes eight numbered issues which sufficiently specify the grounds for reversal or modification.[9, 10]

While the district correctly submits that the parent failed to comply with all of the form requirements for pleadings as set forth in State regulation, even taking into account that the parent repeated two of the deficiencies found in Application of a Student with a Disability, Appeal No. 17-033,[11] I decline to dismiss the parent's request for review on these grounds. The district was not prevented from answering in a timely manner and there is no indication that it suffered any

[8] Changes to the notice that became effective on January 1, 2017 reflected the change in the name of the document used to initiate the appeal from a petition to a request for review, the change in the time allowed for service of an answer from 10 days to 5 business days, and a notice that extensions of the time to answer may be granted upon proper application (8 NYCRR 279.3).

[9] In an apparent typographical error, the parent's second issue reads only "2. The IHO" without any statement of the issue presented for review.

[10] In its memorandum of law, the district also asserts that the request for review did not contain the requisite information on the grounds that it failed to specify relief sought in the underlying proceeding and did not cite to the hearing record, and additionally alleges that the parent did not sign the request for review (Dist. Mem. of Law at pp. 17-19). Even assuming these separate allegations of deficiency are properly raised in the memorandum of law but not in the district's Answer, they are, in any event, without merit. The parent states in her request for review that, in her due process complaint notice, she sought "relief deemed appropriate by an IHO" and further references her request for determinations on pendency and "admonish[ment]" of the district (Req. for Rev. at p. 2). While these are not statements of perfect clarity, the district has not alleged any harm as a result. To the extent the district contends the parent failed to cite to the hearing record, as noted above, no hearing dates were held and no evidence was entered into evidence. Finally, contrary to the district's allegations, the parent's request for review, which was filed with the Office of State Review, bears the parent's signature.

[11] The parent's notice of intention to seek review was served on May 5, 2017 and the request for review was served on May 25, 2017. Both of these submissions post-date the effective date of the amendments to part 279 of the practice requirement but pre-date the undersigned's decision in Application of a Student with a Disability, Appeal No. 17-033, which outlined the deficiencies in the parent's submissions in that matter.

prejudice as a result (see Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058).

B. Scope of Review

On appeal, the parent argues that the IHO erred by failing to address her claim that the student-to-teacher ratio reflected on the March 2017 IEP did not match the student-to-teacher ratio set forth in the September 2016 stipulation of settlement. The district argues that the parent is improperly attempting to raise matters for the first time on appeal, such as the parent's claim relating to the ratio of the class placement at the NPS.

A party may not raise issues at the impartial hearing or for the first time on appeal that were not raised in the due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). The parent did not allege in her April 2017 due process complaint notice that the March 2017 CSE violated the terms of the September 2016 stipulation of settlement by describing the recommended placement in the student's IEP as an 18:2+2 special class and her due process complaint notice cannot be reasonably be read to include this claim (see Dist. Ex. BB). A review of the record shows that the district did not subsequently agree to an expansion of the scope of the impartial hearing to include this issue and that the parent did not attempt to amend the due process complaint notice to include this issue. Accordingly, I decline to review this issue for the first time on appeal (see B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 611 [E.D.N.Y. 2012] [explaining that "[t]he scope of the inquiry of the IHO, and therefore the SRO . . . , is limited to matters either raised in the . . . impartial hearing request or agreed to by [the opposing party]]"; M.R. v. S. Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *13 [S.D.N.Y. Dec. 16, 2011]). However, upon remand, the parent may wish to seek the district's agreement to expand the scope of the impartial hearing and/or seek the IHO's permission to amend her due process complaint notice to include such an issue.

C. Preclusion of Claims or Issues

The parent asserts that the IHO erred in dismissing her due process complaint notice on the basis that it represented the parent's attempt to relitigate old claims. The district asserts that the IHO correctly found that the parent was engaging in improper claim splitting. The district further asserts that the parent is barred from filing multiple due process complaint notices on the same issue.

Initially, while the IHO agreed with the district "that the parent c[ould] not engage in claim splitting" (IHO Decision at p. 3), the IHO did not set forth any legal standard or analysis in this regard. On appeal, the district continues to focus on the doctrine of "claim splitting" as a basis for upholding the IHO's dismissal of the parent's due process complaint notice. The doctrine of claim splitting generally refers to a court's authority to manage its docket and applies when the two duplicative cases involving the same subject matter are pending simultaneously in the same court against the same defendant (Kanciper v. Suffolk Cnty. Soc'y, 722 F.3d 88, 92-93 [2d Cir. 2013], citing Curtis v. Citibank, N.A., 226 F.3d 133, 138-39 [2d Cir. 2000]). Here, since the parent's December 2016 due process complaint notice was no longer pending before the IHO at the time

the IHO dismissed the April 2017 due process complaint notice, claim splitting was not applicable (compare Dist. Ex. Q at p. 2, with IHO Decision at p. 4). Had the proceeding, which arose from the December 2016 due process complaint notice, remained pending when the IHO considered whether the April 2017 due process complaint notice was precluded, the IHO could have considered measures other than dismissing the April 2017 due process complaint notice with prejudice as a means of managing her case load (cf. Curtis, 226 F.3d at 138 [noting that "a court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions"]). For example, the IHO could have considered consolidating the matters (8 NYCRR 200.5[j][3][ii][a]) or allowing an amendment to the December 2016 due process complaint notice (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]).

Nevertheless, since "claim splitting" is generally seen as related to res judicata, the doctrine of claim preclusion shall also be examined to evaluate whether or not the IHO erred in dismissing the parent's April 2017 due process complaint notice (see Curtis, 226 F.3d at 138 [noting that "the rule against duplicative litigation is distinct from but related to the doctrine of claim preclusion or res judicata"]; LG Elecs., Inc. v. Wi-LAN USA, Inc., 2015 WL 4578537, at *5 [S.D.N.Y. July 29, 2015] [noting that res judicata concerns motivate the doctrine of claim splitting]; Coleman v. B.G. Sulzle, Inc., 402 F. Supp. 2d 403, 418-19 [N.D.N.Y. 2005] [acknowledging the "close relationship between claim splitting and res judicata"]; see also Katz v. Gerardi, 655 F.3d 1212, 1218 [10th Cir. 2011] [indicating that claim splitting is examined as an aspect of res judicata]).

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).[12]

As to the second and third elements of the doctrine of res judicata, it is undisputed that the prior proceeding involved the same parties as the present matter, and the district correctly submits that the allegations in the April 2017 due process complaint that relate to the district's failure to include the student's placement or academic annual goals on the student's IEP for the 2016-17 school year prior to March 2017 were the same claims raised in the parent's December 2016 due process complaint notice (at least to the extent that they overlap in time) (compare Dist. Ex. A at

[12] Additionally, while the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]).

pp. 3-4, with Dist. Ex. BB at pp. 304). In her April 2017 due process complaint notice, the parent essentially conceded that her claims were the same as in her December 2016 due process complaint notice but argued that, because of her different request for relief (i.e., compensatory education), her claim was not precluded (Dist. Ex. BB at p. 4); the parent repeats this argument on appeal. However, the parent's request for compensatory education could have been raised in her December 2016 due process complaint notice or in a properly requested amendment thereto (see Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] ["[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'"], quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]; Sure-Snap Corp. v. State St. Bank and Trust Co., 948 F.2d 869, 875 [2d Cir. 1991]). At the time the parent filed the December 2016 due process complaint notice, the student had been attending the NPS pursuant to the stipulation for approximately three months (see Dist. Ex. C), and the parent was able to identify her concerns with the placement and the lack of educational goals (Dist. Ex. A at pp. 3-4). Accordingly, the second and third elements of res judicata are met.

However, turning to the first element of the res judicata analysis, the prior proceeding did not result in an adjudication on the merits of the parent's claims. Rather, the IHO in the first proceeding dismissed the parent's claims because the additions to the student's program and placement, memorialized in the March 2017 IEP, resolved the parent's remaining claims for relief (Dist. Exs. O at p. 1; Q at p. 2). In other words, the IHO determined that the parent's claims had become moot.[13] In Application of a Student with a Disability, Appeal No. 17-033, the undersigned also found the parent's claims underlying her request for amendments to the student's IEP to be moot, given that the only relief sought by the parent was amendment to the student's IEP for the 2016-17 school year, the March 2017 CPSE amended the student's IEP for the 2016-17 school year, and a CPSE should have already convened to develop a new IEP for the student for the 2017-18 school year.[14]

It has been held that a dismissal of a claim for mootness is not a final determination on the merits and, therefore, should not be accorded res judicata effect beyond the question decided in such dismissal (Hell's Kitchen Neighborhood Ass'n v. Bloomberg, 2007 WL 3254393, at *3 [S.D.N.Y. Nov. 1, 2007], citing Farkas v. New York State Dept. of Civ. Serv., 114 A.D.2d 563, 565 [3d Dep't 1985]; see Fieger v Corrigan, 602 F.3d 775, 777 [6th Cir. 2010]; K.C., 2017 WL 2417019, at *7 [noting that res judicata does not apply where a claim was dismissed for lack of jurisdiction]; Application of a Student with a Disability, Appeal No. 09-091). In other words, the first proceeding precludes relitigation of the issue of justiciability actually determined—i.e., the question of amendment to the student's IEP for the 2016-17 school year remains moot[15]—but does not preclude the current proceeding on the same claim if the justiciability problem has been

[13] As with the IHO's determination regarding claim splitting, the IHO did not set forth a legal standard or analysis of mootness in her March 2017 decision (Dist. Ex. Q at p. 2).

[14] In the prior proceeding, the parent's belated request for compensatory education, raised there for the first time on appeal, did not allow her to avoid dismissal for mootness (Application of a Student with a Disability, Appeal No. 17-033).

[15] In addition to res judicata, parties are also limited by the doctrine of collateral estoppel (or issue preclusion), which "precludes parties from litigating 'a legal or factual issue already decided in an earlier proceeding'" (Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426).

overcome—i.e., to the extent the addition of the request for compensatory education may make the case real and live and not academic (cf. Lillbask v. Dep't of Educ., 397 F.3d 77, 89-90 [2d Cir. 2005]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *15 [E.D.N.Y. Oct. 30, 2008]).

Based on the foregoing, the IHO's dismissal of the parent's due process complaint notice on the basis that it represented the parent's attempt to relitigate old claims and because the parent engaged in improper claim splitting is reversed.

D. Waiver of Claims or Issues

As an alternative basis for upholding the IHO's dismissal of the parent's due process complaint notice, the district asserts that the parent waived her right to pursue an impartial hearing against the district with regard to any claims surrounding the 2016-17 school year.[16]

The particular language in the stipulation of settlement between the parties provides that the parent released the district from any claims (including claims for compensatory education) arising out of or related to the district's "actions or omissions during all school years up to the 2016/2017 school year" pertaining to the special education program or services provided or offered to the student, or the lack thereof, or any alleged failure by the district to offer the student a FAPE (Dist. Ex. C at pp. 1-2).

In resolving the parent's December 2016 due process complaint notice, the IHO held that the parent was barred from reopening issues that were addressed in the September 2016 settlement agreement; however, the IHO also found that the parent's requests for the CPSE to update the student's IEP to identify the student's current placement and develop annual goals were not waived by the settlement agreement (Dist. Ex. L at pp. 3, 4).[17] In so finding, the IHO indicated that the stipulation of settlement could not be read to preclude an issue which could not have been raised in the proceeding which gave rise to the agreement, and also noted that "[t]he parent couldn't have known that there would be no goals" (id. at p. 3). The IHO further indicated that "not having an IEP with annual academic goals would be a violation of the IDEA" and that "limited review of the

[16] As discussed above, while the parent also raises an issue on appeal relating to the district's breach of the settlement agreement, that particular claim is outside the scope of review. Moreover, as discussed in Application of a Student with a Disability, Appeal No. 17-033, federal and State law and regulations do not confer jurisdiction to review or enforce settlement agreements on IHOs or SROs, whose jurisdiction is limited to matters relating to the identification, evaluation, or placement of students with disabilities, or the provision of a FAPE to such students (20 U.S.C. § 1415[b][6][A]; Educ. Law § 4404[1][a]; 34 CFR 300.503[a], 300.507[a][1]; 8 NYCRR 200.5[i][1]; see H.C. v. Colton-Pierrepont Cent. Sch. Dist., 341 Fed. App'x 687, 689-90 [2d Cir. July 20, 2009]; Application of the Bd. of Educ., Appeal No. 07-043; but see Application of the Bd. of Educ., Appeal No. 04-068). To the extent that the stipulation of settlement includes language indicating that the parent could pursue an impartial hearing in the event the parent believed the district breached the agreement and provided the district 10 days written notice of their intent to commence such proceeding (Dist. Ex. C at pp. 2-3), "[j]urisdiction cannot . . . be stipulated beyond limits which the Legislature has specifically fixed" (Hudson-Harlem Val. Tit. & Mtge. Co. v. Walker, 282 N.Y. 400, 405 [1940]).

[17] As noted in Application of a Student with a Disability, Appeal No. 17-033, the district did not cross-appeal from the IHO's determination relating to the parent's ability to pursue, via the administrative process, her request for an amendment to the student's IEP and, therefore, that determination became final and binding on the parties (34 CFR 300.51[a]; 8 NYCRR 200.5[j][5][v]).

IEP to Annual Review Meetings would also go against the intent of the IDEA" (id.). In her decision in the present matter, while the IHO acknowledged language in the stipulation of settlement "which specifically barred the parents from commencing any action or proceeding with respect to the student's IEP during any school year up through and including the 2016-2017 school year," she did not rely on this language to dismiss the parent's April 2017 due process complaint notice (IHO Decision at p. 1). Absent any analysis from the IHO distinguishing the parent's ability or inability to pursue different forms of relief (i.e., amendment of the student's IEP versus compensatory education) under the terms of the stipulation of settlement for the same alleged violations of the student's right to a FAPE, I decline to read such a determination into the IHO's decision.

Accordingly, given the lack of clarity from the IHO about the extent to which the parent waived her right to pursue the impartial hearing regarding the issues at hand and the different relief sought, I will leave it for the IHO to consider and expand upon.

E. Remand

Based on all of the foregoing, this matter is remanded to the IHO for a determination as to (1) whether or not the stipulation of settlement allows for the relief sought by the parent, taking into the account the IHO's decisions resolving the parent's December 2016 due process complaint notice; (2) if so, whether the CSE's failure to develop an IEP for the student's 2016-17 school, prior to March 2017, that set forth the student's placement at a NPS or included academic goals amounted to a denial of a FAPE to the student; and (3) if so, whether relief in the form of compensatory education is warranted (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]).

The parent requests that this matter be remanded to a new IHO, rather than the IHO who issued the April 2017 decision that dismissed the parent's April 2017 due process complaint notice. The district argues that this request represents the parent's attempt to engage in "improper judge shopping." The parent does not articulate the basis for the request for a different IHO upon remand but does assert that the IHO's failure to conduct the impartial hearing violated the parent's right to due process. While summary disposition procedures akin to those used in judicial proceedings are an effective mechanism for resolving certain proceedings under the IDEA, they should be used with caution and are only appropriate in instances, where "the parties have had a meaningful opportunity to present evidence and the non-moving party is unable to identify any genuine issue of material fact" (J.D. v. Pawlet Sch. Dist., 224 F.3d 60, 69 [2d Cir. 2000]). While it was appropriate for the IHO to consider the district's application for dismissal of the parent's April 2017 due process complaint notice, for the reasons described above, the IHO's ultimate determination was based on legal error. However, there is no indication in the record on appeal that the IHO would not address the parent's claims in an impartial and fair manner consistent with the requirements of due process. Accordingly, there is no basis to order that the matter be remanded to a different IHO.

With that said, the district's point about the parent's filing of multiple due process complaint notices relating to the same CSE meeting and school year is well taken.[18] Such a practice is inefficient and undermines the expeditious processes intended by the IDEA. While this matter is not precluded at this time—as a result of the justiciability grounds for the earlier dismissal of the parent's December 2016 due process complaint notice—the parent should be aware that, once this matter is adjudicated and taken to final judgment on the merits, any further claims that the parent might be inclined to pursue arising out of the same CSE meeting or IEP or lack thereof, could likely be precluded.[19] The IHO may find it appropriate to schedule a prehearing conference to, among other things, ask the parent if she has asserted all claims and requests for relief relating to the student's 2016-17 school year (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

For the reasons stated above, the matter is remanded to the IHO for a determination on the merits of the issues and/or claims identified herein.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated April 17, 2017, is reversed and the matter is remanded to the same IHO who issued the April 17, 2017 decision to determine the merits of the issue(s) and/or claim(s) arising from the parent's April 6, 2017 due process complaint notice consistent with the body of this decision, and

IT IS FURTHER ORDERED that, if the IHO who issued the April 17, 2017 decision is not available, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: Albany, New York
July 19 , 2017

SARAH L. HARRINGTON
STATE REVIEW OFFICER

[18] However, the evidence in the record on appeal does not support the district's position that the parent is engaging is "impermissible judge shopping" such that immediate dismissal of the parent's claims is required. Unlike in the cases cited by the district (see Application of a Child with a Disability, Appeal No. 06-065; Application of a Child with a Disability, Appeal No. 04-061), there is no evidence here that the parent withdrew a due process complaint notice (or refused to participate in the impartial hearing to the point where it could not proceed) and then refiled for the purpose of obtaining the assignment of a different IHO or demanded the recusal of multiple IHOs. Moreover, State regulation now protects against the practice of withdrawing and refiling due process complaint notices in order to secure assignment of a different IHO by requiring the appointment of the same IHO in such circumstances unless such IHO is no longer available (8 NYCRR 200.5[j][6][iv]). The parent's request for a remand to a different IHO does not, on its own, support a finding of "impermissible judge shopping."

[19] Accordingly, to the extent the parent purported, in her April 2017 due process complaint notice, to "reserve [her] right to file a future due process complaint" relating to the student's lack of progress in the areas of speech-language, occupational therapy, and physical therapy (Ex. BB at p. 9), she may wish instead to seek an amendment to the due process complaint notice in the present matter.