The University of the State of New York

The State Education Department
State Review Officer
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No. 17-053

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Theresa Crotty, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request for the provision of additional services for the 2016-17 school year. 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).[1] 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 has been found eligible for special education and related services as a student with autism (Dist. Ex. 15 at p. 1). His full-scale IQ is reported to be in the "[h]igh [a]verage range," while his basic reading abilities are judged to be in the average range, and his mathematical abilities are in the superior range (Dist. Ex. 3 at p. 4). He has difficulty relating to peers and requires assistance with activities of daily living including feeding and toileting (Dist. Ex. 15 at p.

[1] In September 2016, Part 279 of the practice regulations was 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 relevant events at issue in this appeal occurred before the effective date of the amendments, the new provisions of Part 279 apply, as the request for review was served upon the district after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279 unless otherwise specified.

2). The student, who was in ninth grade during the 2016-17 school year, has been receiving home instruction since 2007 (Tr. p. 48; see Dist. Ex. 11 at pp. 1-2).

The hearing record reflects that, on or around August 1, 2016, the parents received notice from the district that it intended to terminate the student's home instruction in September 2016, absent additional documentation to support the service (Dist. Ex. 2 at p. 3). The district attempted to schedule an August 2016 CSE meeting to discuss the student's educational needs; however, it does not appear that this meeting took place (see Dist. Exs. 4; 15 at pp. 9, 11; 18 at pp. 4-5). The district events log indicates that on August 17, 2016, the student's mother reported that she had not been notified of the meeting and was unable to meet until later in August or September (Dist. Ex. 18 at pp. 4-5). The events log further indicates that the parent requested additional evaluations to assist with placement, that she claimed the student was not able to attend school, and she wanted him to continue with home instruction (id.).

The hearing record reflects that, on September 19, 2016, the parents requested an impartial hearing (the prior proceeding) to protest the district's failure to provide the student with home instruction, pending the development of an appropriate IEP and school placement recommendation for the 2016-17 school year (Dist. Ex. 2 at p. 2).[2] The prior proceeding took place over the course of four days, between October 13, 2016 and February 6, 2017 (id. at pp. 1, 3). On October 13, 2016, the IHO presiding over the prior proceeding issued an interim order on pendency, finding that the student's pendency placement was set forth in a June 24, 2013 IEP that recommended the student be placed in a State-approved nonpublic school with related services of speech-language therapy, occupational therapy (OT), physical therapy (PT), and counseling, with all services provided on a 12-month basis, and that the student should continue to receive home instruction until an appropriate nonpublic school placement was found (id. at pp. 2, 3 & n.1). Pursuant to the October 2016 pendency order, on November 17, 2016, the district issued an "eligibility letter" to the parents, indicating that the district had been unable to locate a nonpublic school placement to implement the student's IEP, and authorizing the student's placement in a State-approved nonpublic school at district expense (Dist. Exs. 12; 18 at p. 3).

On December 9, 2016, the CSE met to develop the student's IEP for the 2016-17 school year (Dist. Exs. 13; 14; 15). The December 2016 CSE recommended the student be placed in a 12:1+1 State-approved nonpublic school program and receive services on a 12-month basis (Dist. Ex. 15 at pp. 1-2, 6, 8). The December 2016 CSE also recommended related services to include one 45-minute session per week of group counseling services, three 45-minute sessions per week of individual OT, three 45-minute sessions per week of individual PT, and four 45-minute sessions per week of individual speech-language therapy (id. at p. 6). In addition, the district also recommended one session of parent counseling and training per three-month period (id.). The December 2016 CSE also identified testing accommodations, postsecondary goals, and transition activities for the student (id. at pp. 3, 7).

As a result of the development of the December 2016 IEP, the parents and the district agreed that the IHO in the prior proceeding should issue an order "providing for [the student] to receive the program and services on the student's most recent IEP . . . and receive home instruction and related services from the" December 2016 IEP until an appropriate nonpublic school was

[2] According to the events log, home instruction and all related services were "in place" by September 20, 2016 (Dist. Ex. 18 at p. 4).

located (Dist. Ex. 2 at p. 3). In a decision dated February 9, 2017, the IHO ordered the CSE to "continue to search for an appropriate [nonpublic school] for the student to attend in the 2016[-]17 school year, and . . . provide the parents . . . with an authorization to place the student in a [nonpublic school] effective for the duration of the 2016[-]17 school year" (id. at pp. 3-4). The IHO further ordered that until the student was placed in a nonpublic school by the district or the parents, the district "shall continue to fund home instruction, two hours per school day and provide related services as per" the December 2016 IEP (id. at p. 4).

A. Due Process Complaint Notice

On March 3, 2017, the parents filed a due process complaint notice, requesting "an impartial hearing and expedited hearing on the issue of pendency" (Dist. Ex. 1 at p. 1). The parents noted that the student was receiving home instruction and related services pending placement in a nonpublic school (id. at p. 2). However, according to the parents, the only nonpublic school offered by the district was a day school that rejected the student (id.). The parents asserted that the district had not yet identified an appropriate nonpublic school placement for the student, that the district had "been working on my son's placement since 2008 without any success," and that during that time the student had received 10 hours of home instruction and related services (id. at pp. 2-3). The parents claimed that 10 hours of home instruction per week would not allow the student to earn enough credits to graduate with a high school diploma in four years (id.). The parents further contended that the student required 15 hours of home instruction to obtain the amount of credits necessary to graduate in four years, and that it was not "fair to deprive him of the opportunity to obtain his High School diploma on time simply because the [district] failed to find an appropriate placement" (id. at p. 3).

The parents requested that the student receive 15 hours of home instruction "during the pendency of this proceeding until an appropriate placement" was found; the parents also requested that the student's current home instruction teacher continue providing home instruction during the summer (Dist. Ex. 1 at pp. 3-4).

B. Impartial Hearing Officer Decision

After prehearing conferences on March 29, 2017, and April 6, 2017, an impartial hearing was held on April 24, 2017 (Tr. pp. 1-70). By decision dated June 2, 2017, the IHO found that the issue of home instruction was decided in the prior proceeding, and that because the parents did not appeal that decision, the order from the prior proceeding was final and binding on the parties (IHO Decision at p. 4). The IHO also determined that as the prior proceeding was "decided on the merits, fairly, and the parties had a full opportunity to litigate the issue," the IHO did not have jurisdiction over the parents' claim, which was barred by res judicata and collateral estoppel (id.). The IHO also found that the district had discretion to select the student's home instruction provider and he did not have jurisdiction to "force the [district] to change" the student's teacher assignment during the summer (id.).

IV. Appeal for State-Level Review

The parents appeal, initially asserting that the district "changed the [IHO] [four] times" until an "appropriate" IHO was found, claiming that this was "very "suspicious." The parents also contended that it was unclear when the impartial hearing would happen and that they did not have

"an opportunity to find out about the status of the hearing." With respect to the substance of their appeal, the parents claim that the IHO "did not address the real matter . . . brought into the litigation, which was the amount of Home Instruction hours." The parents argue that the IHO erred in finding that their claim relating to the amount of home instruction was barred by res judicata or collateral estoppel because the issue was not raised in the prior proceeding, which they initiated to reinstate home instruction services, and did not address the number of hours of home instruction the student would receive. The parents further assert that they did not have an opportunity to litigate this issue because at the time of the prior proceeding, they were not aware that receiving 10 hours per week of home instruction would not enable the student to graduate from high school in four years. Accordingly, the parents argue that the resolution of the issue could not have been necessary to a final judgment in the prior proceeding. The parents claim that two hours of home instruction per day is not enough for the student to graduate on time; they also argue that the student "should not be obligated to attend summer school" in order to graduate in four years.[3]

In an answer, the district generally responds to the parents' allegations with admissions and denials, and argues to uphold the IHO's determinations.[4]

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. v. Rowley, 458 U.S. 176, 180-83, 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; 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. Florida 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 recently 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

[3] The parents do not appeal from the IHO's determination that he did not have jurisdiction to review the district's assignment of a particular teacher to provide the student's home instruction hours. However, the district asserts that the specific teacher requested by the parents taught the student during summer 2017.

[4] The district asserts that the parents failed to number the paragraphs in their request for review, in violation of the practice regulations. As noted above, the practice regulations were amended effective January 1, 2017. Prior to amendment, the practice regulations required each paragraph in a pleading to be numbered (see 8 NYCRR 279.8[a][prior 3]). As amended, the regulations require that the request for review set forth "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" (8 NYCRR 279.8[c][2]).

out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [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., 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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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 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]).[5]

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]). 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; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

The IHO dismissed the parents' claim for an increase in the amount of home instruction provided to the student on res judicata and collateral estoppel grounds, finding that the determination by the IHO in the prior proceeding was "decided on the merits, fairly," and that the parties "had a full opportunity to litigate the issue" at that time (IHO Decision at p. 4). On appeal, the parents claim that the IHO failed to address the matter raised in the due process complaint notice; specifically, that 10 hours per week of home instruction is not enough for the student to be able to graduate in four years. The parents also argue that the student should not be "obligated to attend summer school."[6]

[5] The Supreme Court recently 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., 137 S. Ct. at 1000).

[6] A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its 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 original 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][b]). While the parents raised a claim in their due process complaint related to summer school, specifically that the student would not earn enough credits to graduate on time despite attending summer school, on appeal the parents claim that the student should not be required to attend summer school (Dist. Ex. 1 at p. 2). These claims are distinct, and the parents' argument related to whether the student should be required to attend summer school cannot reasonably be read as being raised in the parents' due process complaint notice. Therefore, this claim will not be addressed on appeal (see N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013]). Furthermore, the student's December 2016 IEP specifically recommended that the student receive services on a 12-month basis, a recommendation that was not challenged by the parents (Dist. Ex. 15 at p. 6; see Dist. Ex. 1).

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. v. Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *4 [S.D.N.Y. Jan. 13, 2012]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19, 2006]). 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" (K.B., 2012 WL 234392, at *4; see Grenon, 2006 WL 3751450, at *6). The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

The evidence in the hearing record does not establish that the claim in the parents' due process complaint notice regarding the amount of home instruction provided to the student was or could have been raised in the prior proceeding and was resolved on the merits such that the parents are precluded on res judicata and collateral estoppel grounds from raising it in this proceeding. As noted above, the IHO in the prior proceeding indicated that the parties agreed he should issue an order for the student to receive two hours of home instruction per day as well as related services in accordance with the December 2016 IEP until an appropriate nonpublic school was located (Dist. Ex. 2 at pp. 3-4). The parents did not appeal from the order in the prior proceeding or challenge the order in the current due process complaint notice (see Dist. Ex. 1). To the contrary, the student's father stated that the parents requested two hours per day of home instruction in the prior proceeding (Tr. p. 33). However, the student's father also asserted that during the prior proceeding, the parents were unaware the student would not "be able to accumulate [the] five credits" per semester necessary to graduate on time (see Tr. pp. 32-33, 35). The parents' due process complaint notice was filed with the district only a few weeks after the IHO decision was issued in the prior proceeding; therefore, it is possible that the parents became aware of their concerns regarding credit accumulation at some point during the prior hearing, and may have been able to raise those issues at the hearing (Dist. Exs. 1 at p. 1; 2 at pp. 3-4). However, due to the scarcity of evidence in this hearing record, it is impossible to know precisely what happened during the prior hearing, specifically, whether the parents were able to raise or actually did raise issues related to credit accumulation during the prior proceeding (see Khalifa v. Town of Coventry, 2006 WL 2008708, at *4 [N.D.N.Y. July 17, 2006]). The hearing record does not include the September 2016 due process complaint notice filed by the parents, and it is unclear what claims the parent raised in the prior proceeding (id. at p. 3).[7] The district does not assert that the parents could have or did raise the instant claim in the prior proceeding, nor does the district assert that, if the parents

[7] The IHO decision in the prior proceeding identified that the parents raised a claim related to the district's termination of home instruction services (Dist. Ex. 2 at pp. 2-3). Furthermore, at the current impartial hearing, the district representative asserted that the parents' September 2016 due process complaint notice "asked for pendency in home instruction and new evaluations, and a new IEP meeting" (Tr. p. 29).

learned of the alleged credit deficiency during the course of the prior proceeding, they would have been required to amend their then-pending complaint to raise the claim in that proceeding, as opposed to initiating a subsequent proceeding. Additionally, the IHO in the prior proceeding did not address any claims relating to credit accumulation, and it does not appear that his resolution of the amount of home instruction to be provided the student was made on the merits but, rather, was based on the parties' agreement (see Dist. Ex. 2 at p. 2). Finally, the current IHO did not offer any analysis of how the IHO's determinations in the prior proceeding were on the merits of the claim raised by the parents in this proceeding, or how res judicata or collateral estoppel applied, other than stating that "[t]he prior case was decided on the merits . . . and the parties had a full opportunity to litigate the issue" (see IHO Decision at pp. 3-4).

As the hearing record does not support the IHO's conclusion that the issue raised in this proceeding was or could have been raised in the prior proceeding, that the parties had a full and fair opportunity to litigate the issue, and the resolution of that issue was necessary to the IHO's determination in that proceeding, the IHO's dismissal of the parents' due process complaint notice on the basis that it represented the parent's attempt to relitigate old claims under res judicata and collateral estoppel grounds must be reversed, and the matter remanded to the IHO for further proceedings (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

The hearing record in this case reveals that the student has received home instruction since October 2007, even though the district appears to have intended the placement to be temporary (Tr. p. 48). The district representative at the impartial hearing stated that "home instruction is never meant to be a permanent program," and that, based upon the parties' agreement in the prior proceeding, it was only supposed to continue until the district located a nonpublic school placement for the student (see Tr. pp. 30-31). A district assistant principal for home instruction testified that home instruction was not recommended on the student's IEP and that the student was only receiving home instruction because it was "an ongoing impartial," and that there was "no medical documentation supporting home instruction; it's basically for the impartial that's been in place since 2007" (Tr. p. 50). Furthermore, the parents claimed in their due process complaint notice that the district had "been working on [the student's] placement since 2008 without any success" (Dist. Ex. 1 at p. 3).[8] A State Review Officer has previously opined that seven months in a "'temporary' home instruction program . . . is far from temporary" (Application of a Child with a Disability, Appeal No. 05-128). Thus, if the district has intended for the past ten years that the student's placement in home instruction should be temporary, the student's continued placement in home instruction and the district's failure to implement his IEPs during that time by finding an appropriate nonpublic school placement are inexcusable. The IDEA guarantees a "substantively adequate program of education to all eligible children" that is "appropriately ambitious in light of [the student's] circumstances" (Endrew F., 137 S. Ct. at 995, 1000), and where a district has failed to implement the terms of an IEP for multiple years, a parent may be entitled to challenge the appropriateness of the program that is actually provided to the student, even if not memorialized

[8] An October 20, 2016 social history update indicated that the parent had last visited "a school program . . . several years ago and at that time the school was not able to offer a program" (Dist. Ex. 11 at p. 2).

on an IEP.[9] Unfortunately, the district's understanding of home instruction as it relates to the student's program is unclear because of inadequacies with the record, including whether home instruction was ever memorialized in an IEP, at what point the district first recommended a nonpublic school placement for the student, and the extent of the district's efforts to locate an appropriate nonpublic school for the student.[10]

For the reasons discussed above, this matter is remanded to the IHO to develop the record and address the parents' claim related to their request to change the student's home instruction services from 10 hours a week to 15 hours a week (see Educ. Law § 4404[2]; 8 NYCRR 279.10[c]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013], 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]). To that end, the IHO may, upon receipt of additional information in the record, determine that it is necessary to dismiss the parents' claims on res judicata, collateral estoppel, or other grounds. However, the record is insufficient at this time to make such a determination.

As a final point, it is unclear whether the basis of the parents' home instruction claim, specifically as it relates to credit accumulation in order to graduate in a timely fashion, is related to the placement of the student, or the provision of a FAPE to the student (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]), and this is an additional matter the IHO should consider on remand. Therefore, the IHO might find it helpful to conduct a prehearing conference with the parties in order to simplify or clarify the issues to be resolved (8 NYCRR 200.5[j][3][xi]).

VII. Conclusion

For the reasons stated above, the IHO's dismissal of the parents' claims on res judicata and collateral estoppel grounds is reversed and the matter is remanded to the IHO for a determination on the merits of the claims identified herein. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated June 2, 2017, is modified, by reversing so much thereof as determined that the parents' claims were barred on the grounds of res judicata and collateral estoppel, and the matter is remanded to the IHO who issued the June 2, 2017 decision for further proceedings in accordance with the body of this decision; and

[9] The parents' argument that the student would not be able to graduate on time with credits received from home instruction indicates that the parents expect, and do not object to, the student continuing to receive home instruction for the next three school years—a not unreasonable expectation given the extraordinarily protracted period of time the district has failed to locate an appropriate school program for the student.

[10] The hearing record includes a document indicating that the student was rejected by a number of nonpublic schools, and that during the proceeding the district applied to an additional five nonpublic schools (Dist. Ex. 16). One of the schools rejected the student because of the student's mother's unwillingness to schedule an intake interview based on the school's distance from the student's home (id. at pp. 4-5; see Tr. p. 10).

IT IS FURTHER ORDERED that if the IHO who issued the June 2, 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**
August 28, 2017

CAROL H. HAUGE
STATE REVIEW OFFICER