The University of the State of New York

The State Education Department
State Review Officer
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No. 18-110

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 Westhampton Beach Union Free School District

Appearances:
Kevin A. Seaman, Esq., attorney for respondent

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 2) which denied, in substantial part, his requested relief concerning the educational placements, programs, and related services recommended by the Committee on Special Education (CSE) for the 2017-18 and 2018-19 school years.[1] The district cross-appeals from IHO 2's decision ordering it to apply for an age variance. The appeal must be sustained in part, the cross-appeal must be dismissed as moot, and for reasons explained more fully below, this matter must be remanded to IHO 2 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];

[1] The request for review identified the student's father as the petitioner in this matter; accordingly, all references to "the parent" in this decision are to the student's father.

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[a]). 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 in this case has been the subject of five prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a

Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and they will not be repeated herein unless relevant to the disposition of the issues presented on appeal.

The CSE process related to the special education program and placement for the student for the 2017-18 school year began in or around January 2017, when the district was ordered through an impartial hearing to hire two inclusion consultants to complete the CSE process for the 2016-17 school year (see IHO Ex. VII at pp. 3-6). A CSE convened in April 2017, and for the remainder of the 2016-17 school year, the April 2017 CSE recommended a 12-month school year program in an 8:1+1 special class placement—located in an "'Other Public School District'"—for the student's instruction in English language arts (ELA), science, mathematics, social studies, and physical education, as well as for a career and vocational skills class and learning lab (id.). The April 2017 CSE also recommended related services consisting of speech-language therapy, occupational therapy (OT), physical therapy (PT); home instruction services; parent counseling and training; and a number of accommodations, program modifications, and supplementary aids and services (id. at p. 3). The parent disagreed with the April 2017 CSE's "recommendation for placement outside of the district" and thereafter, pursued his due process rights through an April 2017 due process complaint notice (id.).

In May 2017, a CSE reconvened to conduct the student's annual review and to develop an IEP for the 2017-18 school year (see IHO Ex. VII at p. 4). Finding that the student remained eligible to receive special education and related services as a student with an intellectual disability, the May 2017 CSE recommended a 12-month school year program in a 12:1+1 special class placement located in "another public school district, with related services, accommodations, program modifications and supplementary aids and services similar to those recommended in the student's April 2017 IEP" (id.).[2] The parent disagreed with the May 2017 CSE's "placement for the 2017-18 school year" and pursued his due process rights through a June 2017 due process complaint notice that largely mirrored the allegations asserted in the April 2017 due process complaint notice (id. at pp. 4-5).

After the IHO (IHO 1) assigned to the case consolidated the April and June 2017 due process complaint notices, the parties proceeded to an impartial hearing (see IHO Ex. VII at p. 6). During these proceedings, a CSE convened in June 2017 "to attempt to finalize the IEP draft" created by the May 2017 CSE for the 2017-18 school year (id.). The CSE did not, however, reach a "final recommendation" as to the "location for the 12:1+1 special class placement" recommendation in the May 2017 IEP (id. at pp. 5-6).

In a decision dated August 2017, IHO 1 found that the district offered the student a free appropriate public education (FAPE) in the least restrictive environment (LRE) for the 2016-17 and 2017-18 school years (see IHO Ex. VI at pp. 16-17). IHO 1 distilled the parties' dispute down to the "geographic placement" within which to implement the student's IEPs, noting specifically that the parent did not dispute or disagree with the "IEP goals and objectives," the "review of [the student's] goals, evaluations, [and the] discussions relevant to those goals and evaluations" (id. at p. 10). Notably, IHO 1 concluded that the parent did not dispute the "type of program" the student

[2] The student's eligibility for special education programs and related services as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

required and moreover, that the parent "agreed that the implementation of [the student's] IEP would require the life skills curriculum . . . to develop activities of daily living skills" (id.). Having determined that the district offered the student a FAPE in the LRE for the 2016-17 and 2017-18 school years, IHO 1 ordered the parties to "immediately complete the placement process for 2017-18" and noted the CSE's "need to canvas out of district programs and offer the student an appropriate program that fulfill[ed] the requirements" of the May 2017 IEP (id. at pp. 16-17). As a final point, IHO 1 indicated that the "parents' insistence on an in-district program and placement [were] not a viable alternative for the 2017-2018 school year and should NOT be a consideration for placement by the CSE" (id. at p. 17).

The parent appealed IHO 1's decision, and in a decision dated October 18, 2017, an SRO (SRO 1) determined that IHO 1 properly concluded that the district offered the student a FAPE in the LRE for the 2016-17 and 2017-18 school years (see IHO Ex. VII at pp. 1, 14-29). In discussing the district's attempt to locate an out-of-district public school within which to implement the IEP and the parent's concerns surrounding those attempts, SRO 1 reminded the district of its continuing obligation to educate the student in the LRE "unless the student's IEP require[d] some other arrangement" (id. at pp. 26-28). SRO 1 further noted that "[w]hile at the time of the hearing in this matter, placement in the district was not a viable option, this may not always be the case" (id. at pp. 28-29). Based upon this premise, SRO 1 overturned IHO 1's directive to the CSE, which precluded the CSE from considering placement within the district (compare IHO Ex. VII at p. 29, with IHO Ex. VI at p. 17). In summary, SRO 1 found that the

> district reviewed the inclusion consultant reports and all available evaluative data meaningfully and in good faith, conducted a thorough and comprehensive analysis of whether it could provide an appropriate education for the student within the district and, upon determining that it could not, permissibly recommended a small class placement in a public general education school in a neighboring school district, which offered the student a FAPE in the LRE.

(IHO Ex. VII at p. 29).

To fully comply with IHO 1's directive to "immediately complete the placement process for 2017-18"—which simultaneously identified the CSE's "need to canvas out of district programs and offer the student an appropriate program that fulfill[ed] the requirements" of the May 2017 IEP (IHO Decision at pp. 16-17)—the district sent out approximately 22 "canvassing packets" to out-of-district public schools (Aug. 1, 2018 Tr. pp. 118-19; see IHO Ex. VIII at pp. 41-43, 102-03). After receiving information that one out-of-district public school "may have an appropriate placement for [the student]," the district's director of pupil personnel services (director) toured the location with the student's mother (Aug. 1, 2018 Tr. at pp. 113-14, 118-19; see IHO Ex. VIII at pp. 112-15).

Next, in further compliance with IHO 1's decision, a CSE convened on March 5, 2018, to conduct a program review and to "[d]iscuss and recommend [a] program placement and location" for the remainder of the 2017-18 school year (Dist. Ex. 2 at p. 2; see IHO Exs. VI at pp. 16-17;

VII at pp. 5, 7, 26-29; see generally IHO Exs. VIII; IX).[3] For the remainder of the 2017-18 school year, the March 2018 CSE continued to recommend a 12:1+1 special class "alternately assessed program" for the student located in an out-of-district public school with "mainstreaming opportunities" (IHO Exs. VIII at pp. 183-201; IX at pp. 13-17).[4]

A. March 2018 Due Process Complaint Notice

In a due process complaint notice dated March 7, 2018 (March 2018 due process complaint notice), the parent raised approximately 16 allegations to describe the "Nature of [the] problem(s)" (see IHO Ex. I at pp. 1-2).[5] As relief, the parent sought an order "mandating the formulation and implementation of an '[IEP]' that adequately utilize[d] the district's special education resources, related services, so as to grant the complainant meaningful access to a [FAPE] within the [LRE]" pursuant to federal and State laws and regulations (id. at p. 2). The parent also requested an order directing the district to "implement the IEP plan advocated for by the complainant's parents, an award for compensatory damages, an award for compensatory education, and reimbursement for attorney fees, as well as any other just and equitable remedies that may be appropriate" (id.).

An IHO (IHO 2) was appointed to the matter (see IHO Ex. III at p. 1). The district, on March 19, 2018, responded to the parent's March 2018 due process complaint notice, arguing, among other things, that the principles of estoppel barred the parent from relitigating issues allegedly resolved through previous administrative proceedings (see IHO Ex. V at pp. 1-5, 13; see generally IHO Exs. VI-VII).

B. Facts Post-Dating the March 2018 Due Process Complaint Notice

On March 28, 2018, IHO 2 held a prehearing conference related to the parent's March 2018 due process complaint notice (see Mar. 28, 2018 Tr. pp. 1-3). Shortly thereafter, on April 9, 2018, a CSE convened pursuant to the parent's request to "review [the student's] current 2017-18 school year IEP for the present levels of performance, [and] goals" (see IHO Ex. XXVII at pp. 1-2). Both of the student's parents attended the April 2018 CSE meeting, along with the same educational consultant who attended the March 2018 CSE meeting (compare IHO Ex. XXVII at p. 2, with IHO Ex. VIII at pp. 2-3). At the outset of the April 2018 CSE meeting, the director distributed a copy of the student's 2017-18 IEP "discussed at the last annual review meeting" to the CSE members (IHO Ex. XXVII at p. 4). The parent noted that the IEP being distributed "was the subject of due process complaints that went forth" and had "never [been] agreed" upon for the 2017-18 school

[3] Both of the student's parents attended the March 2018 CSE meeting, along with an educational consultant on their behalf (see IHO Ex. VIII at pp. 2-3).

[4] At the time of the March 2018 CSE meeting, the district did not have an "alternately assessed program at the high school or middle school level that would address [the student's] functional academic needs" (IHO Ex. VIII at pp. 110, 183). However, the district did have "elementary students alternately assessed afforded education within the district" (id. at pp. 67-69, 151-52). Near the conclusion of the March 2018 CSE meeting, the parent's educational advocate asked whether the district had a "waiver for age" that would possibly allow the student "for next year to be in the middle school with the students coming [to the district]" (id. at pp. 181-82).

[5] Although the March 2018 due process complaint notice included approximately 16 allegations to describe the "Nature of the problem(s)," the parent did not otherwise identify—with any specificity—either the CSE meeting, the IEP, or the school year that formed the basis for those allegations (see generally IHO Ex. I).

year (id. at pp. 4-5). The parent then clarified that one reason for requesting the meeting was to review the "suitability of this IEP" especially given the "last recommendation from the chairperson for an out-of-district placement" (id. at p. 5). The parent explained that a review of the IEP revealed "lots of deficiencies in the IEP with respect to not only the [present levels of performance], but the goals themselves" (id. at pp. 5, 24-25). With regard to the annual goals, the parent further explained his belief that the annual goals "should really be aligned with providing not only functional goals, but also academic goals that [were] aligned with the grade level general education curriculum content standards" (id. at pp. 28-29). In addition, the parent indicated a desire to "discuss [the student's] current placement," and to specifically discuss immediately integrating the student into "electives and/or lunch" during the pendency of the impartial hearing (id. at pp. 25-26). The April 2018 CSE modified the present levels of performance in the IEP but did not, ultimately, draft new annual goals; rather, in wrapping up the meeting, the director discussed allowing those individuals currently working with the student to review the changes made to the present levels of performance and to come prepared for the next CSE meeting to input annual goals for the student (id at pp. 201-14).[6]

Returning to the pending impartial hearing on April 11, 2018, IHO 2 held a "conference call" to address a pendency dispute newly raised by the parent (see Apr. 11, 2018 Tr. at pp. 1-4; see also IHO Ex. XXIX at pp. 1, 9-10; Application of a Student with a Disability, Appeal No. 18-064). Shortly thereafter, in a motion to dismiss dated April 20, 2018, the district argued that principles of res judicata and/or collateral estoppel barred the issues raised in the parent's March 2018 due process complaint notice concerning the 2017-18 school year because those issues had been decided in IHO 1's decision and subsequently affirmed in SRO 1's decision (see IHO Ex. X at pp. 1, 8-10; see generally IHO Exs. VI-VII). The parent simultaneously filed a "Pre-Hearing Brief" to address the issues of res judicata, collateral estoppel, and pendency (IHO Ex. XI at p. 1; see generally IHO Exs. XII-XVII).

On May 22, 2018, a CSE convened to conduct the student's annual review and to develop an IEP for the 2018-19 school year (see IHO Ex. XXVIII at pp. 1-2, 16-18; see generally IHO Ex. XXI). Finding that the student remained eligible for special education and related services as a student with an intellectual disability, the May 2018 CSE recommended a 12-month school year program, which for July and August 2018 consisted of related services (speech-language therapy, OT, and PT), the services of an individual aide, and daily special instruction; for the September 2018 through June 2019 portion of the school year, the CSE recommended a 12:1+1 special class placement to "focus on functional academics and vocational skills," adapted physical education, related services (speech-language therapy, OT, PT, and parent counseling and training), and special instruction (delivered in the home) (see IHO Ex. XXVIII at pp. 16-18). The May 2018 IEP also included strategies to address the student's management needs; annual goals; supplementary aids and services, program modifications, and accommodations; assistive technology devices or services; and supports for school personnel on behalf of the student (specifically, consultation to the student's educational team regarding "Information on Disability and Implications for Instruction") (id. at pp. 8, 10-17). At that time, the May 2018 CSE recommended an "Other Public

[6] The evidence in the hearing record does not include an IEP generated by the April 2018 CSE; instead, it appears that the modifications made by the April 2018 CSE to the present levels of performance and management needs sections of the IEP were reflected in the May 2018 IEP (compare IHO Ex. XXVII at pp. 33-41, 152-54, with IHO Ex. XXVIII at pp. 3-8).

School District"—to wit, the same out-of-district public school location recommended at the March 2018 CSE meeting—within which to implement the student's May 2018 IEP (id. at p. 20; compare IHO Ex. XXI at pp. 194-97, 206, with IHO Ex. VIII at pp. 183-201, and IHO Ex. IX at pp. 13-17).

At the May 2018 CSE meeting, the parent learned that the district was developing a middle school 12:1+1 special class placement for alternately assessed students for the 2018-19 school year (see IHO Ex. XXI at pp. 182-84). After the director described the special class placement—which would focus on a "mix of functional skills, looking at academics, at student levels, embedded language and speech development"—she explained that the program was "still being planned at this point" and the curriculum had not been "completely finalized" (id. at pp. 183-84, 186-87). At that time, the director indicated that the special class consisted of approximately three to four students (id. at p. 184). The parent then asked if the district could "apply for a variance"; the director responded that the district "can choose to apply for a variance for age possibly" but only after "reviewing the profiles of the students that [were] being recommended for the program" (id.). The parent, again, questioned the director about applying for an age variance in order for the student to attend the middle school 12:1+1 special class placement (id.). At that time, the director expressed confusion, noting the parent's disagreement with the 12:1+1 "small class recommendation" and his preference for the student to attend a "resource room and general education" or "hybrid" type program discussed at the meeting—and that the parent, now, appeared to want the student in a "small class setting" or the middle school 12:1+1 special class placement (id. at pp. 184-87).

For clarification, the parent stated that if the district was "starting a 12:1:1 program" for alternately assessed students and an "opportunity via variance to have [the student] included in that program" existed, then "wouldn't that be your recommendation" (IHO Ex. XXI at pp. 187-88). In response, the director stated that before making a decision to "apply for a variance" she needed to review the other students' profiles "as well as the profile of a possible child and make a decision whether it would be appropriate to apply" for the variance (id. at p. 188). The director added that the decision to apply for an age variance also depended upon "what the appropriateness would be based on the students' needs in the programs" (id. at p. 191). The parent continued to press the director to apply for the variance, and the director continued to express that it would be the district's decision—after reviewing the necessary information—regarding whether to apply for the variance (id. at pp. 191-97). The director also explained the differences between the currently recommended program and placement located within an out-of-district public school with the middle school alternately assessed program being developed at the district (id. at pp. 194-95).

In a prior written notice to the parent dated May 22, 2018, the district summarized the special education program and related services recommended for the student for the 2018-19 school year (see IHO Ex. XXII at pp. 1-3).

C. June 2018 Due Process Complaint Notice

On or about June 6, 2018, the parent filed a second due process complaint notice (June 2018 due process complaint notice) (see IHO Exs. II at pp. 1-2; III at p. 1; XXIV at pp. 3-4; see

generally IHO Exs. XXI-XXIII).[7] Pursuant to State regulation, IHO 2 was assigned to the matter (see 8 NYCRR 200.5[j][3][ii][a][1]; IHO Ex. III at pp. 1-2). In the June 2018 due process complaint notice, the parent listed approximately 17 allegations describing the "reasons" for filing the due process complaint notice (IHO Ex. II at pp. 1-3). Overall, the allegations focused on the district's failure to conduct a "meaningful analysis" of its obligation and capacity to educate the student in the LRE—and specifically, within the district itself; the district improperly "'outsourcing'" the student's educational program and placement to an out-of-district public school; the CSE process and composition (including general allegations of bias and predetermination); the district's failure to use its special education resources to implement the student's "unique and individualized educational goals"; failing to develop an "'appropriately ambitious'" IEP for the student based upon "grade level learning 'content' standards" as opposed to "fabricated 'functional academic content standards' geared toward mastery of some nebulous form of 'life skills' curriculum"; and the district's refusal to apply for an age variance to facilitate the student's "potential educational program and placement within the newly formed '12:1:1 alternately assessed' program" located within the district middle school for the 2018-19 school year (id.). As relief, the parent sought an order directing the district to "implement a certain program and placement recommendation (or variant thereof), authored by [a specific individual]; or in the alternative, albeit of lesser propriety," an order directing the district to apply for a 'waiver' . . . therein seeking the placement of [the student] into a newly formed '12:1:1—alternately assessed' special class" located at the district middle school for the "academic year commencing in September 2018" (id. at p. 3). In addition, the parent requested an award of "appropriate compensatory education and for the reimbursement of all legal and consultation fees expended through the duration of any convened impartial hearing" (id.).

D. Facts Post-Dating the June 2018 Due Process Complaint Notice

On June 7, 2018, IHO 2 held a prehearing conference, and on the same date, issued an order consolidating the parent's March 2018 and June 2018 due process complaint notices (see IHO Ex. III at p. 4; see also IHO Ex. XXIV at p. 4).[8] Following IHO 2's consolidation order, on or about June 14, 2018, the district submitted an "Amended/Renewal Motion" (amended motion to dismiss) seeking dismissal of both the March 2018 and the June 2018 due process complaint notices (IHO Ex. XX at p. 1).

In an undated letter to the parent sent on or about June 14, 2018, the district provided the parent with the information it considered when determining that the district would not apply for the age variance discussed at the May 2018 CSE meeting (see generally IHO Ex. XXIII). In particular, the district noted the "significant" age discrepancies between the oldest and youngest potential students in the middle school 12:1+ 1 special class placement ("a variance of some 6 years"), the student's needs related to transition planning and services that would be available in a

[7] Similar to the March 2018 due process complaint notice, the parent did not otherwise identify—with any specificity—in the June 2018 due process complaint notice either the CSE meeting or the IEP that formed the basis for the allegations, except noting that the parent sought relief for the "academic year commencing in September 2018" (compare IHO Ex. II at pp. 1-3, with IHO Ex. I at pp. 1-2).

[8] According to the IHO's consolidation order, the parent's March 2018 due process complaint notice challenged the district's recommendations for the student for the 2017-18 school year and the parent's June 2018 due process complaint notice challenged the district's recommendations for the 2018-19 school year (see IHO Ex. III at p. 1).

high school program but not in a middle school program, and the disparate social/emotional needs of the students due to their ages (id. at pp. 1, 11-12).

In a decision dated June 28, 2018 (June 2018 decision), IHO 2 granted, in part, the district's amended motion to dismiss the parent's March 2018 and June 2018 due process complaint notices (see IHO Ex. IV at pp. 6-14, 16). With regard to the March 2018 due process complaint notice, IHO 2 dismissed 15 of the 16 allegations because the specific issue or claim had "already been determined" by IHO 1 and SRO 1 (id. at pp. 6-10). IHO 2 did, however, find that the parent raised one issue that was not "determined in prior litigation" pertaining to the 2017-18 school year, and the IHO specifically allowed it to remain a subject for resolution at the impartial hearing (id. at pp. 9, 14). With respect to the June 2018 due process complaint notice, IHO 2 similarly dismissed several issues raised by the parent (id. at pp. 10-14). IHO 2 specifically limited the impartial hearing to reviewing the "procedural obligations" of the district—approximately five issues—but otherwise precluded review of the "substantive recommendations" of the CSE with respect to the 2018-19 school year as part of the impartial hearing (id. at pp. 14-15). Finally, IHO 2 listed parameters of the impartial hearing, including the evidence to be presented (id. at pp. 15-16).[9]

E. Impartial Hearing Officer Decision

Returning to the impartial hearing, IHO 2 held a prehearing conference on July 6, 2018, and on August 1, 2018, the parties proceeded to, and completed, the impartial hearing (see July 6, 2018 Tr. at pp. 1-3; Aug. 1, 2018 Tr. pp. 35-297). In an "Interim Order" dated August 3, 2018 (August 2018 decision), IHO 2 addressed the parent's allegation that the district refused to apply for an age variance to allow the student to attend the middle school 12:1+1 special class placement located within the district (IHO Ex. XXX- at pp. 1-3). Based upon the evidence, IHO 2 concluded that the district violated the parent's procedural rights by failing to include the parent "in a discussion regarding a decision to apply for an age variance" and "rejected their request to seek a waiver" (id. at p. 23). Consequently, IHO 2 ordered the district to "initiate an application for an age waiver to the State Education Department with parental input" (id.). In addition, IHO 2 directed that—if the State Education Department approved the application—the district should convene a CSE meeting "including the classroom teacher and educational consultant to facilitate [the student's] attendance in the class" (id.).

In a final decision on the merits dated September 29, 2018 (September 2018 decision), IHO 2 addressed the five remaining "procedural" claims raised by the parent in the consolidated March 2018 and June 2018 due process complaint notices and as condensed within IHO 2's June 2018 decision (IHO Decision at pp. 1-2; see generally IHO Exs. I-IV). Initially, IHO 2 reiterated that the final decision would not "review any claim concerning the substantive appropriateness of the recommendations for the [s]tudent to be placed in a 'life skills' program," since both IHO 1 and SRO 1 "found the recommendations to be appropriate" (IHO Decision at p. 2). IHO 2 also noted

[9] The parent appealed IHO 2's June 2018 decision to the Office of State Review (see Application of a Student with a Disability, Appeal No. 18-075). Finding that IHO 2's June 2018 decision did not address a pendency (stay-put) dispute, another SRO—in a decision dated August 22, 2018—dismissed the parent's appeal because it was not within the scope of a permissible interlocutory appeal under State regulations (see generally Application of a Student with a Disability, Appeal No 18-075).

that in addition to being reviewed by IHO 1 and SRO 1, the parent's argument was the "subject of a federal court complaint" (id.).

Turning to the specific issues, IHO 2 analyzed each of the following procedural claims separately: whether the district "allegedly conducted an inappropriate 'out of district' observation of the [student] without parental consent" during the 2017-18 school year; whether the district "allegedly refused to invite [the parent's inclusion consultant] to the May 2018 CSE meeting"; whether the district "allegedly refused to remove [a particular district staff person] from the May 2018 CSE meeting as an unqualified and biased party"; whether the "CSE Chairperson allegedly overruled the actual consensus of the CSE, which recommended educational placement within the [d]istrict [s]chools"; and whether the "CSE failed to have a representative from the [d]istrict where the student was recommended to attend during the May 2018 CSE meeting" (see IHO Decision at pp. 19-28). Ultimately, IHO 2 concluded that, contrary to the parent's contentions, the evidence in the hearing record did not support findings that the district committed any procedural violations under the IDEA or State laws (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing initially that IHO 2—in the June 2018 decision—erred in dismissing the parent's "substantive complaints" related to the March 2018 due process complaint notice (2017-18 school year) and the June 2018 due process complaint notice (2018-19 school year) based upon the principles of res judicata or collateral estoppel (Req. for Rev. ¶¶ 1-27). Next, the parent asserts that IHO 2—in the September 2018 decision—erred by not determining that the CSE chairperson "failed to afford the petitioner with a FAPE by overruling the consensus of the CSE and depriving the petitioner access to the general education curriculum and grade level learning standards via the educational teaching methodology of 'curriculum modification'" (Req. for Rev. ¶¶ 28-30).[10] As relief, the parent requests that an SRO "reinstate the [p]etitioner's substantive claims, which have never been afforded any substantive review, and to remand the same for adjudication before [IHO 2]." In addition, the parent seeks to overturn IHO 2's determination concerning the "CSE Chairperson's refusal to afford the petitioner with access to the general education curriculum and grade level learning standards, and to 'order' the provision of [an IEP] designed to do so."

In an answer, the district responds to the parent's allegations by denying each and every allegation in the request for review. Thereafter, the district argues, in part, to dismiss the parent's request for review for failing to comply with various regulations governing practice before the Office of State Review. As a cross-appeal, the district argues that IHO 2—in the August 2018 decision—erred in ordering the district to apply for an age variance. As relief, the district seeks to uphold IHO 2's September 2018 decision in its entirety, reverse IHO 2's August 2018 decision, and dismiss the parent's request for review.

[10] To the extent that the parent does not appeal the four remaining procedural violations similarly dismissed by IHO 2 in the September 2018 decision (see Req. for Rev. ¶ 10), IHO 2's determinations dismissing these procedural issues has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

The parent submitted an answer to the district's cross-appeal, as well as a reply to the district's answer.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 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. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created"

(Endrew F., 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 least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[11]

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

VI. Discussion

A. Preliminary Matters

1. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a], [c]; 279.8[c]). In particular, the district asserts that the request for review fails to "identify, with the requisite specificity, the findings, conclusions, and orders to

[11] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

which exceptions are taken," and similarly fails to "identify what relief and/or any appropriate relief that should be granted" by the SRO that "otherwise falls within the [SRO's] jurisdiction."

State regulations provide 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 also requires that a request for review shall 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.
>
> (4) any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer.

(8 NYCRR 279.8[c][1]-[4]).

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 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], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Upon review and notwithstanding the accuracy of the district's contentions relative to the form and content of the parent's request for review, I decline to dismiss the request for review on these grounds given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result (see Application of a Student with a Disability, Appeal No. 18-053; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040; Application of a Student with a Disability, Appeal No. 15-069; Application of a Student with a Disability, Appeal No. 15-058). In this instance, although the parent's failure to comply with the practice regulations will not

ultimately result in a dismissal of their appeal, the parent is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to dismiss a request for review or reject a memorandum of law (8 NYCRR 279.8[a]; 279.13; see Application of a Student with a Disability, Appeal No. 16-040), an SRO may be more inclined to do so after a party's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). However, in light of the foregoing, the district's arguments regarding the form of the parent's request for review are dismissed.

2. Additional Evidence

As indicated above, the district interposes a cross-appeal of IHO 2's August 2018 decision, which ordered the district to "initiate an application for an age waiver to the State Education Department with parental input" (see Answer & Cr. App. ¶¶ 21-47; IHO Ex. XXX at p. 23). Upon review of the evidence in the hearing record, the undersigned determined that it was necessary to seek further additional evidence from the district pursuant to 8 NYCRR 279.10(b). This was, in part, because the parent, in his post-hearing brief, asserted that the district "initially failed to implement" IHO 2's order but "reluctantly acquiesce[d] to abiding by" the order under pressure from the parent (Parent Post-Hr'g Br. at pp. 20-22). Additionally, the parent referred to the district's "proposed variance application," and it was unclear whether the district had, in fact, complied with IHO 2's order to submit an application for an age variance. Accordingly, by letter dated October 19, 2018, the district was directed "to indicate whether it has applied for a variance and, if so, provide to the Office of State Review all materials submitted in support of its application, as well as indicate whether a response to the application has yet been received." The parties were provided the opportunity to submit written argument relating to whether the materials submitted should be considered as additional evidence.

By letter dated October 23, 2018, the district transmitted its application for a variance from the regulatory chronological age range and the materials submitted in support of its application (Supp. Ex. A),[12] and the State Education Department's denial of the application (Supp. Ex. B).[13] The district asserts that this material should be considered by the SRO as necessary to resolution of the cross-appeal.

Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp.

[12] The materials submitted by the district included the variance form, the student's IEP and the IEPs of the students enrolled in the 12:1+1 special class, and a statement of educational justification prepared by the parents (Supp. Ex. A).

[13] By letter to the superintendent dated September 19, 2018, the State Education Department denied the district's application on the grounds that the "application lack[ed] an educational justification that support[ed] exceeding the 36-month age range" in the 12:1+1 special class (Supp. Ex. B).

2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]).

Although both parties agree that this additional documentary evidence should be considered by an SRO, it is clear that this evidence was not available at the time of the impartial hearing. However, while SROs have considered the factor of whether the additional evidence was available or could have been offered at the time of the impartial hearing, this factor is not necessarily dispositive in every case (Application of a Student with a Disability, Appeal No. 08-030). This factor serves to encourage full development of an adequate hearing record at the first tier to enable an IHO to make a correct and well-supported determination, and to prevent the party submitting the additional evidence from "sandbagging"—that is, withholding relevant evidence during the impartial hearing, thereby shielding the additional evidence from cross-examination and later springing it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where neither party submitted evidence concerning the implementation of IHO 2's August 2018 decision, and the additional documentary evidence is now necessary in order to render a decision on this issue as cross-appealed by the district. Furthermore, as noted herein, both federal and State regulations authorize SROs to seek additional evidence if necessary, and SROs have accepted evidence available at the time of the impartial hearing when necessary (34 CFR 300.514[b][2][iii]; 8 NYCRR 279.10[b]; Application of a Student with a Disability, Appeal No. 08-030; Application of a Child with a Disability, Appeal No. 00-019 [finding it necessary to accept evidence available at the time of the impartial hearing to determine the student's pendency placement]). Therefore, while the information presented in the district's age variance application papers was not available at the time of the impartial hearing, the need to render a decision on this issue and the preference for doing so based upon reliable information outweighs the concerns noted above; thus, the district's age variance application papers will be considered.

B. 2017-18 School Year

1. Scope of Review

On appeal, the parent contends that IHO 2 erred in dismissing the "substantive" issues raised in the March 2018 due process complaint notice pertaining to the 2017-18 school year based upon principles of res judicata.[14] In the request for review, the parent sets forth the "substantive and procedural violations" from the consolidated due process complaint notices (Req. for Rev. ¶¶ 4[a]-4[x]). With respect to the 2017-18 school year, the parent appears to recite, verbatim, all of the issues in the March 2018 due process complaint notice, except for the procedural issue IHO 2 selected to be resolved through the impartial hearing (compare IHO Ex. I at pp. 1-2, with Req. for Rev. ¶¶ 4[a]-4[o], and IHO Ex. IV at pp. 6-10). According to the request for review, the parent only appeals IHO 2's dismissal of the "substantive complaints" but without specifically identifying

[14] It appears that IHO 2 primarily relied upon the doctrine of res judicata to dismiss the parent's substantive claims in the June 2018 decision; therefore, this decision focuses primarily upon that doctrine and will not otherwise discuss whether IHO 2 improperly dismissed the parent's substantive claims based upon the doctrine of collateral estoppel.

which allegations constitute substantive issues or complaints (Req. for Rev. ¶¶ 4[a]-4[o]; 10-27). To the extent that IHO 2 also dismissed procedural issues or complaints raised in the March 2018 due process complaint notice and the parent does not appeal IHO 2's dismissal of those procedural issues, IHO 2's determination dismissing the procedural issues has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

With regard to the "substantive" issues raised in the March 2018 due process complaint notice and as discussed more fully below, the evidence in the hearing record supports IHO 2's determination dismissing the same on the basis of res judicata with respect to the 2017-18 school year.

2. Res Judicata

In arguing that IHO 2 erred in dismissing the substantive issues in the March 2018 due process complaint notice, the parent contends that IHO 2 ignored "critical language" in SRO 1's decision that required any subsequently convened CSE to "undertake a 'meaningful analysis'" of the district's ability to educate the student within the district—or according to the parent, to offer the student a FAPE in the LRE.[15] The parent further contends that, as a logical extension of this language, the "propriety of such [subsequently convened] CSE's conduct" could not have been adjudicated and thus, evades dismissal based upon res judicata.

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,

[15] To some extent, the parent's arguments concerning the March 2018 CSE process could be construed as challenging whether the district sufficiently complied with the directives of IHO 1 and SRO 1. However, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a], [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [2d Cir. 2005] [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent enforcement power and granting an injunction requiring the district to implement a final SRO decision]). In the event that the parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, the parent may file a State complaint against the district through the State complaint process for failure to implement an IHO or SRO's due process decision or may seek enforcement through the judicial system (see 34 CFR 300.152[c][3]; SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]; see also A.R., 407 F.3d at 76, 78 n.13).

2006 WL 3751450, at *6).[16] Claims that could have been raised are described as those that "emerge from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm v. Honeoye Falls Lima Cent. Sch. Dist., 517 Fed. App'x 11, 12 [2d Cir. 2013]).

Because the facts of this case establish the first two elements of the res judicata principles, the analysis of whether IHO 2 erred in dismissing the substantive issues raised in the March 2018 due process complaint notice related to the 2017-18 school year based on res judicata necessarily focuses on the third element of the doctrine, that is, whether 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) and specifically, whether those claims that could have been raised "emerge[d] from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm, 517 Fed. App'x at 12).[17] As explained herein, given that the limited purpose of the March 2018 CSE meeting was to identify a location within which to implement the student's May 2017 IEP, any and all other substantive issues or claims now raised by the parent in the March 2018 due process complaint notice were, or could have been raised in the prior proceeding, as those substantive issues emerged from the same nucleus of operative facts as the claims actually asserted in the prior adjudication by IHO 1 and SRO 1.

As noted previously, although SRO 1 upheld IHO 1's decision in all respects concerning the 2017-18 school year—to wit, that the recommended 12:1+1 special class placement located within an out-of-district public school constituted a FAPE in the LRE for the 2017-18 school year—SRO 1 also noted and commented upon the district's continued obligations to educate the student in the LRE (see IHO Ex. VII at pp. 3-5, 13-28). SRO 1 explained that "[w]hile at the time of the hearing in this matter, placement in the district was not a viable option, this may not always be the case"; SRO 1 continued by noting, therefore, that "a directive that required placement of the student outside of the district schools would impede the important statutory purpose of attempting, whenever possible, to have disabled students access the public school system through placement in a public school with their nondisabled peers" (id. at pp. 28-29). Consequently, SRO 1 overturned IHO 1's directive to the CSE that precluded the CSE—when it "reconvened to recommend an appropriate placement for the student"—from considering the student's placement within the district (compare IHO Ex. VII at p. 29, with IHO Ex. VI at p. 17).

While it is undisputed that the March 2018 CSE reconvened after SRO 1's decision and, as SRO 1 indicated, the CSE remained obligated to attempt to educate the student in the LRE, the parent's contention on appeal ignores the plain fact that SRO 1 upheld IHO 1's determination that, at the time of the impartial hearing, the out-of-district public school location constituted the student's LRE (compare Req. for Rev., with IHO Ex. VI at pp. 16-17, and IHO Ex. VII at pp. 14-29). The parent's argument also ignores the fact that IHO 1's directive to reconvene a CSE meeting

[16] It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. D.C., 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

[17] "In determining whether the same nucleus of facts is at issue, 'the court should consider whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore, 772 F. Supp. 2d at 294 [internal citations omitted]).

focused solely on the limited purpose of "immediately complet[ing] the placement process for 2017-18" and to "offer the student an appropriate program location that fulfill[ed] the requirements" of the May 2017 IEP (IHO Ex. VI at pp. 16-17), because at that point, any and all substantive issues raised by the parent concerning whether the district—through the recommendations in the May 2017 IEP—offered the student a FAPE in the LRE for the 2017-18 school year had been resolved in the district's favor (see generally IHO Exs. VI-VII). Thus, as SRO 1 noted in his decision, absent any evidence that a viable placement option existed within the district at the time of the March 2018 CSE meeting or, perhaps, that the student's needs had changed such that a 12:1+1 special class placement was no longer a viable option, it appears that the only issue left for the March 2018 CSE to discern was the identification of the specific out-of-district public school within which to implement the student's IEP (see IHO Ex. VI at pp. 16-17; VII at pp. 28-29).

Notably, at the March 2018 CSE meeting, the parent stated that the district did not have a 12:1+1 special class placement that would meet the student's needs at the high school level (see IHO Ex. VIII at pp. 35-37, 176-79, 183; see also IHO Ex. VIII at pp. 117-18). Nonetheless, a review of the minutes from the March 2018 CSE meeting reveals that CSE members offered updated information about the student's home instruction and related services, which wrapped into discussions about the parent's preference to educate the student within the district in a "hybrid" program and within the district school as his LRE, and which eventually led to information being provided to the CSE by the representative from the out-of-district public school ultimately recommended as the location within which to implement the student's IEP (IHO Ex. VIII at pp. 21-183). Significantly, the parent does not point to any evidence in the hearing record to support that another program or placement option existed at the time of the March 2018 CSE meeting or that the student's needs had changed to the extent that the CSE was required to undertake a more robust discussion of placement options for the student, as argued by the parent.

Based upon these facts, the only new information derived from the March 2018 CSE meeting was the identification of the out-of-district public school recommended for implementation of the student's IEP. The parent did not, however, assert in the March 2018 due

process complaint notice that the out-of-district public school location identified by the March 2018 CSE lacked the capacity to implement the student's IEP for the 2017-18 school year.[18, 19]

C. 2018-19 School Year

1. Scope of Review

With regard to the 2018-19 school year, the parent contends that IHO 2 erred in dismissing the "substantive" issues raised in the June 2018 due process complaint notice based upon principles of res judicata. In the request for review, the parent sets forth the "substantive and procedural violations" from the consolidated due process complaint notices (Req. for Rev. ¶¶ 4[a]-4[x]). With respect to the 2018-19 school year, the parent selects approximately nine issues gleaned from the June 2018 due process complaint notice, except for the procedural issues IHO 2 selected to be resolved through the impartial hearing (compare IHO Ex. II at pp. 1-3, with Req. for Rev. ¶¶ 4[p]-4[x], and IHO Ex. IV at pp. 10-15). According to the request for review, the parent only appeals IHO 2's dismissal of the "substantive complaints" but without specifically identifying which allegations constitute substantive issues or complaints (Req. for Rev. ¶¶ 4[p]-4[x]; 10-27). To the extent that IHO 2 also dismissed other substantive issues or claims not now identified by the parent in the request for review, as well as any and all procedural issues or complaints raised in the June 2018 due process complaint notice and the parent does not appeal IHO 2's dismissal of those substantive and procedural issues, IHO 2's determination dismissing these issues has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR

[18] Generally, the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). However, the Second Circuit has held that claims regarding an assigned school's ability to implement an IEP may not be speculative when they consist of "prospective challenges to [the assigned school's] capacity to provide the services mandated by the IEP" (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 245 [2d Cir. 2015]; see Y.F. v. New York City Dep't of Educ., 659 Fed. App'x 3, 5 [2d Cir. 2016]; J.C. v. New York City Dep't of Educ., 643 Fed. App'x 31, 33 [2d Cir. 2016]; B.P. v. New York City Dep't of Educ., 634 Fed. App'x 845, 847-49 [2d Cir. 2015]). Such challenges must be "tethered" to actual mandates in the student's IEP (see Y.F., 659 Fed. App'x at 5). In order for such challenges to be based on more than speculation, a parent must allege that the school is "factually incapable" of implementing the IEP (K.C. v. New York City Dep't of Educ., 2015 WL 1808602, at *12 [S.D.N.Y. Apr. 9, 2015]; see also Z.C. v. New York City Dep't of Educ., 2016 WL 7410783, at *9 [S.D.N.Y. Nov. 28, 2016]; L.B. v. New York City Dep't of Educ., 2016 WL 5404654, at *25 [S.D.N.Y. Sept. 27, 2016]; G.S. v. New York City Dep't of Educ., 2016 WL 5107039, at *15 [S.D.N.Y. Sept. 19, 2016]; M.T. v. New York City Dep't of Educ., 2016 WL 1267794, at *14 [S.D.N.Y. Mar. 29, 2016]), based on something more than the parent's speculative "personal belief" that the assigned public school site was not appropriate (K.F. v. New York City Dep't of Educ., 2016 WL 3981370, at *13 [S.D.N.Y. Mar. 31, 2016]; Q.W.H. v. New York City Dep't of Educ., 2016 WL 916422, at *9 [S.D.N.Y. Mar. 7, 2016]; N.K. v. New York City Dep't of Educ., 2016 WL 590234, at *7 [S.D.N.Y. Feb. 11, 2016]).

[19] Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b], 300.508[a]; 8 NYCRR 200.5[j][1]; Application of a Student with a Disability, Appeal No. 17-008; Application of a Student with a Disability, Appeal No. 13-151). However, a party requesting an impartial hearing may not raise issues at the impartial hearing, or for the first time on appeal, 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]).

200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

2. May 2018 CSE Process

With regard to IHO 2's September 2018 decision, the parent presents as an issue on appeal that IHO 2 erred by not finding that the CSE chairperson failed to "afford the petitioner with a FAPE by overruling the consensus of the CSE and depriving the petitioner access to the general education curriculum and grade level learning standards via the educational teaching methodology of 'curriculum modification'" (Req. for Rev. ¶¶ 28-29). In support of this contention, the parent points to a portion of one statement in the September 2018 decision indicating that certain CSE members "felt that the general education curriculum could not be modified to [the student's] level" (Req. for Rev. ¶ 28; see IHO Decision at p. 28).

Contrary to the parent's contention, however, IHO 2 did not issue a finding with regard to whether the CSE "depriv[ed] the petitioner access to the general education curriculum and grade level learning standards via the educational teaching methodology of 'curriculum modification'" (compare IHO Decision at pp. 26-28, with Req. for Rev. ¶¶ 28-29). Rather, in the September 2018 decision IHO 2 examined the following issue: whether the "CSE Chairperson allegedly overruled the actual consensus of the CSE, which recommended educational placement within the [d]istrict [s]chools" (IHO Decision at pp. 26-28). On appeal, while the parent argues that the CSE members "felt that the general education curriculum could not be modified to [the student's] level," the parent does not explain how this statement—even if true—supports a finding that IHO 2 erred in determining that the CSE chairperson did not commit a procedural violation when allegedly overruling the consensus of the CSE (Req. for Rev. ¶¶ 28-29).

Regardless of the parent's misguided argument on appeal, a review of the evidence in the hearing record supports IHO 2's determination that the district did not commit a procedural violation when the CSE chairperson allegedly "overruled the actual consensus of the CSE, which recommended educational placements within the [d]istrict [s]chools." As IHO 2 noted, "there was no consensus" at the May 2018 CSE meeting (IHO Decision at p. 27).[20] A review of the May 2018 CSE meeting minutes reflects that, consistent with IHO 2's decision, the CSE engaged in a discussion about educating the student within the district, which entailed both the parent's preferred "hybrid" program as well as a more lengthy discussion about the middle school 12:1+1 special class placement being developed for alternately assessed students for the 2018-19 school year and whether the district would seek an age variance to allow the student to attend that program (see IHO Ex. XXI at pp. 160-210). At the time the CSE chairperson indicated that the CSE would be recommending a 12:1+1 special class placement in an out-of-district public school, at least three CSE members had already left the meeting due to outside obligations (id. at pp. 88, 128, 189-90, 206), who prior to leaving the meeting did not express a position with regard to the student's placement for the 2018-19 school year (see generally IHO Ex. XXI). Additionally, the May 2018 CSE recommended that the student participate in the general education setting for "all special areas and lunch" (IHO Ex. XXVIII at p. 19).

[20] The prior written notice related to this CSE meeting reflected IHO 2's characterization that "there was no consensus" at the May 2018 CSE meeting (compare IHO Decision at p. 27, with IHO Ex. XXII).

At the impartial hearing, the director (who acted as the CSE chairperson at the May 2018 CSE meeting) testified about her responsibilities as the chairperson with regard to "making a recommendation as to placement" (Aug. 1, 2018 Tr. at pp. 130-31). She explained that she "facilitate[s] and seek[s] input from members of the committee regarding progress and program and recommendations, and as the CSE chairperson, take[s] that into account when making recommendations for an IEP" (Aug. 1, 2018 Tr. at p. 131). The director further explained during cross-examination that the "recommendation [was] not a vote" and that it was the CSE chairperson's responsibility to "review all of the recommendations and ultimately make the final recommendation"—or the "final decision at the table" (Aug. 1, 2018 Tr. pp. 238-39).

Also on cross-examination, the director acknowledged that the student's then-current special education teacher who delivered instruction services to the student at home—and who attended the May 2018 CSE meeting—felt "it was possible to integrate [the student] into the district" (Aug. 1, 2018 Tr. at p. 241). The director also indicated that the district physical education teacher who participated at the May 2018 CSE meeting believed that the student "at some point with support . . . . may be able to participate in some areas of physical education" (Aug. 1, 2018 Tr. at p. 242). And finally, the director testified that the student's then-current PT provider felt that the student could "through consultation with the teachers, be implemented into electives such as gym" (Aug. 1, 2018 Tr. at p. 243).

Thus, consistent with the opinions of the physical education teacher and the PT provider, the May 2018 CSE recommended that the student participate in the general education setting for "all special areas and lunch" (compare IHO Ex. XXVIII at p. 19, with Aug. 1, 2018 Tr. at pp. 242-43). Yet notwithstanding this evidence, the parent fails to point to any evidence to support the allegation that the CSE chairperson overruled any consensus derived at the May 2018 CSE meeting with regard to the recommendation for a 12:1+1 special class placement in an out-of-district public school. If anything, the evidence reveals that the CSE chairperson responded to the aforementioned information by including it as a recommendation in the May 2018 IEP. As a result, the parent's argument must be dismissed.

3. Grouping—36-Month Age Variance

In its cross-appeal, the district contends that IHO 2 erred in directing the district to apply for a variance from the chronological age range limitation requirement contained in State regulation. Specifically, the district asserts that IHO 2 exceeded her authority in directing it to apply for a variance because the determination to apply for a variance was a matter committed to the district's discretion; that the age range within the district 12:1+1 special class would so far exceed the regulatory maximum that it could not be "justified on any basis"; and that IHO 2 erred by ordering the district to apply for a variance in an interim order, precluding review by an SRO until after the time the district had been required to comply with the order, "effectively render[ing] the issue moot" before the district could seek review.

In response, the parent contends that IHO 2 did not usurp the district's authority; rather, the parent asserts IHO 2's direction that the district apply for a variance simply required the district to "act in compliance with its obligation to facilitate a FAPE within the LRE and to the maximum extent possible."

State regulation requires that the "chronological age range within special classes of students with disabilities who are less than 16 years of age shall not exceed 36 months" (8 NYCRR 200.6[h][5]). "Upon application and documented educational justification to the commissioner, approval may be granted for variance from the . . . chronological age ranges specified in" 8 NYCRR 200.6(h)(5) (8 NYCRR 200.6[h][6]). It is undisputed that the students recommended to attend the 12:1+1 special class in the district were more than 36 months younger than the student and the student could not attend the special class without a variance being granted.

Under the circumstances of this case, it is not necessary to determine whether IHO 2 exceeded her authority in directing the district to apply for a variance. The additional evidence submitted by the district establishes that it has complied with the relief ordered by IHO 2 by applying for a variance and that the State Education Department has denied the district's application, thus resolving any controversy regarding IHO 2's determination that the district violated the student's rights under the IDEA by not applying for a variance.[21] Accordingly, as the issue raised in the district's cross-appeal is no longer "real and live," it has become "academic" and, therefore, moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y. Sept. 30, 2008]; Application of a Student with a Disability, Appeal No. 17-033). Thus, the district's cross-appeal is dismissed.[22]

4. Res Judicata

Based upon the same legal standard recited above and out of an abundance of caution, the evidence in the hearing record does not support IHO 2's June 2018 decision dismissing the parent's substantive issues or claims regarding the 2018-19 school year. As with the 2017-18 school year, assuming for the sake of argument that the facts of this case establish the first two elements of the res judicata principles, then the analysis of whether IHO 2 erred in dismissing the substantive issues raised in the June 2018 due process complaint notice related to the 2018-19 school year based on res judicata necessarily focuses on the third element of the doctrine, that is, whether 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) and specifically, whether those claims that could have been raised "emerge[d] from the same 'nucleus of operative fact' as any claim actually asserted" in the prior adjudication (Malcolm, 517 Fed. App'x at 12).

Thus, in determining whether the substantive issues raised by the parent in the June 2018 due process complaint notice concerning the May 2018 CSE and the recommendations in the May 2018 IEP for the 2018-19 school year arose from the same nucleus of facts as the March 2018 CSE meeting, and therefore, required dismissal under res judicata, consideration is given to "'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit,

[21] In a letter dated October 23, 2018, the parent argues that the district complied with IHO 2's order to apply for a variance "begrudgingly" and "in a manner directly averse to the spirit and intent of" the order. The parent further asserts that he "has submitted an independent due process complaint relative to the manner in which the respondent district clearly subverted the spirit and intent of" IHO 2's August 2018 decision, which is currently "pending adjudication" before the same IHO 2.

[22] To the extent the parent challenges the adequacy of the district's compliance with IHO 2's August 2018 decision, as noted above an SRO has no authority to enforce compliance with an IHO's decision.

and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore, 772 F. Supp. 2d at 294 [internal citations omitted]). Here, the May 2018 CSE convened to develop the student's IEP for the 2018-19 school year (see IHO Ex. XXVIII at pp. 1-2). Beginning with the April 2018 CSE meeting, the CSE created new present levels of performance, annual goals, and management needs for the student, which were reflected in the May 2018 IEP and which differed from those sections of the March 2018 IEP (compare IHO Ex. IX, with IHO Ex. XXVIII, and IHO Ex. XXVII). In addition, while the CSE met in March 2018, the purpose of that meeting, as noted previously, was to identify a location within which to implement the student's May 2017 IEP—for the remainder of the 2017-18 school year (see IHO Ex. VI at pp. 16-17). Consequently, given the time between the May 2017 CSE meeting and the May 2018 CSE meeting, the disparate motivations behind the two meetings, and the fact that it seems unlikely that the parties expected to treat the March 2018 CSE meeting and the May 2018 CSE meeting as a unit, these factors taken as a whole weigh against a finding that the substantive issues raised by the parent in the June 2018 due process complaint notice concerning the 2018-19 school year arose from the same nucleus of facts as the claims addressed by IHO 1 and SRO 1 and were thus, subject to dismissal based upon res judicata.

D. Unaddressed Issues and Remand

Next, the matter must be remanded for further administrative proceedings. This is especially true where, as here, IHO 2 dismissed the parent's substantive issues concerning the 2018-19 school year without providing him with a full opportunity to testify, to present additional witnesses, or to present additional documentary evidence about the May 2018 IEP and the 2018-19 school year, and thus, the hearing record is bereft of any evidence on these issues (see IHO Exs. II-IV; XXVIII).[23] Absent such evidence, a meaningful review of the parties' dispute is not possible with the current state of the hearing record. Therefore, it is appropriate to remand this matter to IHO 2 for a determination on the merits of the remaining substantive issues and requests for relief set forth in the parent's June 2018 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]). Furthermore, IHO 2 is strongly encouraged to conduct a prehearing conference for the purpose of clarifying and narrowing these issues, as well as the remaining requests for relief (8 NYCRR 200.5[j][3][xi]). Additionally, IHO 2 is reminded that any relief awarded to the parent must be predicated upon a finding that the district did not offer the student a FAPE in the LRE for the 2018-19 school year. Should IHO 2 ultimately conclude that the district failed to offer the student a FAPE in the LRE, it would be reasonable for IHO 2 to consider whether compensatory educational services—as requested in the June 2018 due process complaint notice—would constitute an appropriate equitable remedy that is tailored to meet the

[23] As a reminder, while impartial hearing rights include the right of both a parent and a district to "present evidence and confront, cross-examine, and compel the attendance of witnesses" (34 CFR 300.512[a][2]; see 8 NYCRR 200.5[j][3][xii]), State regulation requires that an IHO "exclude evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c]).

unique circumstances of this case (see Wenger v. Canastota, 979 F. Supp. 147, 151 [N.D.N.Y. 1997]).

If either of the parties chooses to appeal IHO 2's decision after remand, the merits of all claims 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]).

VII. Conclusion

Accordingly, the matter must be remanded to IHO 2 for a determination on the merits of the parent's claims with respect to whether the district offered the student a FAPE in the LRE for the 2018-19 school year, and specifically, with respect to the issues set forth in the parent's June 2018 due process complaint notice that have not already been adjudicated. If IHO 2 determines that the district failed to offer the student a FAPE in the LRE, she must then determine what, if any, relief is warranted under the circumstances of this case, keeping in mind the principle that equitable considerations are relevant to fashioning relief under the IDEA (see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 454 [2d Cir. 2015]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014]).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that IHO 2's decision, dated June 28, 2018, is modified by reversing the finding that the substantive issues raised in the parent's June 2018 due process complaint notice pertaining to the 2018-19 school year were barred by the doctrine of res judicata; and

IT IS FURTHER ORDERED that the matter be remanded to the same IHO who issued the June 28, 2018 decision to determine whether the district offered the student a FAPE in the LRE for the 2018-19 school year based upon the issues set forth in the parent's June 2018 due process complaint notice, and what relief, if any, the parent may be entitled to based upon the relief sought in the June 2018 due process complaint notice; and

IT IS FURTHER ORDERED that, if the IHO who issued the June 28, 2018 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**
November 2, 2018

CAROL H. HAUGE
STATE REVIEW OFFICER