The University of the State of New York

The State Education Department
State Review Officer
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No. 18-115

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Cuddy Law Firm, PLLC, attorneys for petitioner, by Jason H. Sterne, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Brian Davenport, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request for reimbursement of transportation costs for the student to attend the unilateral placement at Diamond Ranch Academy (DRA). The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative hearing concerning the 2015-16 and 2016-17 school years (see Dist. Ex. 5). Beyond documentation relating to the occurrence and substance of the prior impartial hearing, there is minimal evidence in this hearing record about the student's educational history or needs. The parent initiated the prior impartial hearing by filing a due process complaint notice dated June 10, 2016 (IHO Ex. I). The parent alleged that the district had failed to offer the student a free appropriate public education (FAPE) for 2015-16 and 2016-17 school years (id. at pp. 1, 3-6). For relief, the parent requested that the district be required to fund a psychiatric evaluation of the student and reconvene the CSE to develop a new IEP for the student for the 2016-17 school year to include specific recommendations, including a recommendation for deferral to the central based support team (CBST) to locate "[a] more

restrictive placement, e.g., in another more specialized and therapeutic school program in a nonpublic school" for the student (id. at pp. 6-7). Additionally, the parent sought compensatory services to remedy the district failure to provide the student with a FAPE during the 2015-16 school year in the form of "[o]ne-to-one instruction" (id.).

During the prior impartial hearing, the IHO (IHO I) issued four interim orders and one order on pendency (Dist. Ex. 5 at pp. 5-7, 14). As relevant to the present proceedings, by interim order dated April 3, 2017, IHO I directed the district to fund a 30-day diagnostic evaluation of the student at DRA—an out-of-State nonpublic residential school—as well as the student's transportation to DRA via a private service specializing in transportation of students to residential facilities (Tr. p. 24; Answer Ex. 1 at pp. 3-4; see Dist. Ex. 5 at pp. 5, 9).[1, 2] During the prior impartial hearing, on April 10, 2017, the student began attending DRA (Tr. p. 25; see Dist. Ex. 2 at p. 1), and, by order on pendency dated June 22, 2017, IHO I determined that DRA was the student's stay-put placement for the pendency of the proceedings (Answer Ex. 2 at p. 3). IHO I's order on pendency made no specific provision for transportation or visitation, but directed the district to "continue to fund the [s]tudent's placement . . . includ[ing] all related fees and costs associated with said placement" (id.).

The parties in the prior impartial hearing submitted closing briefs to IHO I (see Dist. Exs. 3; 4). In its closing brief, the district argued that relief in the form of tuition at DRA was outside the scope of the parent's due process complaint notice and, in the alternative, that if IHO I ordered the district to fund the costs of the student's tuition at DRA for the 2017-18 school year, the parent should be "barred from making claims for the 2017-2018 school year as relief will have prospectively been awarded" (Dist. Ex. 3 at pp. 8-9, 11). The parent sought relief from IHO I, including the costs of the student's tuition at DRA through the 2017-18 school year (Dist. Ex. 4 at p. 18). By decision dated July 18, 2017, IHO I found that the district had failed to offer the student a FAPE for the 2015-16 and 2016-17 school years (Dist. Ex. 5 at pp. 7-8). For relief, IHO I ordered the district to fund the student's attendance at DRA beginning on April 10, 2017 through the end of the 2017-18 school year (id. at p. 11). IHO I further ordered that the CSE cooperate with DRA to develop a transition plan for the student to return to "an appropriate placement for the 2018-19 school year" and for such cooperation to be included in the student's 2017-18 IEP (id.).[3] Neither party appealed IHO I's decision.

On September 14, 2017, a CSE convened and developed an IEP for the student for the 2017-18 school year to be implemented after October 2, 2017 (Parent Ex. B at pp. 1, 10, 13). Finding the student eligible for special education as a student with an other health-impairment, the CSE recommended that the student attend a 12-month school year program in a 12:1+1 special

[1] The district attached two exhibits to its answer in the present appeal, consideration of which is discussed below.

[2] The Commissioner of Education has not approved DRA as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 42-43; see 8 NYCRR 200.1[d], 200.7).

[3] IHO I specifically rejected the district's argument that an award of tuition reimbursement would fall outside the scope of the parent's due process complaint notice, indicating that district's argument did not take into account that the parent provided the district with 10-day notice regarding the student's placement at DRA (Dist. Ex. 5 at p. 10).

class at a State-approved nonpublic school and receive individual counselling services (id. at pp. 1, 10, 12).[4] The September 2017 IEP indicated that the student needed special transportation but did not further detail the nature of such transportation (id. at p. 12).

According to the parent, transportation to DRA was discussed at the September 2017 CSE meeting but the district representative informed her that, because the transportation was out of State, it should be addressed with the CBST (Tr. pp. 25-26). The evidence in the hearing record indicates that the parent sought the aid of various district staff to arrange for district payment of the costs of the student's transportation to DRA, including one or more staff of the CBST, as well as personnel from the implementation office for the district (Tr. pp. 26-28; Parent Ex. F at p. 1; see generally Parent Exs. C-F).

In November 2017, the student traveled back and forth between DRA and his home in the district for a holiday break at the parent's expense (Tr. pp. 30-34; see Parent Exs. K; L).

A. Due Process Complaint Notice

By due process complaint notice dated December 6, 2017, the parent sought the costs of the student's transportation to and from DRA during the 2017-18 school year (Parent Ex. A). The parent alleged that State regulation—specifically 8 NYCRR 200.12—mandates that "students attending residential schools are afforded ample opportunity to return home in order to visit family members during the residential placement time period" (id. at p. 3). The parent argued that the student's transportation to and from DRA—an out-of-State nonpublic residential placement found appropriate for the student by IHO I—fell within the parameters of the regulation, thereby qualifying the student for public funding of his transportation costs (id.). The parent alleged that, notwithstanding this regulation, her efforts to arrange the transportation with the district were unsuccessful (id. at pp. 4-5).

The parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year because, despite the State regulation pertaining to transportation for students attending nonpublic residential schools, the district did not include a provision for transportation on the student's IEP or otherwise fund the student's transportation costs (Parent Ex. A at pp. 5-6). As relief, the parent requested that the student's IEP be amended to include a provision that the district would fund the student's transportation to and from DRA in accordance with State regulation (id. at p. 6). The parent also sought reimbursement for all costs incurred transporting the student to and from DRA, as well as the costs of two additional round-trips and one final trip home (id. at pp. 6-7). The parent further requested copies of the student's educational records (id. at pp. 7-8).

B. Events Post-Dating the Due Process Complaint Notice

In December 2017 and January 2018, the student traveled back and forth between DRA and his home in the district for a holiday break at the parent's expense (Tr. pp. 34-37; see Parent Exs. I; J). Next, the hearing record reveals that the student traveled home on March 23, 2018 at parent expense (Tr. pp. 37-40; Parent Exs. G; H). The student was scheduled to return to DRA on

[4] The student's eligibility for special education programs and related services as a student with an other health-impairment is not in dispute (see 34 CFR 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

April 6, 2018, but refused to leave home (Tr. p. 29; Parent Ex. H at p. 1). The hearing record indicates that the student did not return to DRA and, according to the parent, the district did not offer any services for the remainder of the 2017-18 school year (Tr. pp. 29-30; IHO Exs. III at p. 2; IV at pp. 4-5).

C. Impartial Hearing Officer Decision

A prehearing conference was held on January 26, 2018, and the parties proceeded to a one-day hearing on May 8, 2018 (Tr. pp. 1-48).[5] By decision dated August 30, 2018, IHO II determined that the parent's claim for reimbursement of transportation costs to and from DRA "accrued" when the student was unilaterally placed at DRA and the parent sought tuition reimbursement (IHO Decision at p. 3).[6] IHO II further found that res judicata applied to the parent's claim and that it should have been resolved along with the parent's tuition claim during the prior impartial hearing when reasonableness of cost was at issue, particularly since the transportation costs at issue were significant (id. at pp. 3-4). IHO II also noted that res judicata applied even though "the transportation expenses actually occurred after [IHO I's] decision" and even though IHO I did not order transportation, and that the proper remedy for the parent was to "have the decision corrected or, if denied, to appeal the [d]ecision" (id.). IHO II then denied the parent's claim for transportation costs (id. at p. 4).

IV. Appeal for State-Level Review

The parent appeals IHO II's denial of her request for transportation costs. The parent argues that res judicata does not apply because the parent's transportation claim was not part of the prior impartial hearing. In support of this argument, the parent contends that: (1) IHO I exceeded her authority by ordering the district to fund the student's tuition at DRA for the period of time commencing April 2017 through the end of the 2017-18 school year; (2) the parent could not amend her due process complaint notice during the prior impartial hearing without the consent of the district; and (3) the district opposed IHO I's consideration of the tuition claim and argued that IHO I did not have the authority to order such relief. For these reasons, the parent asserts that the elements of res judicata have not been met and that the parent's claim is not barred.

The parent also asserts that the IHO II erred by failing to reach the merits of the parent's entitlement to the costs of transportation. The parent argues that the student is entitled to transportation pursuant to the Education Law and State regulation. In addition, the parent asserts that a FAPE includes transportation and that, when a district becomes responsible for the costs of a student's tuition at a unilateral placement, it also must pay for the student's transportation costs. As relief, the parent requests reimbursement for the student's travel to and from DRA on three

[5] The IHO's decision contains a typographical error on page 2, indicating that the hearing was held on May 6, 2018 (IHO Decision at p. 2). A review of the entire hearing record reflects that the hearing was held on May 8, 2016 (Tr. pp. 11, 14, 48).

[6] In a footnote, IHO II opined that "[i]t would appear that the [district's] due process rights were violated" based on IHO I's interim order for an out-of-State placement and subsequent determination on tuition reimbursement absent a request therefore in the parent's due process complaint notice in that proceeding (IHO Decision at pp. 3-4 n.4).

occasions or, in the alternative, two instances of round-trip travel and the student's final trip home in March 2018, as he did not return to DRA to complete the 2017-18 school year.

In an answer, the district responds to the parent's claim with admissions and denials and argues that IHO II's decision should be upheld in its entirety.

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]).[7]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should 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).

[7] 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).

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. Additional Evidence

The district has attached IHO I's interim decision dated April 3, 2017 (Answer Ex. 1), and IHO I's order on pendency dated June 22, 2017 (Answer Ex. 2) to its answer. Generally, documentary evidence not presented at an impartial hearing may be 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. 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]). Both of these documents could have been offered at the time of the impartial hearing in the present proceeding and were not. 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 the Department of Education, Appeal No. 16-017; 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. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]). That factor is of less weight in this instance, where the parent has not objected to the additional evidence and has generally referred to IHO I's interim decision and pendency order indirectly by citing to references thereto in the IHO's final decision (see Req. for Rev. ¶¶ 12-13, 32).[8] Moreover, the additional documentary evidence is now necessary in order to render a decision on this issue, as any available information on the subject of transportation from the prior proceeding is relevant to the determination of whether the parent may pursue her request for transportation in the present proceeding. Furthermore, both federal and State regulation 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]). Had the district not provided IHO I's interim

[8] The parent cites to Parent Exhibit M; however, the hearing record does not include such an exhibit (see generally Dist. Exs. 2-5; Parent Exs. A-L; IHO Exs. I-IV). An exhibit list submitted with the parent's exhibits listed an Parent Exhibit M, described as a July 18, 2017 "Findings of Fact and Decision," which was crossed out. Since the district's exhibits included a copy of the IHO I's final decision (Dist Ex. 5), it appears that the parent's duplicative copy of the decision was not admitted into evidence (see Tr. pp. 17-18).

decision and pendency order, it would have been necessary to request them. Therefore, while IHO I's interim decision and pendency order were available at the time of the impartial hearing in the present proceeding, the need to render a decision on the parent's request for transportation outweighs the concerns noted above; thus, the district's additional evidence has been considered.

B. Transportation

Before turning to the merits of the parent's appeal, it is important to reiterate that neither party appealed from IHO I's decision. IHO I's final order set forth three directives and did not mention transportation (Dist. Ex. 5 at p. 11). She directed the district to fund the student's attendance at DRA from April 10, 2017 through June 30, 2018, to cooperate with DRA to develop a transition plan to return the student to an appropriate placement for the 2018-19 school year, and to include the cooperation on the student's 2017-18 IEP (id.).[9] Neither party appealed those determinations and, accordingly, they became final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

While IHO I's determination is not before the undersigned in this appeal, it is necessary to refer to that decision in order to review the merits of the parent's claim in the current proceeding.[10] The nature of IHO I's award presents a conundrum with respect to sorting out permissible claims or issues in its aftermath. This is because there was no allegation of a denial of a FAPE for the 2017-18 school year before the IHO and the parent did not request tuition reimbursement (or transportation) for any school year (let alone the 2017-18 school year) in her due process complaint notice in that proceeding (see IHO Ex. I).[11] To be sure, the parent did not object to the liberties IHO I took in granting the parent relief in excess of that sought in the due process complaint notice, nor did the parent appeal IHO I's failure to grant the parent transportation costs related to the tuition reimbursement ordered, and the parent candidly admits in the present proceeding that any appeal

[9] Within the body of her decision, IHO I noted that "[t]ransportation to DRA is handled by private transportation services that specialize in transporting [students] to residential facilities" (Dist. Ex. 5 at p. 5). The hearing record reflects that the student was transported to DRA in this manner at district expense for a 30-day diagnostic evaluation as ordered by IHO I her April 3, 2017 interim order (Answer Ex. 1 at p. 3).

[10] While IHO I's interim order, requiring the student's diagnostic placement at DRA, ordered the district to fund the student's transportation to DRA (Answer Ex. 1 at pp. 3-4) and her pendency order required the district to pay "fees and costs" associated with the student's attendance at DRA (Answer Ex. 2 at p. 3), her final decision did not explicitly order the district to fund transportation (Dist. Ex. 5 at p. 11).

[11] By way of dicta, I note that SROs have been reluctant to order prospective relief of this sort, which tends to circumvent the statutory process pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (e.g., Application of a Student with a Disability, Appeal No. 18-055; Application of a Student with a Disability, Appeal No. 17-088; Application of a Student with a Disability, Appeal No. 16-081; see Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). The confusion that has resulted in the present case is yet another reason for IHOs and SROs to limit the exercise of their authority to the remediation of past harms explored through development of a hearing record rather than prospective placement (see Eley v. District of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

of IHO I's order would have amounted to an argument that IHO I "did not exceed her authority enough" (Parent's Mem. of Law at p. 3), ultimately placing the parent's tuition award in jeopardy. The parent's strategic choice in the prior proceeding may very well have resulted in the loss of the opportunity to pursue relief in the form of transportation expenses incurred, at least in this forum on the grounds the parent alleges.

IHO II rested on the doctrine of res judicata to support his determination that the parent's request for transportation costs were impermissible (IHO Decision at pp. 3-4);[12] however, here, the parent does not attempt to relitigate claims—i.e., the underlying reasons for the allegation that the district denied the student a FAPE for the 2015-16 and 2016-17 school years—which were adjudicated before IHO I. Perhaps the parent's request for transportation costs may be viewed as the parent seeking additional relief to remedy the same denial of a FAPE found by IHO I, which would fall under the umbrella of claim preclusion (GV v. Bd. of Educ. of W. Genesee Cent. Sch. Dist., 2017 WL 3172417, at *3 n.6 [N.D.N.Y. July 25, 2017] [noting that, even if the IHO in the prior matter could not have awarded the relief the plaintiff sought in the action before the court, "'[a] party cannot avoid the preclusive effect of res judicata by asserting . . . a different remedy'"], quoting Brown Media Corp. v. K&L Gates, LLP, 854 F.3d 150, 157 [2d Cir. 2017]; see also Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] ["[P]rinciples of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'"], quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]). Instead, however, it appears that the parent is pursuing the transportation for the 2017-18 school year based on the theory that the district denied the student a FAPE for the 2017-18 school year by not automatically reimbursing the parent for the transportation. This theory presents more fundamental issues with the parent's request for transportation costs in this proceeding.

In her due process complaint notice in the present proceeding, the parent alleged that the district failed to offer the student a FAPE for the 2017-18 school year because, despite the State regulation about transportation for students attending nonpublic residential schools, the district did not include a provision for transportation on the student's IEP or otherwise fund the student's transportation costs (Parent Ex. A at pp. 5-6). On appeal, the parent does not pursue this argument as directly but continues to assert that State regulation mandates that the district fund the student's transportation to and from DRA and that a FAPE encompasses transportation.

[12] It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

Initially, with respect to the parent's contentions in her due process complaint notice about the CSE's failure to provide for transportation to and from DRA on the student's IEP, such a provision would be inconsistent with the September 2017 CSE's recommendations—which the parent has not challenged in this proceeding—that the student attend a day program in a State-approved nonpublic school (Parent Ex. B at pp. 10, 13). While the district was responsible for the costs of the student's tuition at DRA for the 2017-18 school year pursuant to IHO I's decision, the CSE was not obligated to recommend DRA on the IEP.[13] Ultimately, however, the parent appears to concede in her request for review that the student's alleged right to transportation flowed from the district first having been found responsible for the cost of tuition—and not from the CSE's recommendations (see Req. for Rev. ¶ 42, citing Matter of the Parent of Handicapped Child, 19 Educ. Dep't. Rep. 357, Decision No. 10,165 [1980]).[14]

The parent's main argument is that State regulation mandates that the district provide transportation to and from DRA for the student five times per year (8 NYCRR 200.12[a]). The parent's reliance on this regulation is misplaced. Section 200.12 provides a vehicle for State reimbursement to a school district that has made "[a]n expenditure . . . to provide suitable transportation during the period from July 1st through June 30th for a student with a disability to and from a private residential school located within or outside of the State" (8 NYCRR 200.12). The regulation reflects that the State contemplated that there would be circumstances when a district would fund the costs of the student's transportation to and from an out-of-State residential school and that the frequency of such trips could reasonably be limited (see also Letter to Dorman, 211 IDELR 70 [OSEP 1978]), but it does not establish an independent entitlement to the transportation costs enforceable by the parent or provide that a district's failure to reimburse a parent for transportation may stand on its own as the basis for a denial of a FAPE (8 NYCRR

[13] While a school district may be required to reimburse parents for the costs of a student's tuition at a non-State approved nonpublic school as a remedy for the district's failure to offer the student a FAPE, generally a school district may not be compelled to place a student in a non-State approved nonpublic school in order to provide the student with a FAPE (see Z.H. v. New York City Dep't of Educ., 107 F. Supp. 35 369, 374-76 [S.D.N.Y. 2015]).

[14] The language which the parent relies upon in Matter of the Parent of Handicapped Child, 19 Educ. Dep't. Rep. 357, Decision No. 10,165 (1980) is as follows: "The[] [provisions of the Education Law] do not authorize special transportation services for handicapped pupils attending a school in which they have been placed by their parents at private expense, except in those instances in which the school district has become responsible for the cost of tuition as a result of a failure to carry out its responsibility to evaluate the pupil and recommend an appropriate public placement." Applying this language to the present matter, the parent's argument could be construed as alleging that IHO I's order of tuition automatically made the district responsible for transportation; if this were the case, it would seem that the proper course for the parent would be one of enforcement. 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 a parent experiences difficulty with the district in implementing a final decision of an IHO or SRO reached through the impartial due process hearing process, such 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).

200.12; see Application of a Child with a Disability, Appeal No. 00-010; see also Educ. Law § 4405[2]).

The parent's frustration with the process is understandable given that, under a more traditional application of the Burlington/Carter framework for tuition reimbursement, an order for tuition reimbursement may very likely have included the costs of the transportation sought by the parent (see Union Sch. Dist. v. Smith, 15 F.3d 1519, 1528 [9th Cir 1994] [finding "that the language and spirit of the IDEA encompass reimbursement for reasonable transportation and lodging expenses . . . as related services"]; see also Ne. Cent. Sch. Dist. v. Sobol, 79 N.Y.2d 598, 608 [1992] [finding that, since a FAPE included related services such as transportation, an order of reimbursement for transportation was an appropriate remedy for a denial of a FAPE]). However, the parent has not pointed to a legally permissible route upon which an order for relief in the form of transportation costs for the 2017-18 school year may be granted in this proceeding under the unique factual and procedural circumstances of this case.

VII. Conclusion

Based on the foregoing, the evidence in the hearing record supports the IHO's denial of the parent's request for transportation in this matter.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 14, 2018

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SARAH L. HARRINGTON
STATE REVIEW OFFICER