The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 20-158

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

The Cuddy Law Firm, PLLC, attorneys for respondent, by Mark Gutman, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fund the costs of their son's tuition at the Happy Hour 4 Kids (HH4K) school for a portion of the 2019-20 school year. 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

According to the parent, during the 2016-17 through 2018-19 school years (kindergarten through second grade), the student attended a charter school and a district public school and then received home instruction, during which time the district unsuccessfully attempted to locate a therapeutic day placement for the student (see Parent Ex. Q at pp. 1, 5, 7). The parent initiated an impartial hearing, alleging that the district failed to offer the student a FAPE for the 2016-17, 2017-18, and 2018-19 school years (2016-2019 proceeding) (see Parent Ex. A at p. 2). While the 2016-2019 proceeding was pending, a CSE convened on January 22, 2019 and developed an IEP for the student with a projected implementation date of February 5, 2019 (see generally Parent Ex. D at pp. 1, 8-9, 12). The CSE recommended that the student attend a 12:1+1 special class in a State-approved nonpublic school, along with related services (id. at pp. 8-9, 12). However, the district was not able to locate an appropriate State-approved nonpublic school for the student (Parent Ex. B at p. 1). The 2016-2019 proceeding culminated with a decision dated March 31, 2019, in which

an IHO ordered, among other things, that the district reconvene the CSE to place the student in a 6:1 or smaller class at Academics West, a nonpublic school located by the parent, and provide for the student to receive specified related services (id. at pp. 3-4).[1] The IHO in that matter characterized the student as "hard to place" (id. at p. 1).

On or about July 1, 2019 the parent initiated an impartial hearing seeking funding for unilateral placement of the student at Academics West for the 2019-20 (third grade) school year (first 2019-20 proceeding) (see IHO Ex. I at pp. 17-22). In the July 2019 due process complaint notice, the parent alleged that the CSE had not convened to develop an IEP for the student for the 2019-20 school year (id. at pp. 18-19, 20). The first 2019-20 proceeding was conducted on a single hearing date on September 3, 2019 (see Dist. Ex. 1).

After the impartial hearing for the first 2019-20 proceeding concluded but before the parties received a final decision and order, the parent became concerned about the continued appropriateness of Academics West for the student, as she began to receive phone calls from the school during the school day to the effect that the school was experiencing difficulties dealing with the student's behaviors (Tr. pp. 50-54; Parent Ex. Q at pp. 7-8).[2] Academics West suggested to the parent that a different nonpublic school, HH4K, would be a better fit for the student's needs, and the parent contacted HH4K in "early" November 2019 and she and the student underwent "an interview and observation" (Parent Ex. Q at p. 8).[3]

The IHO who presided over the first 2019-20 proceeding issued a decision, dated November 10, 2019, which ordered, among other things, "that upon its receipt of reasonably satisfactory proof of services having been rendered, the [district] shall either reimburse the Parent and/or directly pay the cost of the student's placement at [Academics West] for the entirety of the student's 12-month 2019-2020 school year" (Parent Ex. C at pp. 5-6).[4]

In a letter to the district dated November 15, 2019, the parent stated that she disagreed with the district's "continued failure to recommend any placement . . . for the 2019-20 school year," and requested an immediate CSE meeting "to locate a potential placement" for the student for the remainder of the 2019-20 school year (Parent Ex. E at p. 1). In the letter, the parent related that, although she had received the November 2019 IHO decision requiring the district to fund the student's tuition costs at Academic West, "shortly following the impartial hearing, [she] was informed by Academics West that [the student's] behaviors were no longer manageable by their

[1] The Commissioner of Education has not approved Academics West as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The parent indicated that, initially, Academics West appeared to be appropriate for the student and the student began to make progress, but that the school began to have concerns "after a couple of months" (Tr. pp. 49-51; Parent Ex. Q at pp. 7-8).

[3] The Commissioner of Education has not approved HH4K as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[4] The November 2019 IHO decision arising from the first 2019-20 proceeding is styled as a "statement of agreement" and a "pendency" decision in places, but also renders a final decision on the merits (see Parent Ex. C).

program," and she had recently toured HH4K, which appeared able to meet the student's needs (id.). The parent indicated that, if the district did not "locate an appropriate placement within 10 days," she reserved her right to place the student at HH4K and seek public funding for the costs of his attendance for the remainder of the 2019-20 school year (id. at pp. 1-2). The parent received no response from the district to her November 15, 2019 letter (Parent Ex. Q at pp. 8-9).

On November 21, 2019, the parent executed an enrollment contract for the student's attendance at HH4K for the remainder of the 2019-20 school year beginning December 2, 2019 through June 30, 2020 (Parent Ex. I).

A. Due Process Complaint Notice

In a due process complaint notice, dated December 20, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year and requested tuition funding and other expenses related to the student's attendance at HH4K during the 2019-20 school year (see Parent Ex. A). Specifically, the parent alleged that, the district failed to hold a CSE meeting or "secure a new placement" for the student after the parent requested the same in her November 15, 2019 letter (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened on June 16, 2020 and concluded on July 6, 2020 after two days of proceedings (see Tr. pp. 1-66).[5] On June 29, 2020, the district submitted a motion to dismiss the parent's due process complaint notice based upon res judicata, arguing that any claims concerning the student's 2019-20 school year could have and should have been raised by the parent in the first 2019-20 proceeding (IHO Ex. I). Also on June 29, 2020 the parent submitted written opposition to the district's motion to dismiss, to which the district replied via email on July 1, 2020 (see IHO Exs. II; III at p. 1). In an email to the parties dated July 1, 2020, the IHO indicated that she would not be dismissing the matter on res judicata grounds at that point and that the impartial hearing would proceed (Dist. Ex. 9 at p. 1).

In a decision dated September 2, 2020, the IHO set forth her rationale for denying the district's motion to dismiss, reasoning that the claims raised by the parent in the matter before her concerned events that took place after the decision was issued in the first 2019-20 proceeding and, therefore, were not and could not have been raised or resolved in the first 2019-20 proceeding (IHO Decision at pp. 2, 7). The IHO also noted that the decision resolving the first 2019-20 proceeding ordered tuition payment for the program at Academics West during the 2019-20 school year only upon "receipt of reasonably satisfactory proof of services having been rendered" and that as a result the order did not require the district to fund the program after the student ceased attending it and began to attend HH4K in December 2019 (id. at p. 4).

Regarding the merits, the IHO determined that the district conceded that it failed to offer the student a FAPE for the 2019-20 school year, that HH4K was an appropriate unilateral

[5] Although the parent's due process complaint notice was filed in December 2019 (see Parent Ex. A), the matter was not assigned to the IHO who ultimately presided over the impartial hearing until June 2020 (see Tr. p. 2). The district's delay in assigning an IHO to the matter was the subject of a State complaint (see Parent Ex. F).

placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 5-7). As relief, the IHO ordered the district to fund the program at HH4K for the 2019-20 school year from December 2, 2019 through June 30, 2020 upon receipt of appropriate documentation that the student was provided services (id. p. 7).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in finding that the parent's request for tuition funding at HH4K was not barred on res judicata and/or mootness grounds during the 2019-20 school year.[6] In an answer, the parent responds to the district's allegations with admissions or denials and argues that the IHO'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

[6] The district's appeal of the IHO's decision on the grounds of mootness mirrors the district's appeal on the grounds of res judicata, i.e. that the parent's claim that the student was denied a FAPE for the 2019-20 school year was already resolved in a prior proceeding. As res judicata is the theory that most closely follows the district's argument, the analysis in this decision focuses on the district's arguments related to res judicata.

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]

[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).

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).

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. Scope of Review

State regulation governing practice before the Office of State Review requires that the parties set forth in their pleadings "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 further specify that "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][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]).

Here, the district has not appealed the IHO's findings that it failed to offer the student a FAPE for the 2019-20 school year, that HH4K was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of an award of tuition reimbursement. As such, those findings have become final and binding on the parties and will not be reviewed on appeal (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]).

B. Res Judicata

The district argues that the IHO erred in failing to dismiss the parent's claim for tuition reimbursement at HH4K for the 2019-20 school year because that claim could have and should have been raised in the parent's initial due process complaint notice related to the 2019-20 school year and is therefore barred by the doctrine of res judicata.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills

Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).[8] 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. Apr. 1, 2013]).

Here, I find that the IHO correctly denied the district's motion to dismiss the parent's request for tuition funding at HH4K on res judicata and/or mootness grounds during the 2019-20 school year, largely for the same reasons that the IHO set forth in her decision (see IHO Decision at p. 2). Specifically, res judicata does not apply to the parent's claim for tuition funding at HH4K in the present matter because that claim could not have been raised in the prior proceeding.

At the time the parent filed the due process complaint notice initiating the first 2019-20 proceeding, in July 2019, the student was attending a unilateral placement at Academics West that the parent asserted was appropriate for the student during the 2019-20 school year (see IHO Ex. I at pp. 17-22). The final hearing date in the first 2019-20 proceeding was conducted on September 3, 2019, and as of that time, the parent continued to assert that Academics West remained appropriate and the student continued to attend that school (see Dist. Ex. 1 at pp. 32-34). Accordingly, at that time and contrary to the district's assertion, the parent had no reason to amend the due process complaint notice that initiated the first 2019-20 proceeding, and instead had every incentive to seek a favorable decision in the matter that would result in funding for the student's then-current placement at Academics West. It was not until the student had attended Academics West for the 2019-20 school year for a "couple of months" that the school became concerned it could not meet the student's needs and it was not until "early November" that the parent reached out to HH4K at the suggestion of staff at Academics West (Tr. pp. 50-54; Parent Ex. Q at pp. 8-9). Contemporaneous with these events, the November 2019 decision concluding the first 2019-20 proceeding was issued and ordered funding for the student's attendance at Academics West upon "receipt of reasonably satisfactory proof of services having been rendered" (Parent Ex. C at pp. 5-6). Shortly thereafter on November 15, 2019, having been informed by Academics West that it could not meet the student's needs, the parent sent a letter to the district seeking a CSE meeting and a placement recommendation from the district (Parent Ex. E). In that letter the parent

[8] While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). 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. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

informed the district that, if it could not "locate an appropriate placement within 10 days," the parent intended to enroll the student at HH4K and seek public funding for that placement (id.).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Thus, the parent's November 15, 2019 letter served as a 10-day notice and gave the district an opportunity to offer the student a FAPE for the balance of the 2019-20 school year, which the district did not take advantage of.

The district points to the parent's testimony as support for its contention that the parent's allegations could have been raised in the prior proceeding; however, the district's argument is spurious. The parent testified that Academics West could not handle the student's elopement; she testified that "it was the same behaviors like he was displaying before" and that his behaviors "didn't get worse," but "the structure of the school had changed" (Tr. pp. 51-53). The parent's testimony on this issue would have been relevant to a determination of the appropriateness of Academics West in the prior proceeding—an issue that has been litigated; however, that question is not before me. Rather, the parent's due process complaint notice in this matter relates to the district's failure to respond to the parent's November 15, 2020 request for a CSE meeting. Additionally, while the information provided in the parent's testimony would have unquestionably been relevant to a CSE reviewing the student's needs, it does not provide a basis for ignoring the November 15, 2020 request for a CSE meeting.

The district also argues that the November 15, 2020 request for a CSE meeting cannot serve as the basis for a claim of a denial of FAPE because the request was either merely a request to select a new site in which to implement the same, existing special education program or an improper attempt to unilaterally remove the student from the public school but then subsequently demand that the public school implement the student's IEP without delay. Initially, although the parent specifically requested a CSE meeting, the letter did indicate that the purpose was "to locate a potential placement for [the student] for the 2019-2020 school year" (Parent Ex. E at p. 1). However, relevant to both of the district's points, there is no evidence in the hearing record that a CSE had convened or developed an IEP for this student since January 2019 (see Parent Ex. D); as such, the parent's request for a CSE meeting would have required the development of an IEP for the student and was not just for the purpose of finding a school location where the student's program could be implemented. Further, relevant to the district's second point, it may be that the parent's request for an immediate CSE review within 10 days was not a valid timetable and that the district should have had additional time to review the student's program and implement special education programs and services (see 8 NYCRR 200.4[e][1] [a district must arrange for appropriate special programs and services "within 60 school days of the referral for review of the student with a disability"]); however, the district's argument goes to the merits of the parent's claim and the district has only appealed from the IHO's decision not to grant the district's motion to

dismiss the parent's due process complaint notice on the grounds of res judicata. As stated above, I will not address the merits of the parent's substantive claims as they have become final and binding on the parties.

Regarding the parent's requests for tuition reimbursement for two unilateral placements over the course of one school year, such a factual scenario is not unprecedented (see, e.g., Application of the Dep't of Educ., Appeal No. 20-147 [upholding an IHO order of tuition reimbursement to two unilateral placements during the same school year after finding the student's needs had changed during the school year and each unilateral placement was appropriate at the time the student attended]). Just as if the student had been attending a program and placement recommended by the CSE, once the unilateral placement seemed to become inappropriate for the student, the parent's recourse was to seek the CSE's review and that is what she did (see 8 NYCRR 200.4[e][4]). As such, this is not an instance where the district's path for going forward was unclear (see Application of a Student with a Disability, Appeal No. 20-089 [noting the potential pitfalls of awarding prospective relief, including envisioning a district's role going forward where the procedural protections of the IDEA, IEP development and the placement selection process, had been circumvented]; Application of a Student with a Disability, Appeal No. 19-018 [same]); rather, the district had the opportunity to respond to the parent's request for a CSE meeting or, at the very least, present a defense as to that limited issue in this proceeding, but it declined to do so.

After the parent gave the district notice of her intention to unilaterally place the student at HH4K, the parent contracted with HH4K to enroll the student there and the student began to attend the new school on December 2, 2019 (Parent Ex. A at p. 3; see Parent Ex. I). Thereafter, the parent submitted a due process complaint notice dated December 20, 2019 which initiated this proceeding seeking funding for the student's new unilateral placement at HH4K (Parent Ex. A). In light of the above, the parent was suffering from a new injury—the district's failure to respond to the parent's request for a new CSE meeting and to address the student's changed circumstances—and the parent was also requesting a new form of relief—funding for a unilateral placement at HH4K for the remainder of the 2019-20 school year. These claims could not have been asserted in the due process complaint notice initiating the first 2019-20 proceeding , nor could they have been asserted prior to the decision concluding the first 2019-20 proceeding.

Accordingly, the IHO correctly concluded that the parent's claims raised in the December 20, 2019 due process complaint notice were not barred by the doctrine of res judicata and there appears no basis in the hearing record to disturb that determination.[9]

VII. Conclusion

The IHO's findings that the district failed to offer the student a FAPE for the 2019-20 school year, that HH4K was an appropriate unilateral placement for the student, and that equitable considerations favored reimbursement have not been appealed and are therefore final and binding

[9] As the IHO identified, because the decision concluding the first 2019-20 proceeding conditioned tuition funding upon "receipt of reasonably satisfactory proof of services having been rendered," and the IHO decision concluding the current matter also conditioned tuition funding upon "appropriate documentation that the student was provided services," there is no danger that the district would be unjustly required to fund either program for the entire 2019-20 school year (IHO Decision at p. 7; see Parent Ex. C at p. 5). Rather, the IHO decision only requires the district to fund HH4K for that portion of the school year that the student was in attendance (IHO Decision at pp. 4, 7).

on both parties and need not be reviewed on appeal (8 NYCRR 200.5[j][5][v]). Having determined that the IHO did not err in denying the district's motion to dismiss the parent's claim for tuition funding at HH4K during the 2019-20 school year, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 30, 2020

SARAH L. HARRINGTON
STATE REVIEW OFFICER