The University of the State of New York

The State Education Department
State Review Officer
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No. 19-121

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 a decision of an impartial hearing officer (IHO) which dismissed the due process complaint notice and denied the parent's requested relief concerning the educational placements, programs, and related services recommended by the Committee on Special Education (CSE) for his son for the 2019-20 school year. The appeal must be sustained in part and the matter must be remanded to the IHO for further administrative proceedings.

II. Overview—Administrative Procedures

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 six prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; 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 in this appeal.

In this proceeding, the IHO granted the district's motion to dismiss the parent's due process complaint notice prior to conducting an impartial hearing. In light of the procedural posture of this matter, there is little evidence in the hearing record with regard to the facts during the 2018-19 school year leading up to the parent's due process complaint notice. Based on the parent's allegations, it can be gleaned that CSE meetings were convened on June 19, July 21, and August 25, 2019 to conduct an annual review and develop an IEP for the student's 2019-20 school year (see Amended Due Process Compl. Notice at p. 4, 7, 9, 11; Parent Aff. in Opp. to Dist. Mot. to Dismiss at pp. 2-3, 6, 8).[1]

A. Due Process Complaint Notice

In a due process complaint notice dated September 5, 2019, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year (Due Process Compl. Notice at pp. 1-3).[2] With respect to the CSE process, the parent asserted that the CSE was not appropriately composed, that the district "inappropriately exerted influence upon the CSE membership," that no member from an out-of-district placement attended, and that the CSE chairperson "failed to abide by her regulatory obliged roles and responsibilities" (id. at p. 2). The parent also indicated that the district inappropriately directed that the recording of the CSE meeting be halted (id.). In addition, the parent alleged that the CSE chairperson "unilaterally drafted and modified" the student's IEP (id.). Further, the parent alleged that the district predetermined the student's "program and placement recommendation" (id. at p. 1).

The parent also alleged that the district "failed to conduct a meaningful analysis regarding its ability to employ" and "failed to employ its special education resources, related services and supplementary aids towards meeting the unique and individualized needs" of the student and failed to recommend a "program and placement" in the least restrictive environment (LRE) (Due Process Compl. Notice at p. 2). Further, the parent argued that the district failed to "develop an appropriately ambitious IEP" and failed to provide the student with "meaningful access to the general education curriculum" (id.). Relatedly, the parent claimed that the CSEs failed to rely on "appropriate assessments" or "appropriate state assessments and learning profiles" in order to identify the student's present levels of performance and failed to develop appropriately ambitious annual goals (id. at pp. 1-2). With respect to post-secondary planning, the parent alleged that the CSEs failed to develop transitional services that were appropriately ambitious and failed to develop appropriate "transitional goal [present levels of educational performance]" (id. at p. 2).

[1] Several pages of the hearing record filed with the Office of State Review contain handwritten notations and highlighting of text, which were presumably made by either the attorney for the district or the IHO (see, e.g., Due Process Compl. Notice at p. 1; Dist. Answer & Mot. to Dismiss at pp. 2-6, 8-9; Dist. Aff. in Support of Mot. to Dismiss at pp. 3-5). The district and/or the IHO is reminded that it is necessary to avoid annotating the documents maintained as the official record of the proceedings as it becomes very difficult during subsequent administrative and judicial review to decipher what notations, if any, should be attributed to the various document authors or to the party offering the exhibit. The notations and highlighting have been disregarded.

[2] The due process complaint notice was stamped as "received" by the district on September 9, 2019 (Due Process Compl. Notice at p. 1).

As a final matter, the parent alleged that the district "continue[d] to fail to implement" the student's pendency placement (Due Process Compl. Notice at p. 2).[3] As relief, the parent requested that specific district personnel be "removed from the CSE," that the district be required "to implement a proposed 'hybrid' program" for the student with the assistance of the parent's expert, and that the student receive "compensatory education 'back end' damages and reimbursement for all legal fees" (id. at p. 3).

B. Motion to Dismiss

In a motion dated September 13, 2019—followed by an affirmation in support thereof dated September 19, 2019 with exhibits "A" through "F6"[4]—the district requested that the IHO dismiss the parent's claims on, among others, the grounds that the due process complaint notice was insufficient, sought relief outside of the IHO's jurisdiction, and set forth allegations that were barred by the doctrines of res judicata or collateral estoppel (see Dist. Answer & Mot. to Dismiss at pp. 1-12; Dist. Aff. in Support of Mot. to Dismiss & Exs. A-F6). With regard to res judicata or collateral estoppel, the district argued that the parent's allegations had "been fully and fairly adjudicated in a prior proceeding or proceedings" and referenced the parent's "earlier complaints and corresponding appeals to the SRO," which involved identical parties and the same issues (see Dist. Answer & Mot. to Dismiss at pp. 6-7). In the affirmation in support of the motion, the district elaborated on its position that, "distilled to its basic ingredient, the parents have sought for some four years at this point the establishing (creating) of a special class (or inclusion within a regular education class) for their child within the bricks and mortar of the buildings of the [district]" (Dist. Aff. in Support of Mot. to Dismiss at p. 2). The district noted that prior IHO and SRO decisions had determined that the district did "not possess a viable life skills/functional academics class" to address the student's needs, that the district was not required to create a program for a particular student, and that the out-of-district placements recommended for the student were within the CSEs authority (id. at pp. 3-4). The district acknowledged that the CSEs' recommendation of a 12:1+1 "life skills/functional academics placement [wa]s 'new' to the extent it [wa]s recommended for the 2019-2020 school year" but argued that the parent's underlying arguments and contentions were identical (id. at p. 5). The district alleged that there was "'nothing new under the sun' with regard to the parents' continuing odyssey to, somehow, some way, gain an in-district placement [for the

[3] During the October 2, 2019 prehearing conference, the parties agreed that the issue of the implementation of the student's pendency placement had been resolved (Oct. 2, 2019 Tr. pp. 45-47).

[4] The affirmation included exhibits "A" through "E," which are copies of prior IHO decisions involving this student, as well as a State complaint filed by the parent regarding the conduct of an IHO (see Dist. Aff. in Support of Mot. to Dismiss Exs. A-E), and "F1" through "F6," which are copies of prior State-level administrative decisions involving this student (see Dist. Aff. in Support of Mot. to Dismiss Exs. F1-F6). Although the district's affirmation in support of the motion to dismiss references exhibits "F1" through "F7" (see Dist. Aff. in Support of Mot. to Dismiss at p. 5), the copy of the hearing record filed with the Office of State Review includes copies of only six State-level administrative decisions, not including the duplicate received of exhibit F1. In this instance, this discrepancy is of little consequence, as all State-level administrative decisions are published by appeal docket number and shall be referenced accordingly rather than by motion exhibit references (see Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; 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).

student] notwithstanding that no secondary placement exist[s] within the [district] which could possibly accommodate the Down Syndrome student's intensive needs" (id. at p. 6).

By affirmation dated September 24, 2019, the parent responded to the district's motion (see Parent Aff. in Opp. to Dist. Mot. to Dismiss). The parent argued that the district's obligations to the student were "not static in nature or time, but rather [we]re owed year after academic year" (id. at pp. 1-2, 8). To meet its obligations, the parent alleged that the district was obligated to "undertake a meaningful and continuous analysis regarding its ability to employ its special education resources, related services, and supplementary aids" to meet the student's needs (id.). Since the merits of the program and placement recommended by the CSEs for the student's 2019-20 school year had not yet been adjudicated, the parent argued that the district's defense of res judicata was without merit (id. at pp. 2-3, 6-7). As such, the parent argued that the history of the proceedings, which addressed the student's prior school years, was "irrelevant" (id.). Nevertheless, the parent provided a "synopsis" of the prior proceedings, purportedly to correct the district's mischaracterization of past decisions (id. at pp. 3-5). Moreover, the parent characterized his complaints as having "evolved year over year" and noted that the "'cast of characters' associated" with developing and implementing the student's IEPs over the years had likewise changed (id. at p. 9). The parent further noted that the district had unsuccessfully argued res judicata on similar grounds in a prior matter involving the student (id. at p. 2, citing Application of a Student with a Disability, Appeal No. 18-110).

The district replied on September 30, 2019, attaching two exhibits to the submission (Dist. Reply in Support of Mot. to Dismiss).[5, 6] The district addressed the numbered allegations in the parent's due process complaint notice, detailing grounds for dismissal of each, including res judicata, but also insufficiency of the due process complaint notice and, factually, the lack of merit to the allegations (id. at pp. 3-5). Indeed, at one point, the district argued that a contention of the parent's was "belied by a record," which revealed different facts (id. at p. 4). The district requested that the IHO dismiss the due process complaint notice or limit the scope of the impartial hearing to "those matters which require[d] factual consideration" (id. at pp. 5-6).

[5] The reply included exhibit "A," which is a copy of a decision by the Commissioner involving this student, and exhibit "B," which is a decision issued by the District Court in the Eastern District of New York involving this student (see Dist. Reply in Support of Mot. to Dismiss Exs. A-B).

[6] On September 27, 2019, the United States District Court for the Eastern District of New York entered a decision (see Dist. Reply in Support of Mot. to Dismiss Ex. B). The parent had requested review of several previous IHO and State-level administrative decisions (id. at pp. 2-3, 8-23). The district court held that it lacked subject matter jurisdiction to review the parent's claims regarding an IHO decision issued regarding the 2015-16 and 2016-17 school years as the parent was not aggrieved by the decision and failed to request compensatory education in the due process complaint notice in that proceeding (id. at pp. 28-29, 31-37). The district court denied the district's request to dismiss and the parent's request for summary judgment on the parent's claims under Section 504 of the Rehabilitation Act of 1973 (section 504) and American with Disabilities Act (ADA) (id. at pp. 39, 43-44). The district court also dismissed the parent's claims against individual defendants and claims under 20 U.S.C. § 1983 (id. at pp. 44-45). As for the parent's request for "equitable relief," the district court found that, as with the IDEA claims, the court lacked jurisdiction to reach the question, and, in any event, noted that the IDEA does not authorize parents to participate in school selection (id. at pp. 52-54). The district court also noted that the parties did not move with respect to the parent's causes of action appealing "the 2017 and 2018 administrative decisions" and that, therefore, those claims survived (id. at p. 55).

On October 2, 2019, the IHO conducted a prehearing conference with the parties (Oct. 2, 2019 Tr. pp. 1-56). After hearing the parties' respective positions regarding the merit of the district's motion to dismiss on the grounds of res judicata or collateral estoppel (see Oct. 2, 2019 Tr. pp. 6-26), the IHO made some inquiries of the parent. First, the IHO asked the parent to elaborate on why the matter was not collaterally estopped if the parent was "arguing the same issue" as addressed in the proceedings relevant to the 2018-19 school year (Oct. 2, 2019 Tr. pp. 26-27). The parent indicated that the district's underlying "rationales" and "policies" had changed over the years (Oct. 2, 2019 Tr. pp. 27-29). In response, the IHO inquired as to how the rationale of the CSE would be determinative when the IHO was tasked with evaluating the substance of the IEP (Oct. 2, 2019 Tr. pp. 29-30). The IHO noted that "the nature of the complaint" was such that the "allegations . . . appear[ed] on the surface to be the same allegations that [the parent had] brought up" in past proceedings," and further noted that an SRO in a decision addressing a prior school year indicated "that the needs of the child didn't appear to change from prior adjudication[s]" in which it was found that the district offered the student a FAPE in the LRE (Oct. 2, 2019 Tr. pp. 32-33). Based on this, the IHO indicated that he could "look through [the] due process complaint" and identify areas where he felt it "fail[ed] for reasons of specificity" (Oct. 2, 2019 Tr. p. 33). The IHO informed that parent that he needed "the facts," which the IHO indicated were required to survive a motion to dismiss for lack of specificity (Oct. 2, 2019 Tr. p. 34). In particular, the IHO noted that the parent did not allege "facts as to how the child's needs ha[d] changed from the last IEP which was found appropriate" and consistent with LRE requirements (Oct. 2, 2019 Tr. pp. 35, 39). IHO summarized the agreement that the parent would "withdraw his compliant, . . . without prejudice, and re-file with adequate, supporting underlying facts so as to provide . . . the necessary specificity" (Oct. 2, 2019 Tr. p. 51).

As to areas of relief requested, the IHO also noted during the prehearing conference that he had no "control over personnel determinations" (Oct. 2, 2019 Tr. pp. 41-42, 48-49). The IHO also indicated that he had authority to award compensatory education but not money damages or attorney's fees (Oct. 2, 2019 Tr. pp. 49-51).

C. Amended Due Process Complaint Notice

In an undated amended due process complaint notice, the parent alleged that the district failed to offer the student a FAPE for the 2019-20 school year (Amended Due Process Compl. Notice at p. 1).[7, 8] Overall, the parent reiterated most of the claims from the September 5, 2019 due process complaint notice but additionally set forth excerpts from discussions, which the parent alleges took place at the June, July, and August 2019 CSE meetings, to support several of the allegations (compare Due Process Compl. Notice at pp. 1-3, with Amended Due Process Compl. Notice at pp. 1-28).[9] For example, with respect to CSE composition, the parent points to lack of

[7] According to the IHO's decision, the amended due process complaint notice was filed "on or about October 15, 2019" (IHO Decision at p. 13).

[8] It appears that, instead of withdrawing and refiling the due process complaint notice, in the manner discussed at the October 2, 2019 prehearing conference (see Oct. 2, 2019 Tr. pp. 51-54), the parent submitted an amended due process complaint notice instead (see Amended Due Process Compl. Notice).

[9] Most of the claims set forth in the September 2019 due process complaint notice were restated in the amended

attendance of a representative from the out-of-district placement (Amended Due Process Compl. Notice at pp. 23-24).[10] Further, to support claims of predetermination and denial of parental participation, the parent cited statements purportedly made at the CSE meetings, which tended to demonstrate that certain conversations were halted or redirected, as well as statements made by the parent at the CSE meetings expressing frustration about the lack of collaboration among committee members (id. at pp. 20-25). With respect to his allegation that the district failed to provide the student with meaningful access to the general education curriculum, the parent cited excerpts from discussions at the CSE meetings to show, for example, that teachers or providers who worked with the student had not been provided with the general education curriculum or that members of the CSEs had divergent views as to whether the general education curriculum was appropriate for the student (id. at pp. 3-6). In alleging that the CSEs failed to rely on "appropriate assessments" in developing the student's present levels of performance, the parent pointed to examples of statements made at the CSE meetings demonstrating that the CSEs relied on an assistive technology evaluation from 2014, that members of the CSE who did not know the student developed the present levels of performance, and that the CSEs failed to use or inappropriately used the student's performance on alternate assessments to develop his present levels of performance (id. at pp. 7-9). With respect to the annual goals, the parent pointed to the CSEs' failure to rely on the student's performance on alternate assessments or on State learning standards (i.e., dynamic learning maps) or on the general education curriculum in developing the goals (id. at pp. 9-11). In support of the parent's claim that the district failed to offer the student a FAPE in the LRE, the parent pointed to examples of statements made during the CSE meetings regarding the possibility of an integrated setting for the student, the student's access to nondisabled peers during lunch and electives, the viability of educating the student within the district absent a cohort of other students with similar needs, consideration of the inclusion report prepared by the parent's expert, and the parent's proposal for a hybrid program (id. at pp. 11-16).

For relief, the parent requested that the IHO "issue a determinative finding" that the district violated the student's rights under the IDEA, as well as "compensatory 'back end' education" and "equitable relief" in the form of an order requiring the district to hire the parent's expert and implement the proposed hybrid program (Amended Due Process Compl. Notice at pp. 27-28). The

due process complaint notice—albeit, some in slightly different language (i.e., framed as examples of the district's predetermination of the student's program and placement rather than as independent claims) and some expanded upon—and generally fell under the broad categories of CSE composition, parent participation and predetermination, development of an appropriately ambitious IEP that provides for the student's meaningful access to the general education curriculum, utilization of appropriate assessment in developing present levels of performance, appropriateness of annual goals, and LRE (compare Due Process Compl. Notice at pp. 1-3, with Amended Due Process Compl. Notice at pp. 1-28). Claims that were included in the September 2019 due process complaint notice but which were not set forth in the amended due process complaint notice include the parent's allegations that the recording of one of the CSE meetings was "tainted" when the transcriber was instructed to halt the recording, that the CSEs failed to develop appropriate post-secondary transition services or goals for the student, and that the district failed to implement the student's pendency placement (compare Due Process Compl. Notice at p. 2, with Amended Due Process Compl. Notice at pp. 1-28).

[10] Other aspects of the CSE composition claim(s) as articulated in the September 2019 due process complaint notice were reframed in the amended due process complaint notice to relate more closely to the parent's claims of predetermination and parent participation (i.e., regarding the CSE chairperson's role and the level of collaboration among committee members) (compare Due Process Compl. Notice at p. 2, with Amended Due Process Compl. Notice at pp. 20-25).

parent also requested that the IHO not send the matter back to the same CSE (id.at p. 28). Finally, the parent sought attorney's fees (id.).

D. Impartial Hearing Officer Decision

The parties participated in a second prehearing conference conducted by the IHO on October 29, 2019 (Oct. 29, 2019 Tr. pp. 1-30). During the prehearing conference, the IHO stated his recollection that the parent's amended due process complaint was expected to set forth "a statement of facts that have changed since the prior determination" relevant to the 2018-19 school year (Oct. 29, 2019 Tr. pp. pp. 18-20). Reviewing the amended due process complaint notice, the IHO found "zero allegations regarding [the student] and anything that ha[d] changed regarding [the student] from [the] 2018/2019" school year" (Oct. 29, 2019 Tr. pp. 19-20). Instead, the IHO viewed the amended due process complaint notice as presenting a "restatement of the legal arguments that have been previously proffered and adjudicated upon," along with "some of the statements made at a CSE meeting which don't appear to be necessarily appropriate" (Oct. 29, 2019 Tr. p. 20). Based on the allegations, the IHO opined that the parent could possibly "make a case on predetermination" but that "predetermination is a procedural violation" and the amended due process complaint notice did not allege substantive violations or facts underlying the same other than that which had already been adjudicated and ruled upon (Oct. 29, 2019 Tr. pp. 21-22). Based on this, the IHO stated that he was "inclined to grant the Motion to Dismiss based on collateral estoppel" (Oct. 29, 2019 Tr. p. 22).

In a decision dated November 15, 2019, the IHO granted the district's motion to dismiss (IHO Decision at p. 17). With regard to the district's argument on the ground of res judicata, the IHO found that the "first two prongs" had been met (id. at p. 6). Specifically, the IHO noted that the prior proceedings involved the same parties and that an adjudication on the merits of the parents' claims regarding the 2018-19 school year had been completed (id. at pp. 6, 13). The IHO stated that the "remaining question" was whether the claims as set forth in the parent's amended due process complaint notice pertaining to the 2019-20 school year "could have been raised" or "emerge[d] from the same operative facts as asserted in the prior adjudication" (id. at pp. 6, 13).

The IHO set forth the parent's allegations as presented in the prior proceeding relating to the 2018-19 school year (IHO Decision at pp. 6-8). The IHO compared those claims to the allegations set forth in the parent's September 2019 due process complaint notice, finding that the issues "were, in large measure, raised and subject to adjudication by [the] IHO [in the prior proceeding]" (id. at pp. 8-9). Specifically, the IHO found that paragraphs one through four of the September 2019 due process complaint notice—relating to predetermination and the CSEs' analysis of the district's ability to educate the student in-district, the CSEs' development of an appropriately ambitious IEP which would provide the student with meaningful access to the general education curriculum and had appropriate present levels of performance and goals, the appropriateness of an out-of-district placement, and LRE—had been addressed by the IHO in the prior proceeding in the district's favor and upheld by an SRO (id.). The IHO found that paragraphs five through nine and eleven of the due process complaint notice "allege[d] procedural issues

without stating any underlying facts which would rise to the level of a substantive denial" of a FAPE in the LRE (id. at p. 9).[11]

The IHO then turned to the parent's allegations as set forth in the amended due process complaint notice and noted that, aside from stating the student's name, diagnosis, and status as a student with a disability enrolled in the district and eligible for alternate assessment, the amended due process complaint notice did not state any factual allegations regarding the student (IHO Decision at p. 13). The IHO stated that, "[a]bsent any factual allegations that were not addressed in the prior litigation," the parent could not defeat the district's motion (id. at p. 14).

The IHO acknowledged that that the parent's amended due process complaint notice related to a new school year and indicated his "general[] agree[ment]" that a parent could pursue an impartial hearing on an annual basis (IHO Decision at p. 15). However, the IHO found that "such a right arises based on new facts of a student's needs" and that the parent had failed to provide factual allegations that the student's needs had changed since the 2018-19 school year (id. at pp. 15-16). With regard to the content of the amended due process complaint notice, which cited statements made at CSE meetings convened to develop the student's IEP for the 2019-20 school year, the IHO indicated that, while some of the "comments do not appear to be necessarily appropriate," without the "full transcripts" the context of the statements was not clear (id. at p. 16). The IHO found that the parent could probably "make a procedural case on 'predetermination' and that, "[a]t best," the statements cited in the amended due process complaint notice "could rise to the level of procedural violations" (id.). However, absent "factual allegations that the procedural violations denied substantive rights," the IHO found that these allegations could not survive the motion to dismiss (id.).

Finally, the IHO turned to the relief sought by the parent in the amended due process complaint notice (IHO Decision at pp. 16-17). The IHO found that the request for compensatory education could not survive because the amended due process complaint notice failed to state facts upon which a finding of a violation of the IDEA could be based (id. at p. 16). As to the parent's request for equitable relief, including an order requiring the district to hire the parent's expert to implement a hybrid program, the IHO determined that he did not have authority to mandate that the district hire a particular individual and further indicated that the request that the district implement a hybrid program had previously been denied (id. at pp. 16-17). The IHO also found that an award of attorney's fees was outside the authority of an IHO (id. at p. 17). Based on all of the foregoing, the IHO granted the district's motion to dismiss the due process complaint notice (id.).

IV. Appeal for State-Level Review

The parent appeals, seeking reversal of the IHO's dismissal of the parent's due process complaint notice on the ground of res judicata. For relief, the parent seeks "reinstatement of all of the claims articulated within [his] due process complaint [notice]," as well as attorney's fees.

[11] Paragraph 10 related to implementation of pendency, which as previously noted, the parties had resolved (Oct. 2, 2019 Tr. pp. 45-47; Due Process Compl. Notice at p. 2).

The district responds and argues that the IHO's decision should be upheld in its entirety. Further, the district argues that the parent's request for review should be dismissed for failure to comply with the practice regulations governing appeals to the Office of State Review. The district also asserts that the parent's request for attorney's fees is outside the jurisdiction of an SRO to grant.[12]

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.

[12] The IDEA does not authorize an administrative officer to award attorneys' fees or other costs to the prevailing party, and entitlement, if any, to costs must be determined by a court of competent jurisdiction (see 20 U.S.C. § 1415[i][3][B]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332 [2d Cir. 2005]; see also B.C. v. Colton-Pierrepont Cent. Sch. Dist., 2009 WL 4893639, at *2 [2d Cir. Dec. 21, 2009]; Application of a Student with a Disability, Appeal No. 11-027; Application of the Bd. of Educ., Appeal No. 09-081). Accordingly, the parent's request for attorney's fees will not be further discussed.

§ 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]).[13]

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).

[13] 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).

VI. Discussion

A. Compliance with Practice Regulations

The district contends that the parent's request for review should be dismissed as it fails to comply with Part 279 of the State regulations. Specifically, the district asserts that the request for review fails to "clearly specify the reasons for challenging the [IHO's] decision," fails to set forth a clear and concise statement of issues presented for review and grounds for reversal, and fails to set forth citations to the record (Answer at pp. 1-3, citing 8 NYCRR 279.4[a]; 279.8[c][2]-[3]). Moreover, the district contends that the parent's memorandum of law does not comply with the State regulations as it does not contain table of contents, a concise statement of the case, or a statement of the party's arguments (Answer at pp. 3-4, citing 8 NYCRR 279.8[d][1]-[2]).

With respect to the content of a request for review, State regulation provides that a request for review "shall clearly specify the reasons for challenging the [IHO's] decision, identify the findings, conclusions, and orders 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]). In addition, section 279.4(a) provides that the request for review "must conform to the form requirements in section 279.8 of this Part."

In describing content requirements, section 279.8 of the State regulations 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.

(8 NYCRR 279.8[c][1]-[3]). The regulation further states 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][4]).

Generally, 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]; 279.13; see M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]; 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]).

Initially, issues about the form and content of the parent's pleadings filed with the Office of State Review have arisen in several prior appeals involving this student, including Application of a Student with a Disability, Appeal No. 19-021, Application of a Student with a Disability, Appeal No. 18-110, Application of a Student with a Disability, Appeal No. 17-079, Application of a Student with a Disability, Appeal No. 17-015, and Application of a Student with a Disability, Appeal No. 16-040). The parent has been repeatedly cautioned that his failures to comply with the practice regulations could result in dismissal or rejection of his pleadings and, in fact, the parent's appeal was dismissed in Application of a Student with a Disability, Appeal No. 19-021 for failure to comply with the practice regulations, as well as on alternative grounds.

In the present case, the parent's request for review was one page (see Req. for Rev.). The parent indicated that he was seeking review and an "overrule" the IHO's decision, "wherein IHO dismissed [the parent's] due process complaint on grounds of 'res judicata'" (id.). The parent requested that the SRO reinstate "all claims articulated" in the due process complaint notice (id.). Under the circumstances of this case, the parent's appeal is spared from outright dismissal, in part, due to the narrow procedural grounds upon which the IHO's decision rested. That is, the parent's grievance with the IHO's findings regarding res judicata, while tersely stated, sufficiently articulates which of the IHO's rulings are presented for review. Accordingly, I decline the reject the parent's request for review for non-compliance with the practice regulations in this instance. With that said, as discussed below, the parent's request for review will not be read as an appeal of any issue other than the IHO's determination that a number of the parent's claims were barred by res judicata.

Turning next to the district's arguments regarding the parent's memorandum of law, State regulation requires that a memorandum of law "shall include a table of contents and set forth" the following:

> (1) a concise statement of the case, setting out the facts relevant to the issues submitted for review; and
>
> (2) a statement of the party's arguments, including the party's contentions regarding the decision of the [IHO] and the reasons for them, with each contention set forth separately under an appropriate heading, supported by citations to appropriate legal authority and to the record on appeal.

(8 NYCRR 279.8[d][1]-[2]).

Here, the parent's memorandum of law did not contain a table of contents. However, to the extent the memorandum of law also did not include a concise statement of the case setting out the facts or citations to the record, in this instance, given the procedural posture of this matter, attributable to the district's use of motion practice seeking summary disposition, there was little by way of facts or evidentiary record for the parent to reference. Further, the memorandum of law

does elaborate on the parent's argument from the request for review (i.e., regarding res judicata) and explain the parent's position as to why the IHO erred in his finding on the issue. Therefore, the memorandum of law will be considered inasmuch as it discusses the parent's argument that the IHO erred in his findings regarding res judicata. On the other hand, to the extent that the parent argues additional grounds for reversal of the IHO's decision solely within the memorandum of law, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of a Student with a Disability, Appeal No. 19-021; Application of the Bd. of Educ., Appeal No. 16-080). Thus, any arguments excluded from the parent's request for review and set forth solely within the memorandum of law have not been properly raised and will not be considered or addressed in this decision.[14]

B. Scope of Review

State regulation provides 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][4]). As noted above, the parent's request for review only specifically challenges the IHO's finding on res judicata (Req. for Rev.). However, a review of the IHO's decision shows that the IHO dismissed some of the parent's claims on grounds of insufficiency or failure to state a claim (IHO Decision at pp. 9, 16), and the parent did not allege in his request for review that the IHO erred in these findings.[15]

Specifically, the IHO held that the parent's due process complaint notices included claims, specifically regarding CSE composition, predetermination, and parental participation, that lacked accompanying factual allegations to support a finding that the parent's substantive rights were denied (IHO Decision at pp. 9, 16).[16] The IHO more explicitly described the claims being

[14] As a final matter, the district contends that the parent failed to timely file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review within two days after service of the request for review was completed (8 NYCRR 279.4[e]). Since all of these documents were received by the Office of State Review and the district has not allege any undue prejudice due to the allegedly untimely filing, the argument does not warrant rejection of the parent's appeal.

[15] A sufficiency challenge addresses a complaint on its face and whether the complaint lacks the elements required by the IDEA. The IDEA provides that a due process complaint notice shall include the student's name and address of the student's residence; the name of the school the student is attending; "a description of the nature of the problem of the student relating to the proposed or refused initiation or change, including facts relating to the problem"; and a proposed resolution of the problem (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]). In most instances when a challenge to the sufficiency of a due process complaint notice is timely made, an impartial hearing may not proceed unless the due process complaint notice satisfies the sufficiency requirements (20 U.S.C. § 1415[b][7][B]; 34 CFR 300.508[c-d]; 8 NYCRR 200.5[i][2]-[3]). If there has been an allegation that a due process complaint notice is insufficient, the IDEA and federal and State regulations provide that the party receiving the due process complaint must notify the hearing officer and the other party in writing of their challenge to the sufficiency of the complaint within 15 days of receipt thereof (20 U.S.C. § 1415[c][2][A], [C]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]; [i][6][i]). An IHO must render a determination within five days of receiving the notice of insufficiency (see 34 CFR 300.508[d][2]; 8 NYCRR 200.5[i][6][ii]). If a receiving party fails to timely challenge the sufficiency of a due process complaint notice, the due process complaint must be deemed sufficient (20 U.S.C. § 1415[c][2]; 34 CFR 300.508[d][1]; 8 NYCRR 200.5[i][3]).

[16] To be clear, the parent's amended due process complaint notice includes several claims that are framed with

dismissed on this ground by referencing the parent's September 2019 due process complaint notice (IHO Decision at p. 9). The IHO identified claims set forth in paragraphs five through nine and eleven of the due process complaint notice as "procedural issues without stating any underlying facts which would rise to the level of a substantive denial" of a FAPE in the LRE (id. at p. 9). These included claims alleging that the CSE chairperson failed to "appropriately comport the CSE membership," the district attempted to inappropriately exert influence on CSE membership, the district failed to facilitate the presence of a representative of the out-of-district educational placement, the district tainted the recording of a CSE meeting by instructing the transcriber to halt the recording, and the CSE chairperson inappropriately drafted and modified the student's IEP (compare IHO Decision at p. 9, with Due Process Compl. Notice at p. 2). The IHO went on to find that the amended due process complaint notice failed to set forth facts which would allow these claims to survive (id. at p. 16). To be sure, the amended due process complaint notice did not repeat the allegations from the September 2019 due process complaint notice verbatim. The parent's September 2019 allegation about the recording of the CSE meeting was discontinued in the amended due process complaint (compare Due Process Compl. Notice at p. 2, with Amended Due Process Compl. Notice at pp. 1-28). Further, as alluded to above, the parent reframed some allegations (compare Due Process Compl. Notice at p. 2, with Amended Due Process Compl. Notice at pp. 20-25). However, upon reviewing the amended due process complaint notice, in conjunction with the September 2019 due process complaint notice and the IHO's decision, the following CSE composition, predetermination, and parental participation allegations were dismissed by the IHO in his final decision on grounds of insufficiency or failure to state a claim:

> Claim 3(A)(iii): The defendant district has "pre-determined" the educational program and placement of the [student] by appearing at an "annual review" CSE without even bothering to require a general education CSE member to be in attendance, by dismissing another CSE member prior to soliciting a placement recommendation, by failing to collaborate with the CSE membership, and by failing to abide by evaluative reports
>
> * * *
>
> Claim 3(A)(v): The defendant district has "pre-determined" the educational program and placement of the [student] by failing to invite the representative of the district to which the CSE Chairperson ultimately recommended placement
>
> * * *
>
> Claim 5: The defendant district has violated the [student's] IDEA based rights by failing to consider the complainant's parent's concerns and input, and by moreover allowing the CSE Chairperson

reference to the district's "predetermination," some of which fell under the IHO's finding of res judicata, discussed below (see Amended Due Process Compl. Notice at pp. 19-24).

> and Director of Pupil Personnel to unilaterally craft the complainant's IEP[17]

(Amended Due Process Compl. Notice at pp. 20-25).

Therefore, to the extent that the IHO dismissed these claims on grounds of insufficiency or failure to state a claim (rather than res judicata) and the parent does not appeal the IHO's dismissal of these issues, the parent has abandoned appeal of these issues and they will not be further addressed. Likewise, to the extent that the IHO dismissed aspects of the parent's requested relief as beyond the scope of his authority to award—i.e., the parent's request for an order requiring the district to hire an expert to supervise the implementation of a hybrid program and the parent's request for attorney's fees (IHO Decision at pp. 16-17)—the parent also did not allege in the request for review that the IHO erred in these findings and, therefore, appeal of these determinations have also been deemed abandoned and will not be further discussed.[18]

As a final note, the parent appears to have raised the issue of retaliation in the amended due process complaint notice as follows:

> Claim 5: The defendant district has violated the complainant's IDEA based rights by committing to maintaining its abject refusal to even consider educating the complainant within the general education setting and his home community, so as inflict retaliation against the complainant for commencing federal lawsuits against the defendant district

(Amended Due Process Compl. Notice at p. 27). The parent does not pursue this claim in the request for review, in that the parent does not allege that the IHO erred in failing to address it or erred in otherwise dismissing it under one of the grounds discussed herein. Moreover, even if this claim was not abandoned and to the extent the allegation falls under the guise of 42 U.S.C. § 1983 (section 1983) or section 504 of the Rehabilitation Act of 1974 (section 504), 29 U.S.C. § 794(a), an SRO would not be empowered to address the claim. As compensatory damages are not available in the administrative forum under the IDEA, neither an IHO nor an SRO has jurisdiction to award any remedy for a claim under section 1983 (see Taylor v. Vt. Dep't of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ. of Newburgh Enlarged City Sch. Dist., 288 F.3d 478, 483 [2d Cir. 2002]; see also R.B. v. Bd. of Educ. of the City of New York, 99 F. Supp. 2d 411, 418 [S.D.N.Y. 2000]). Further, there is no indication in the hearing record that, in this case, the district appointed the IHO to hear section 504 claims through the IDEA impartial hearing procedures (see 34 CFR 104.36). And State law does not make provision for review of section

[17] The parent's amended due process complaint notice included two claims numbered "5" (see Amended Due Process Compl. Notice at pp. 24, 27). The above referenced "[c]laim 5" is the first of the two set forth in the amended due process complaint notice.

[18] With regard to relief, the IHO also determined that the parent's request for compensatory education could not survive the motion to dismiss because the parent had not stated a ground upon which relief could be granted (IHO Decision at p. 16). In light of the below discussion of the IHO's res judicata determination and the remand of several claims, the parent's request for compensatory education is also remanded.

1983 or section 504 claims through the State-level appeals process authorized by the IDEA and the Education Law (see Educ. Law § 4404[2] [providing that SROs review IHO determinations "relating to the determination of the nature of a child's handicapping condition, selection of an appropriate special education program or service and the failure to provide such program"]). Therefore, an SRO has no jurisdiction to review any portion of the parent's claims regarding retaliation (see A.M. v. New York City Dep't of Educ., 840 F. Supp. 2d 660, 672 n.17 [E.D.N.Y. 2012] ["Under New York State education law, the SRO's jurisdiction is limited to matters arising under the IDEA or its state counterpart"]; see also D.C. v. New York City Dep't of Educ., 950 F. Supp. 2d 494, 507 [S.D.N.Y. 2013]). As such, given the lack of jurisdiction, this claim will not be further discussed and will not be among the claims remanded to the IHO.

C. Res Judicata & Remand

In the memorandum of law accompanying the parent's request for review, the parent elaborates on his challenge to the IHO's res judicata determination. The parent argues that: there has been no prior proceeding on the merits of the issues pertaining to the 2019-20 school year; that the claims pertaining to the 2019-20 school year differed from those addressed for prior school years; that the parties in the prior proceedings differed from the current proceeding in that different individuals served as members of the CSEs for the 2019-20 school year; and that the claims pertaining to the 2019-20 school year could not have been raised in the prior proceedings.

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]).[19] 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).[20] 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]).

[19] Although during the prehearing conference the IHO stated his inclination to dismiss the parent's claims on the grounds of collateral estoppel, in the final decision, the IHO rested on res judicata (IHO Decision at pp. 5-17 ; Oct. 29, 2019 Tr. p. 22).

[20] 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]).

Here, even assuming for the sake of argument that the first two elements of the res judicata principles were met in this case, the IHO erred in finding that the parent's claims pertaining to the 2019-20 school year were raised, or could have been raised, in the prior proceedings about the 2018-19 or earlier school years. The last proceeding for this student involved claims concerning a CSE meeting that took place on May 22, 2018, as well as the resultant IEP created during that meeting for the student's 2018-19 school year (see Application of a Student with a Disability, Appeal No. 19-021). In the State-level administrative decision regarding the 2018-19 school year, the SRO addressed the parent's allegations that the district denied the student a FAPE: by failing to consider alternate assessment when developing the student's present levels of performance in the May 2018 CSE; by failing to provide the student with access to the general education curriculum in the May 2018 IEP; by failing to align the student's annual goals in that IEP with grade-level learning standards; or by recommending in that IEP a 12:1+1 special class placement in a life skills program located at an out-of-district public school as the student's least restrictive environment (LRE) (see id.).

In the present proceeding, it can be gleaned from the allegations that CSEs purportedly met on June 19, July 21, and August 25, 2019 to develop the student's IEP for the 2019-20 school year (see Amended Due Process Compl. Notice at p. 4, 7, 9, 11). The claims as set forth in the parent's amended due process complaint notice, which the IHO dismissed on res judicata grounds, are as follows:

> Claim 1(A): The complainant herein asserts a violation of his rights, as protected by the IDEA, by claiming that he has been denied access to the general education curriculum for purposes of facilitating appropriate curriculum modification
>
> * * *
>
> Claim 1(B): The complainant herein asserts a violation of his IDEA based rights, by claiming that his present levels of academic performance (PLEPS) have not been developed through the utilization of appropriate assessments
>
> * * *
>
> Claim 1(C): The complainant herein asserts a violation of his IDEA based rights, by claiming that his academic goals have not been aligned with grade level learning standards.
>
> * * *
>
> Claim 1(D): The complainant herein asserts a violation of his IDEA based rights, by claiming that without the provision of the general education curriculum, as well as the grade level learning standards, it remains impossible for any CSE to develop appropriately ambitious academic goals.
>
> * * *

> Claim 2(A): The defendant district has failed violated the twin doctrines of "LRE" and "portability", by failing to meaningfully consider the internal utilization of the full range of services profiled along the "continuum of services" which includes a hybrid program, as well as the full range of placements, profiled within the "continuum of placements"
>
> * * *
>
> Claim 2(B): The defendant remains fully capable of satisfactorily addressing the unique and individualized educational needs of the complainant internally
>
> * * *
>
> Claim 3(A): The defendant district has "pre-determined" the educational program and placement of the complainant because it failed to undertake a meaningful analysis regarding its ability to employ its special education resources towards addressing the complainant's unique and individualized needs.
>
> * * *
>
> Claim 3(A)(i): The defendant district has evidenced its "pre-determination" of the complainant by failing to provide [the student] with access to the general education curriculum for purposes of facilitating appropriate curriculum modification
>
> * * *
>
> Claim 3(A)(ii): The defendant district has evidenced its "pre-determination" of the complainant by failing to meaningfully explore even the possibility of educating [the student] within the LRE
>
> * * *
>
> Claim 3(A)(iv): The defendant district has "pre-determined" the educational program and placement of the complainant by simply adopting a previous CSE recommendation without conducting any independent analysis whatsoever for the current academic year

(Amended Due Process Compl Notice at pp. 3-20, 22-23).[21]

[21] As with the claims discussed above in the scope of review section, the IHO more explicitly described his findings by referencing the parent's September 2019 due process complaint notice and then went on to conclude that the additional allegations in the parent's amended due process complaint notice did not save the claims from

The IDEA requires that a student's IEP be reviewed periodically, but not less frequently than annually, and revised as appropriate (20 U.S.C 1414[d][4][A]; 34 CFR 300.324[b][1][i]; see also Educ. Law § 4402[2]; 8 NYCRR 200.4[f]), and, in examining a district's offer of a FAPE, each school year is treated separately (see J.R. v. New York City Dep't of Educ., 748 Fed Appx 382, 386 [2d Cir. Sept. 27, 2018]; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]). In the present case, the different time frames and the disparate motivations between the CSEs convened to plan for the student's 2019-20 school year and the CSEs convened to plan for the student's earlier school years weigh against a finding that the issues raised by the parent in the prior proceeding(s) concerning the earlier school years arose from the same nucleus of facts as the claims in the present matter (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 294 [D.D.C. 2011] [noting that, in determining whether the same nucleus of facts is at issue, consideration is given to '"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"'] [internal citations omitted]).

To be sure the parent's claims in the present proceeding are very similar to those alleged in the proceedings leading up to and culminating in Application of a Student with a Disability, Appeal No. 19-021 and, as the SRO noted in that matter, "the review and revision of a student's IEP—even annually—does not occur in a vacuum" and it may be appropriate for a decision-maker to review issues that arise with a student's IEP in context; however, the SRO in that proceeding also made fact determinations on an evidentiary record that was presented by the parties. Thus it is important to take into account prior school year determinations and the extent to which a student's needs have changed, the progress the student has made since his previous IEP was developed, and the extent to which the district's available continuum of programs have changed during the intervening period, if at all.[22] The extent to which these conditions have changed over time must be either established through facts stipulated by the parties, or determined based upon a hearing record developed during an evidentiary hearing. Along these lines, the IHO in this proceeding was asking a critically important question for the efficient resolution of this proceeding, namely what facts had changed since the determinations in the last administrative proceeding (see, e.g., Oct. 29, 2019 Tr. pp. 18-20). However, the IHO went too far in requiring the parent (the nonmoving party in the motion seeking dismissal of the claims) to come forward with facts prior to an evidentiary hearing and ultimately dismissing claims on res judicata and sufficiency grounds.[23] The IDEA

dismissal (IHO Decision at pp. 8-9, 14-16). Also as with the claims discussed above, the amended due process complaint notice did not restate, verbatim, the claims from the September 2019 due process complaint notice (compare Due Process Compl. Notice at pp. 1-3, with Amended Due Process Compl. Notice at pp. 1-28). Accordingly, the above articulation of the claims dismissed on res judicata grounds are stated based on a review of the IHO's decision and a comparison of the due process complaint notices.

[22] For example, for the 2018-19 school year, the district added to its continuum of available programs when it developed a new 12:1+1 special class placement for alternately assessed students at its middle school (see Application for a Student with a Disability, Appeal No. 18-110).

[23] While the subject matter of the inquiry is important, to require the parent to come forward with facts in which

requires a party to state in the due process complaint notice "the nature of the problem" including facts related thereto (20 U.S.C. § 1415[b][7][A][ii]; 34 CFR 300.508[b]; 8 NYCRR 200.5[i][1]) but does not require parents to plead their claims with particularity.[24] A better practice more in line with the goal of reaching a determination on substantive grounds may be to limit the scope of the hearing to relevant factual matters that differ compared to the prior school year(s). To facilitate this, the IHO could, upon notice to the parties, adopt the legal principals discussed in a prior matter involving the student and limit the hearing to factual matters related to the student's needs or the district's available continuum as they may relate to application of the legal standard. The parent should be provided an opportunity to be heard with regard to facts since the events underlying the last proceeding, but need not be provided an unrestrained right to elicit facts to support legal arguments that have been rejected previously. For example, the parent does not have to be heard anew on the issue of whether the school district is legally required to create a new class to address his son's needs, but there should be a limited inquiry as to whether the district has, since the 2018-19 school year, created a program in district that could appropriately address the student's needs.[25]

Based on the foregoing, the IHO erred in dismissing the parent's claims outlined above based on res judicata despite that the claims were directed at different school years.

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; 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]).

Having found that the IHO erred in finding that the issues raised in the parent's amended due process complaint notice were barred under the doctrine of res judicata, it is necessary to

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the district—not the parent—had the burden under State law is particularly problematic at the prehearing stage (see Educ. Law § 4404[1][c]).

[24] For example, the parent previously filed a due process complaint in March 2018 that failed to identify CSE meeting, the IEP, or the school year that formed the basis for the allegations of wrongdoing on the a part of the district (see Application of a Student with a Disability, Appeal No. 18-110), which would clearly be problematic from a factual standpoint, but the complaint is not so infirm in this case.

[25] For example, in Application of a Student with a Disability, Appeal No. 17-079, the SRO held that a district is able under the continuum of services to recommend an educational program outside of the district. "The continuum may instead include free public placements at educational programs operated by other entities, including other public agencies or private schools." (T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 165 [2d Cir. 2014]). This is consistent with State law, which allows districts to '[c]ontract[] with other districts for special services or programs' (Educ. Law § 4401[2][b])" (Application of a Student with a Disability, Appeal No. 17-079). However, the SRO in that appeal noted that the district's inability to educate the student within district one year, does "not absolve[] [it] of its obligation to continue to attempt to educate the student in the school he would have attended if not disabled unless the student's IEP requires some other arrangement (see 8 NYCRR 200.4[d][c][4][ii][b])" (id.).

remand this case to the IHO to render substantive determinations regarding the appropriateness of the student's IEP for the 2019-20 school year based on the allegations set forth in the parent's amended due process complaint notice, detailed above. Upon remand, the district should be prepared to defend against the alleged claims by presenting evidence regarding why the CSE made the recommendation that it did and whether the student's needs and progress remained constant such that a placement recommendation similar to prior school years continued to be appropriate for the 2019-20 school year.[26]

VII. Conclusion

For the reasons stated above, this matter is remanded back to an IHO to determine whether the district offered the student a FAPE for the 2019-20 school years and address the issues described above. The remaining findings of the IHO are undisturbed.

THE APPEAL IS SUSTAINED IN PART.

IT IS ORDERED that that the IHO's decision, dated November 15, 2019, is hereby modified by reversing that portion that dismissed the parent's claims based on the doctrine of res judicata;

IT IS FURTHER ORDERED that the matter be remanded to the same IHO who issued the November 15, 2019 decision to determine whether the district offered the student a FAPE for the 2019-20 school year based upon the issues listed above, and what relief, if any, the parent may be entitled to;

IT IS FURTHER ORDERED that, if the IHO who issued the November 15, 2019 decision is not available to conduct a proceeding, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
December 26, 2019

JUSTYN P. BATES
STATE REVIEW OFFICER

[26] Upon remand, the IHO is strongly encouraged to conduct a prehearing conference for the purpose of identifying agreed upon fact between the parties and narrowing the issues that remain outstanding (8 NYCRR 200.5[j][3][xi]).