The University of the State of New York

The State Education Department
State Review Officer
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No. 21-170

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

Appearances:
The Law Office of Elisa Hyman, PC, attorneys for petitioners, by Erin O'Connor, Esq.

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which dismissed with prejudice their request that respondent (the district) fund independent educational evaluations (IEEs) of the student. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The student received special education services through the Early Intervention Program (EIP) and, in February 2018, developmental, educational, speech-language, and occupational therapy (OT) assessments of the student were completed (see Parent Exs. C; D; E; F). As part of the student's transition from the EIP to the Committee on Preschool Special Education (CPSE), a psychological evaluation, behavioral observation, social history, and home language survey were conducted in June 2018 (see Parent Exs. G; H; I; J). According to the parent, the district conducted a reevaluation of the student in January 2019 (see Dist. Ex. 3 at p. 3). As part of the student's "Turning 5" transition to school-aged programming under the CSE, the district conducted a teacher interview and classroom observation of the student in February 2020 (see Parent Ex. M).

In a due process complaint notice dated September 8, 2020, the parents alleged that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years (Dist. Ex. 3). The September 2020 due process complaint notice underlies proceedings that will hereinafter be referred to as "proceeding I." Among the allegations set forth in the September 2020 due process complaint notice, the parents alleged that "[f]or all the evaluations and reevaluations conducted, the [district] failed to follow the procedural requirements of the IDEA" and "did not adequately evaluate the student in every area of suspected disability," specifically indicating that the district failed to conduct a neuropsychological evaluation, a diagnostic evaluation by an expert in the area of the student's disability, a functional behavioral assessment (FBA), an assessment of visual processing, an auditory processing assessment, an assistive technology assessment, or an assessment of the degree of the student's regression during breaks (id. at p. 8). The parents expressed their disagreement with "the evaluations and reevaluations conducted" by the district and asserted that the district should fund IEEs (id.).[1] As relief, the parents requested that an IHO order evaluations "on an interim basis to inform the record" at district expense, including neuropsychological, speech-language, OT, auditory processing, assistive technology, and visual processing evaluations, as well as an observation by an expert in behavior and an FBA (id. at p. 15).

In a letter dated October 6, 2020, the parents requested a copy of records from the district and further stated that the parents "wish[ed] to inform" the district of their disagreement with the district's "most recent evaluations of the Student" (Parent Ex. B). The parents requested district funding of IEEs and listed the same evaluations/assessments listed in the September 2020 due process complaint notice (compare Parent Ex. O at pp. 3-4, with Dist. Ex. 3 at p. 15).

By prior written notice dated October 13, 2020, the district acknowledged the parents' October 6, 2020 request for IEEs (Parent Ex. O). The prior written notice indicated that the district proposed to authorize district funding for neuropsychological, speech-language, OT, and audiological IEEs (id. at p. 2). The district proposed to conduct an assistive technology evaluation and FBA (id.). Finally, the district denied the parents' request for a vision processing evaluation but "requested additional information regarding the rational[e] for this request" (id.). Based on the parents' request for IEEs, the district also indicated it would "open a reevaluation" of the student (id. at p. 3). It is unclear from the hearing record whether the parents responded to the district's proposal.

The parents' September 2020 due process complaint notice was assigned to an IHO ("IHO I") (see Parent Ex. N at p. 1). In a motion dated February 5, 2021, the parents requested that IHO I issue an interim order for IEEs, which the district opposed in a response dated February 12, 2021 (Dist. Exs. 4; 5).[2] In an interim decision dated March 9, 2021, IHO I denied the parents' request

[1] It is very common in due process proceedings in this State to refer to an independent comprehensive evaluation that is made up of multiple assessments by different individuals/disciplines as a series of IEEs (in the plural) rather than as a singular (IEE) because it becomes very difficult for parties and IHOs to distinguish one component of the IEE from another. This decision similarly treats the

[2] The copy of the parents' motion included in the hearing record does not include attachments to the motion despite reference thereto in the motion itself (see Dist. Ex. 4).

for IEEs (Parent Ex. N).[3] Specifically, IHO I found that the parents had not expressed disagreement with evaluations conducted by the district prior to their September 2020 due process complaint notice and, therefore, did not have a right to IEEs (id. at p. 3). IHO I further found that IEEs "were unwarranted" (id.).

A. Due Process Complaint Notice and Subsequent Events

After the interim decision was issued by IHO I, the parents file a separate due process complaint notice dated April 1, 2021, in which they sought district funding of IEEs (Dist. Ex. 1). The April 2020 due process complaint notice underlies proceedings that will hereinafter be referred to as "proceeding II." In their second due process complaint, the parents alleged that, to date, the district had not responded to the parents' request for IEEs set forth in their September 2020 due process complaint notice (id. at pp. 1-2). The parents requested district funding for neuropsychological, speech-language, OT, vision processing, and assistive technology IEEs, as well as an observation by an expert in behavior (id. at p. 2).[4]

The parents requested that the April 2021 due process complaint notice be consolidated with proceeding I (Dist. Ex. 1 at p. 3). In an interim decision dated April 15, 2021, IHO I denied the parents' request for consolidation, finding that "significant proceedings" had already occurred in proceeding I and consolidation would not be in the interest of the student or further judicial economy (Parent Ex. P).

A different IHO was assigned to proceeding II (see IHO Decision at p. 3). As part of proceeding II, on April 22, 2021, the parents amended their due process complaint notice to add reference to the parents' October 2020 letter to the district stating their disagreement with the district's evaluations and requesting district funding of IEEs (Parent Ex. A).

B. Impartial Hearing Officer Decision and Subsequent Events

The district filed a motion, dated May 21, 2021, arguing that proceeding II should be dismissed on the grounds of res judicata (Dist. Ex. 7), which the parents opposed (IHO Ex. I). An impartial hearing in proceeding II convened on July 28, 2021, at which IHO II and the parties discussed the district's motion (Tr. pp. 1-34).

In a decision dated July 4, 2021, IHO II dismissed the parents' April 2021 due process complaint notice as barred by the doctrine of res judicata (IHO Decision).

IHO II examined the parents' position that IHO I did not take into account the October 6, 2020 request for IEEs and did not rule on the merits of the parents' request for IEEs (IHO Decision at pp. 7-9). IHO II noted that, in their motion to IHO I requesting an interim order for IEEs, the

[3] The hearing record contains duplicative exhibits (compare Parent Exs. A; N, with Dist. Exs. 2; 6). For purposes of this decision, only parent exhibits are cited in instances where a parent and district exhibit are identical.

[4] The April 2021 due process complaint notice did not include a request for an auditory processing IEE or an independent FBA, which the parents had requested in the September 2020 due process complaint notice (compare Dist. Ex. 1 at p. 2, with Dist. Ex. 3 at p. 15).

parents stated that they could show the IEEs were warranted and the question of the October 6, 2020 letter was argued before IHO I (id. at pp. 7-8). IHO II further examined IHO I's decision noting that IHO I had decided, not only that the parents did not have a right to IEEs but that, in addition, the evaluations were "unwarranted" and the parents' requested relief was "denied in all respects" (id. at pp. 9, 12). Thus, IHO II found support in IHO I's decision for the conclusion that IHO I addressed the issue of IEEs on the merits and made a final determination, despite that the order was contained in an interim decision (id. at p. 9). IHO II indicated that the parents' course was to seek appeal of IHO I's decision if they disagreed with the ruling, not proceed with a new due process complaint notice (id. at p. 12).

Further, IHO II examined the parents' position that proceeding II was not barred because the allegations underlying proceeding II were based on the parents' October 2020 letter stating disagreement with district evaluations and requesting IEEs, whereas IHO I had dismissed their request for IEEs in proceeding I because the parents had expressed disagreement with district evaluations in their September 2020 due process complaint notice (IHO Decision at pp. 5-7). IHO II examined the statutory and regulatory provisions permitting a parent to seek an IEE and highlighted that a parent may only seek one IEE at public expense each time the agency conducts an evaluation, "[n]ot every time a parent disagrees (or requests an IEE)" (id. at p. 6). IHO II continued, noting "[i]t is not each time that a parent makes a request, unconnected to the district's evaluation at issue, with a corresponding failure to respond in one of the permissible ways, that a separate violation under the IDEA occurs" (id.). IHO II considered the "nonsensical" consequences of an alternative interpretation including that a district would have to file due process complaint notices to defend evaluations for each parent request even if the evaluations at issue were the same and even if the district had already successfully defended its evaluations (id.). Thus, IHO II disagreed that the district's alleged failure to respond to the parents' October 6, 2020 letter constituted a separate violation under the IDEA which would permit the parents to proceed with a separate due process complaint notice (id. at p. 7). IHO II also did not find merit to the contention that IHO I's decision not to consolidate proceedings I and II was based on a finding that the October 6, 2020 letter post-dated the September 2020 due process complaint notice and, therefore, was a separate violation (id.).

Based on the foregoing, IHO II found that the parents' claims as raised in the April 2021 amended due process complaint notice had been adjudicated upon previously and, therefore, were barred by the doctrine of res judicata (IHO Decision at p. 12). IHO II dismissed the parents' claims with prejudice (id. at p. 13).

After IHO II's July 4, 2021 decision in proceeding II, on July 6, 2021, IHO I issued a final decision in proceeding I (Req. for Rev. Ex. B). In the July 2021 decision in proceeding I, IHO I found that, in addition to the reasons for denying the parents' request for IEEs set forth in the March 2021 interim decision, the district had "successfully defended its evaluations, which were thorough and comprehensive" (id. at p. 9). Accordingly, in proceeding I, IHO I found that the parents did not have a right to IEEs at public expense (id.).[5]

[5] The parents have also filed an appeal of IHO I's decision in proceeding I. As of the date of this decision, that appeal is currently pending under SRO appeal number 21-172.

IV. Appeal for State-Level Review

The parent appeals from the final determination in proceeding II, arguing that IHO II erred in dismissing the parents' April 2021 amended due process complaint notice as barred by res judicata.

Procedurally, the parents argue that the district's motion to dismiss proceeding II was untimely as the IDEA requires a motion challenging the sufficiency of a due process complaint notice must be made within 15 days.[6]

As for the merits of IHO II's decision, the parents argue that IHO II erred in finding that IHO I's interim decision was a final determination given that it was an interim decision and proceeding I was still pending. In addition, the parents allege that IHO I's interim decision denying IEEs was based on the manner in which the parents requested IEEs and not based on whether the district evaluations were appropriate. The parents allege that, although IHO I stated "in a cursory manner" that he was denying the IEEs pursuant to 34 CFR 300.502(d), he did not engage in a substantive discussion of whether the IEEs were warranted or whether they were necessary to inform the record. The parents argue that res judicata cannot apply in the absence of a final determination on the merits. The parents further argue that, since they appealed IHO I's decision, there still is not a final determination which would warrant application of res judicata. The parents likewise argue that collateral estoppel cannot apply since there has been no determination of the merits of their request for IEEs. IHO II, argue the parents, could have taken other action besides dismissal with prejudice, such as staying proceeding II, dismissing it without prejudice, enjoining the parties from proceeding, or consolidating the two actions.

In addition, the parents allege that IHO II erred in finding that the parents' claims asserted in proceeding I and II were the same such that proceeding II was barred by res judicata. The parents argue that their October 2020 letter and the district's failure to respond thereto occurred after the filing of their September 2020 due process complaint notice in proceeding I and, therefore, could not have been included as a claim in proceeding I. The parents also allege that the claims differed in that the parents sought an order for interim IEEs in proceeding I, whereas they sought a final order for IEEs in proceeding II. The parents also indicate that IHO I denied their request for interim IEEs "merely because [the parents] requested IEEs for the first time in their" due process complaint notice.

Next, the parents argue that they were entitled to IEEs as a matter of law when the district failed to respond to their requests.

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[6] The parents' argument that the district's motion was untimely is not persuasive. The parents' reference to the requirement that a motion be brought within 15 days of the filing of the due process complaint notice relates to a challenge to the sufficiency of the due process complaint notice, rather than to a motion to dismiss on res judicata grounds (see 8 NYCRR 200.5[i][1], [3], [6]). 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]).

The parents request that their appeal of IHO II's decision should be consolidated with their appeal of IHO I's decision as the matters "should have been consolidated below and are related." Further, the parents assert that IHO II's dismissal of their claim should be reversed and the IEEs awarded. In the alternative, the parents request that IHO II's dismissal of proceeding II with prejudice be reversed and that the matter be dismissed without prejudice with leave to renew subject to the resolution of proceeding I.

In an answer, the district responds to the parents' material allegations with admissions and denials and request that IHO II's decision be affirmed.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

VI. Discussion

Turning to the parents' appeal of IHO II's dismissal of their April 2021 amended due process complaint notice, one can banter the finer points of which legal theory proceeding II should fall under, but there is no doubt that the parents in this case have engaged in duplicative litigation and that it is not permitted in the administrative due process forum. 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]). In both proceeding I and proceeding II, the parents alleged that publicly funded IEEs are required and should be awarded to the them because they objected to the evaluations that the district conducted. (Parent Ex. A; Dist. Exs. 1-3). They are not separate issues, and as the IHO correctly pointed out "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The parents' actions of commencing multiple due process proceedings to request the same IEE achieves little except to clog the due process system needlessly. The motion to dismiss in proceeding II, in my view, is very much analogous to a motion to dismiss when there is "another action pending between the same parties for the same cause of action" under New York's Civil Practice Law and Rules (CPLR 3211[a][4]),[7] which function similarly to the provisions permitting separate due process complaints on separate issues in 20 U.S.C. § 1415(o). Both leave room to prevent litigants from engaging in duplicative litigation, pursuing the same claims in two different proceedings at the same time, which is exactly that the parents did in these circumstances. On this basis, I find the IHO did not err in dismissing the parents' due process complaint notice in proceeding II.

I would end the discussion there, but both parties and the IHO addressed the matter on "res judicata" grounds as well. Accordingly, I will discuss the elements of that doctrine as well. 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

[7] There is no formal, explicit adoption of the CPLR procedures in administrative due process proceedings under IDEA, just as the technical rules of evidence do not formally apply. However, administrative hearing officers have at times found the elements and principles underlying the CPLR or the federal rules of civil procedure, if used cautiously and consistently with all IDEA-specific caselaw and regulations, to be a useful, familiar framework when filling in gaps to structure the administrative proceedings, especially when the IDEA hearing framework is silent and needs to be fleshed out in order to conduct the proceeding in a fair and reasonable manner.

[8] Additionally, while the "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]).

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]).[9]

As to the first element, the parents allege that IHO I's interim decision was not a final determination on the merits of the IEE issue and, further, that the parents' appeal of IHO I's decision precludes a finding that the decision is final. The parents were correct as to that element of that test at the time IHO II's final decision was rendered, but their victory was extremely short lived. Although at the time of IHO II's decision the question of the IEEs had been addressed in proceeding I only in an interim decision, IHO I has since issued a final decision in proceeding I, thus rendering the parent's argument moot. Therefore, even presuming that IHO II had inaccurately characterized IHO I's interim decision as a final one, the error is not fatal to the remainder of IHO II's res judicata analysis. It would make no sense to modify IHO II's dismissal at this point, especially since IHO I subsequently rendered a final decision that further addressed the merits of the parents' IEE claims (Req. for Rev. Ex. B at p. 9). Regarding the substance of IHO I's decision, as IHO II determined, IHO I's findings were broader than his finding that the manner in which the parents requested the IEEs precluded an award of IEEs (see IHO Decision at pp. 9, 12; Parent Ex. N at p. 3) and the parents point to no authority for the proposition that a decision or order must include a detailed discussion of the rationale for the outcome in order to have preclusive effect on a subsequent proceeding. Any argument regarding IHO I's reasoning underlying his decision(s) or the lack thereof would be a subject for direct appeal from IHO I's decision but would have no impact on the preclusive effect of the decision(s). As to the parents' argument about the effect of their appeal of IHO II's decision, it has been held that a pending appeal does not deprive a decision of res judicata effect (see Straus v. Am. Publishers' Ass'n, 201 F. 306, 310 [2d Cir. 1912]; In re Adelphia Communications Corp., 2006 WL 2463355, at *4 [S.D.N.Y. Aug. 23, 2006]). Accordingly, the parents' contention that their appeal of IHO I's decision affects the finality for purposes of res judicata is without merit, and nothing productive will be achieved by remanding the matter for further duplicative litigation and collateral attacks before IHO II, who has no jurisdiction to review the actions of IHO I.

As for the second element, there is no dispute that the parties were the same in proceedings I and II. That leaves the third element of res judicata to examine, i.e., whether the claims in proceeding II were or could have been raised in proceeding I. On appeal, the parents reiterate their arguments that they made to IHO II on this issue, i.e., arguing that the parents' October 2020 letter to the district requesting IEEs and the district's failure to respond thereto created a new violation

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[9] The doctrine of collateral estoppel "precludes parties from litigating a legal or factual issue already decided in an earlier proceeding" (Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]). To establish that a claim is collaterally estopped, a party must show that:

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

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]; see Perez, 347 F.3d at 426; Boguslavsky v. Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

that the parents could pursue in a separate proceeding.[10] However, the parents have made no argument, let alone a persuasive one, that IHO II erred in finding that the parents' April 2021 amended due process complaint notice did not set forth a new claim. IHO II thoroughly examined the parents' arguments and found them to be without merit (IHO Decision at pp. 5-7). In so finding, IHO II thoughtfully considered the statutory and regulatory context for requesting IEEs, as well as the potential consequences of the parents' interpretations of the district's obligations. Accordingly, after careful review, I agree with the conclusion reached by IHO II and adopt the findings of fact and conclusions of law as my own. That is, in stating their disagreement with the district evaluations and seeking IEEs in the September 2020 due process complaint notice, the parents chose their course. Even assuming that, contrary to IHO I's findings, it was permissible for the parents to express disagreement with district evaluations and seek IEEs in a due process complaint notice in the first instance, there is no court authority explicitly endorsing this particular means for requesting IEEs of which I am aware.[11] Therefore, by pursuing this route, the parents took the risk that a decisionmaker would not find it an appropriate means for seeking IEEs. Moreover, the parents pursued their IEEs in the due process complaint notice in the first instance notwithstanding that there were other means for pursuing their request that tend to be less ponderous than the impartial hearing process, such as through the State complaint procedure (see 8 NYCRR 200.5[*l*]). Having chosen the impartial hearing process as the mechanism for seeking their IEEs, the parents are bound by their choice and must stay the course. If they are of the opinion that IHO I erred in his determination that the parents were not entitled to IEEs, their option was to appeal that finding (Educ. Law § 4404[1]), which as noted herein they have done, and that appeal remains pending.

Finally, even if IHO II erred in finding that res judicata applied to bar the parents' claims asserted in proceeding II either based on the lack of a final decision in proceeding I at the time of IHO II's decision or some other basis, as the parents themselves allude to, the IHO alternatively had discretion to dismiss the parents' appeal based on the doctrine of claim splitting. The doctrine of claim splitting generally refers to a court's authority to manage its docket and applies when the two duplicative cases involving the same subject matter are pending simultaneously in the same court against the same defendant (Kanciper v. Suffolk Cnty. Soc'y, 722 F.3d 88, 92-93 [2d Cir. 2013], citing Curtis v. Citibank, N.A., 226 F.3d 133, 138-39 [2d Cir. 2000]). "Claim splitting" is

[10] On appeal, the parents assert for the first time that their claims in the two proceedings differed because they sought IEEs as interim relief in proceeding I and as final relief in proceeding II. However, the alleged basis for the parents' request for IEEs in both proceedings was their disagreement with the district evaluations and the district's failure to respond to the parents' requests for IEEs; accordingly, the stage of the proceedings at which the parents requested the relief be awarded is immaterial.

[11] While in past decisions, SROs have held that a parent may request a district funded IEE in a due process complaint notice in the first instance (see Application of a Student with a Disability, Appeal No. 19-094), this is not exactly the process contemplated by the IDEA and its implementing regulations (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). In the absence of further judicial guidance in this circuit on the topic, I have not yet made a decision to reverse course on this approach, but in cases such as this, it is becoming obvious that the parent is delaying the IEE request in favor of including it in their own due process complaint, then trying to use the due process procedures a second time with respect to IEEs to twist the procedures further into a weapon used merely harass the district. This is an improper use of the due process procedures. Such technical "gotcha" tactics are unnecessary, especially when the district appeared to be willing to engage with the parents by October 2020, one month after the initial request for the IEEs, and the district even agreed to pay for some IEE elements by that point.

generally seen as related to res judicata (see Curtis, 226 F.3d at 138 [noting that "the rule against duplicative litigation is distinct from but related to the doctrine of claim preclusion or res judicata"]; LG Elecs., Inc. v. Wi-LAN USA, Inc., 2015 WL 4578537, at *5 [S.D.N.Y. July 29, 2015] [noting that res judicata concerns motivate the doctrine of claim splitting]; Coleman v. B.G. Sulzle, Inc., 402 F. Supp. 2d 403, 418-19 [N.D.N.Y. 2005] [acknowledging the "close relationship between claim splitting and res judicata"]; see also Katz v. Gerardi, 655 F.3d 1212, 1218 [10th Cir. 2011] [indicating that claim splitting is examined as an aspect of res judicata]).

Here, since proceeding I was still pending at the time of the parents' April 2021 due process complaint notice, claim splitting may have been the more appropriate doctrine to apply. With two matters pending simultaneously, generally, a court (or, in this case, an IHO) may consider measures other than dismissal with prejudice as a means of managing a docket (cf. Curtis, 226 F.3d at 138 [noting that "a court faced with a duplicative suit will commonly stay the second suit, dismiss it without prejudice, enjoin the parties from proceeding with it, or consolidate the two actions"]). However, here, there was no authority in federal or State regulations upon which the IHO could base a stay of proceedings given strict regulatory timelines for IHO decision issuance (see 34 CFR 300.510[b][2], [c]; 300.515[a]; 8 NYCRR 200.5[j][5). Further, IHO I had already denied consolidation of the two proceedings (Parent Ex. P; see 8 NYCRR 200.5[j][3][ii][a]), and the possibility of an amendment to the September 2020 due process complaint notice in proceeding I was not before IHO II in proceeding II (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][i][b]). While IHO II could have considered dismissing the matter without prejudice, there is insufficient basis in the hearing record to modify IHO II's dismissal of the matter with prejudice given that the parents' request for IEEs was addressed in proceeding I.

VII. Conclusion

Having found that IHO II did not err is dismissing the parents' April 2021 amended due process complaint notice with prejudice, it is unnecessary to address the parents' argument that they were entitled to relief in proceeding II as a matter of law or their request that this appeal be consolidated with the parents' pending appeal of IHO I's decision.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
October 4, 2021

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JUSTYN P. BATES
STATE REVIEW OFFICER