The University of the State of New York

The State Education Department
State Review Officer
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No. 22-147

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:
Anne Leahey Law, LLC, attorneys for respondent, by Anne C. Leahey, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice on the basis of res judicata and collateral estoppel. 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 in this case has been the subject of 14 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; 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, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

As set forth in a previous appeal, due to the nearly continuous nature of the administrative due process proceedings and State-level administrative appeals—and related federal district court proceedings—involving this student, he has been receiving his special education program under various pendency placements since approximately the 2015-16 school year (see generally Application of a Student with a Disability, Appeal No. 22-102).

During the 2021-22 school year, the student's pendency placement arose as a result of an agreement between the parties, which was formally documented in a letter dated September 20, 2019 (September 2019 pendency agreement) and which consisted of the following, in relevant part, as the student's most recently implemented pendency placement that was in effect during this administrative proceeding:

> 2. Upon arrival at the defendant District, [the student] shall receive his scheduled related services, which consist of physical therapy, adapt[ed] physical education, speech pathology and occupational therapy. . . .
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> 3. Upon completion of his related services, [the student] will be bused to the local library for the provision of his special education instruction. . . . [A]n aide shall accompany [the student] throughout the provision of his special education instruction. [The student] shall receive three hours of special education at the library as follows: instruction shall occur for a minimum of two hours pursuant to district policy . . . ; [the student] shall receive an additional hour of instruction to makeup previously missed instruction. . . . In the event [the student's] special education teacher shall cancel instruction, [the student] shall not be sent home, but the defendant [d]istrict shall, upon its discretion, either bus [the student] to the local library with his aide, or keep him within the defendant [s]chool [d]istrict, within a safe and appropriate space, where [the student] will receive carry-over activities. . . .
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> 4. Following [the student's] school day, and at the scheduled time, [the student's] parents shall be responsible for transporting [the student] to the local library for the provision of his special instruction. During such time, the defendant [d]istrict will be responsible for providing [the student's] special instruction and [the student's] parents will be responsible for providing a suitable person to provide adult supervision for [the student]. . . . The defendant [d]istrict will be responsible for documenting any cancelled special instruction and will be responsible for making up any missed time when the provider cancels, but not if and when the parent cancels.

> 5. At any time that [the student's] aide, special education teacher, or after school support teacher shall cancel services, [the student's] parents shall be notified in the morning or as soon as possible after the [d]istrict learns of the cancellation.
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> 6. At no time, shall the defendant [d]istrict drop [the student] off at home, without [his] parents or a responsible adult being at the home to receive [the student].
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> 7. [The student's] parents shall be responsible for ensuring that a suitable person is available to receive [the student] at home. The obligation set forth herein does not waive the [d]istrict's obligation to comply with paragraph 6 above.
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> 8. Should the library become unavailable for home instruction or special instruction, due to an emergency, a library closure, or other circumstances not caused by and beyond the control of the parties, the terms above shall remain operative except that the instruction set forth in paragraphs 3 and 4 above shall take place in [the student's] home, if available. . . .

(see IHO Ex. II-A at pp. 1-3; see generally Application of a Student with a Disability, Appeal No. 22-102).[1]

A CSE meeting took place on June 17, 2021 for an annual review meeting, at which time a special class program was recommended for the student for the 2021-22 school year (see IHO Ex. II-B). In a letter to the parent dated August 25, 2021, the CSE chairperson explained that, given the parent's rejection of the "special class program" for the 2021-22 school year, the student would "continue to receive home instruction per the pendency agreement" (id.).[2] After setting forth the student's scheduled instruction pursuant to the pendency agreement, the district informed the parent that the student's then-current special education teacher would "continue to provide this instruction" to the student; however, the district indicated that "for the first few weeks of school," the student's special education teacher was not available and a "substitute teacher w[ould] provide" the student's instruction (id.).

The parent filed a due process complaint notice dated January 13, 2022, alleging that the district "unilaterally changed the instructional content being taught during the student's after-school academic support period" for the 2021-22 school year in violation of the 2019 pendency agreement by "focusing on the [student's] 'transition[] instruction" (IHO Ex. IV-A at p. 2). The

[1] Exhibits attached to the district's motion papers will be cited by reference to the IHO exhibit number followed by the letter designation assigned to the attached documents (e.g., IHO Ex. II-A).

[2] The district's director of pupil personnel services also served as the CSE chairperson and is referred to as both throughout the hearing record. Throughout this decision, this person shall be referenced as the CSE chairperson.

January 2022 due process complaint notice was the subject of a prior proceeding (hereinafter "the prior pendency proceeding").[3]

Also on January 13, 2022, the parent submitted a notice of claim, naming the district, the CSE chairperson, a private agency, and the special education teacher as defendants, and describing the nature of the claim as sounding in "Breach of Contract/Educational Negligence/Educational Malpractice" and relating to the "[p]eriod of [e]mployment of . . . [the] special education teacher for [the student], ending in December, 2021" (IHO Ex. IV-D at p. 1). The parent's subsequent summons and complaint filed in the New York State Supreme Court on February 22, 2022 contained factual allegations pertaining to the special education teacher's conduct for the period of May through December 2021 and how the district responded (IHO Ex. IV-E at pp. 4-23). In a decision dated May 3, 2022, the State Supreme Court noted that the gravamen of the parent's complaint was that "an educator assigned to [the student] was absent, was late, and was otherwise derelict in the provision of educational services to [the student]" and dismissed the parent's complaint because, among other reasons, New York State does not recognize a cause of action for educational malpractice (IHO Ex. IV-F at pp. 2-4).

A. Due Process Complaint Notice

Turning to the present matter, in a due process complaint notice, dated May 12, 2022, the parent alleged that the district failed to provide the student a free appropriate public education (FAPE) for the 2021-22 school year by failing to implement the student's pendency placement (see IHO Ex. I at pp. 1, 8). More specifically, the parent asserted that, at that time, the student had been "receiving his academic education pursuant to a 'pendency placement,'" which involved the student "receiving his academic instruction, at his local library, from a 'special education teacher' facilitated" by the district (id. at p. 1). According to the parent, the student was "supposed to be receiving the provision of a [FAPE]" (id.). The parent asserted, however, that the student's special education teacher had been "habitually late" and "habitually absent" for the student's "educational instructional sessions" (id. at pp. 1-2). For example, the parent asserted that, one day in October 2021, the special education teacher was late and "instructed" the student to wait outside during inclement weather (id. at p. 2). On a second day in October 2021, the parent alleged that the special education teacher was not at the library to receive the student for his instruction, which required an "emergency call" from the bus company to the parent (id.). In addition, the parent alleged that, on two separate dates in December 2021, the special education teacher was otherwise unfit to "render any meaningful education" (id. at pp. 5-6). Additionally, the parent alleged that the CSE chairperson knew of the issues surrounding the special education teacher, but failed to remediate the issues and acted to prevent the parent from being informed of the issues (id. at pp. 3-8). The parent asserted that the district violated the IDEA by allowing the CSE chairperson to engage in acts that threatened the employment of the student's aide (id. at pp. 3-4, 8). As relief, the parent requested an order finding that the district failed to offer the student a FAPE, awarding

[3] The IHO issued a decision in the prior pendency proceeding dated July 27, 2022, in which he granted the district's motion to dismiss and noted that "the precise teaching methodology to be used by a student's teacher [wa]s usually a matter to be left to the teacher's discretion—absent evidence that a specific methodology [wa]s necessary" (IHO Ex. IV-B at pp. 18-19). An appeal of the IHO's July 2022 decision was dismissed in a State-level administrative review decision (Application of a Student with a Disability, Appeal No. 22-102).

compensatory education, and directing the removal the CSE chairperson from "any further role or involvement upon the [student's] CSE" for the alleged violations (id. at p. 9).

B. Motion to Dismiss and Impartial Hearing Officer Decision

On May 31, 2022, the district responded to the allegations in the parent's due process complaint notice and simultaneously moved to dismiss the due process complaint notice (see generally IHO Ex. II). The district moved to have the due process complaint dismissed for its alleged insufficiency, failure to propose a resolution of the claimed issues, and failure to state a cause for proceeding; because the request for the CSE chairperson's removal was allegedly barred by res judicata; because the allegations surrounding the special education teacher were rendered moot since she no longer taught the student; and because punitive remedies are unavailable under the IDEA (id. at pp. 10-21).

On August 24, 2022, the IHO conducted a prehearing conference with the parties (Tr. pp. 1-51). During the prehearing conference, the parties and the IHO discussed the multiple matters pending before the IHO involving the same parties, including the present matter, and it was noted that the district had already submitted its answer and motion to dismiss before the prehearing conference (Tr. pp. 4-22, 30). The IHO observed that, as with the present matter, the prior pendency proceeding involving the parties—initiated by a due process complaint notice dated January 13, 2022, for which he had recently issued a decision—also contained allegations pertaining to the district's implementation of the student's pendency placement during the 2021-22 school year (Tr. pp. 31-34). The IHO opined that "it would at least at first blush appear to me that [the parent] was aware, should have been aware of his concerns with [the student's special education teacher] in the fall of 2021 and that should have been included in the January 2022 [c]omplaint" (Tr. p. 34). The parent replied that he learned about the teacher's conduct later and, further, that upon discovering the alleged misconduct by the special education teacher during the 2021-22 school year, he filed an action for educational neglect in the New York State Supreme Court but that the civil action was dismissed as it did not allege "a viable tort" in New York State (Tr. pp. 34-38). The IHO noted that "this [wa]s an issue with pendency," which "often has to do with issues that are legal issues such as . . . collateral estoppel" and gave the parent an opportunity to respond to the district's motion to dismiss (Tr. pp. 39, 48).

In the parent's opposition to the district's motion to dismiss, the parent responded to the district's arguments and, further addressed the question of collateral estoppel raised by the IHO (IHO Ex. III at pp. 1-8).[4] On September 28, 2022, the district filed a reply memorandum of law in support of its motion to dismiss (see generally IHO Ex. IV). As relevant here, the district argued that "both the [p]rior [p]roceeding and the instant [c]omplaint involve[d] the same 'nucleus of facts' relating to the implementation of the pendency agreement in the local public library during the first half of the [2021]-2022 academic year" (id. at p. 6).

[4] While the parent addressed the question of whether the complaints about the special education teacher's conduct and the district's response thereto could have been raised in "any previously filed due process complaint," he did not directly address whether they could have been raised in the complaint underlying the prior pendency proceeding (see IHO Ex. III at pp. 5-6).

In a decision dated October 24, 2022, the IHO granted the district's motion to dismiss, finding that the parent's claims had already been litigated in prior proceedings and were barred by res judicata and/or collateral estoppel (IHO Decision at pp. 13, 15-16, 18). The IHO noted that the specific allegations surrounding the student's special education teacher's conduct set forth in the parent's May 2022 due process complaint notice "were known to the parent at the time he filed his January 13, 2022 due process complaint . . . and could have been raised by the parent in that prior proceeding" (id. at p. 16). As such, the IHO determined that the "principal of res judicata preclude[d] a hearing on the parent's May 13, 2022 due process complaint . . . because the issues raised in that complaint could have been litigated in a prior proceeding involving the same parties which resulted in an adjudication on the merits" (id. at p. 15).

As to an element of the relief sought by the parent, the IHO further explained that, in a prior decision dated November 12, 2021, he "found that the parent's due process complaint [notice] failed to state a claim upon which relief could be granted because removing a pupil personnel services director from a CSE [wa]s beyond the jurisdictional limits of impartial due process hearings under federal and State law" (id. at p. 17, citing Application of a Student with a Disability, Appeal No. 21-249). The IHO concluded that, "[a]pplying the doctrine of collateral estoppel, . . . the parent [wa]s precluded from litigating that legal issue as it ha[d] already been decided in an earlier proceeding" (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in granting the district's motion to dismiss. The parent alleges that the doctrine of res judicata may only be applied to "claims that have 'emerged from the same nucleus of operative facts' as claims set forth within any formerly filed due process complaint." The parent argues that the facts leading to the claims contained in the May 2022 due process complaint notice underlying the present matter were unknown to the parent in January 2022 and did not arise from the "same nucleus of operative facts" as those in the January 13, 2022 due process complaint notice, which gave rise to the prior pendency proceeding. For these reasons, the parent alleges that the IHO erred by precluding the parent's claims pursuant to the doctrine of res judicata. The parent further argues that, to the extent the IHO relied upon the State Supreme Court's decision to find that the parent's allegations pertaining to the special education teacher were barred by the doctrine of collateral estoppel, this was error since the Court did not address whether the alleged acts demonstrated a violation of the IDEA. As to the parent's request that the CSE chairperson be removed, the parent alleges that the IHO erred in finding the request barred by collateral estoppel since neither a State Review Officer, the Commissioner of Education, nor a federal district court had addressed the question on the merits. For these reasons, the parent requests that the due process complaint notice be remanded to the IHO for further adjudication, accompanied by an instruction to the IHO that IHOs have discretion to order removal of CSE members from a CSE if appropriate.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district argues that the IHO correctly ruled that the issues raised in the parent's due process complaint notice were barred by res judicata and/or collateral estoppel. In addition, the district contends that, since the special education teacher about whom the parent complained in the due process complaint notice was no longer employed by the district,

the issues raised by the parent were moot.[5] The district also argues that the parent's request for review should be dismissed for failing to comply with State regulations governing appeals before the Office of State Review.

V. Applicable Standards

During the pendency of any proceedings relating to the identification, evaluation or placement of the student, the IDEA and the New York State Education Law require that a student remain in his or her then-current educational placement, unless the student's parents and the board of education otherwise agree (20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 170-71 [2d Cir. 2014]; Mackey v. Bd. of Educ. of the Arlington Cent. Sch. Dist., 386 F.3d 158, 163 [2d Cir. 2004], citing Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; M.G. v. New York City Dep't of Educ., 982 F. Supp. 2d 240, 246-47 [S.D.N.Y. 2013]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *20 [E.D.N.Y. Oct. 30, 2008]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 455-56 [S.D.N.Y. 2005]).[6] Pendency has the effect of an automatic injunction, and the party requesting it need not meet the requirements for injunctive relief such as irreparable harm, likelihood of success on the merits, and a balancing of the hardships (Zvi D., 694 F.2d at 906; see Wagner v. Bd. of Educ. of Montgomery County, 335 F.3d 297, 301 [4th Cir. 2003]; Drinker v. Colonial Sch. Dist., 78 F.3d 859, 864 [3d Cir. 1996]). The purpose of the pendency provision is to provide stability and consistency in the education of a student with a disability and to "strip schools of the unilateral authority they had traditionally employed to exclude disabled students . . . from school" (Honig v. Doe, 484 U.S. 305, 323 [1987] [emphasis in original]; Evans v. Bd. of Educ. of Rhinebeck Cent. Sch. Dist., 921 F. Supp. 1184, 1187 [S.D.N.Y. 1996], citing Bd. of Educ. of City of New York v. Ambach, 612 F. Supp. 230, 233 [E.D.N.Y. 1985]). A student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey, 386 F.3d at 160-61; Zvi D., 694 F.2d at 906; O'Shea, 353 F. Supp. 2d at 459 [noting that "pendency placement and appropriate placement are separate and distinct concepts"]). The pendency provision does not require that a student remain in a particular site or location (Ventura de Paulino, 959 F.3d at 532; T.M., 752 F.3d at 170-71; Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]; see Child's Status During Proceedings, 71 Fed. Reg. 46709 [Aug. 14, 2006] [noting that the "current placement is generally not considered to be location-specific"]), or at a particular grade level (Application of

[5] Here, the parent's request for compensatory pendency services to correct past wrongs, namely the district's failure to appropriately implement pendency, remains a live controversy, and, therefore, I decline to dismiss this matter as moot (see Mason v. Schenectady City Sch. Dist., 879 F. Supp. 215, 219 [N.D.N.Y. 1993] [finding that a demand for compensation to correct past wrongs remains as a live controversy even if parents are satisfied with student's current placement]; see also Toth v. City of New York Dep't of Educ., 720 Fed. App'x 48, 51 [2d Cir. Jan. 2, 2018]).

[6] In Ventura de Paulino, the Court concluded that parents may not transfer a student from one nonpublic school to another nonpublic school and simultaneously transfer a district's obligation to fund that pendency placement based upon a substantial similarity analysis (see Ventura de Paulino, 959 F.3d at 532-36).

a Child with a Disability, Appeal No. 03-032; Application of a Child with a Disability, Appeal No. 95-16).

Under the IDEA, the pendency inquiry focuses on identifying the student's then-current educational placement (Ventura de Paulino, 959 F.3d at 532; Mackey, 386 F.3d at 163, citing Zvi D., 694 F.2d at 906). Although not defined by statute, the phrase "then-current placement" has been found to mean either: (1) the placement described in the student's most recently implemented IEP; (2) the operative placement actually functioning at the time when the due process proceeding was commenced; or (3) the placement at the time of the previously implemented IEP (Dervishi v. Stamford Bd. of Educ., 653 Fed. App'x 55, 57-58 [2d Cir. June 27, 2016], quoting Mackey, 386 F.3d at 163; T.M., 752 F.3d at 170-71 [holding that the pendency provision "requires a school district to continue funding whatever educational placement was last agreed upon for the child"]; see Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 452 [2d Cir. 2015] [holding that a student's entitlement to stay-put arises when a due process complaint notice is filed]; Susquenita Sch. Dist. v. Raelee, 96 F.3d 78, 83 [3d Cir. 1996]; Letter to Baugh, 211 IDELR 481 [OSEP 1987]). Furthermore, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed" (Concerned Parents, 629 F.2d at 753, 756), and that "the pendency provision does not guarantee a disabled child the right to remain in the exact same school with the exact same service providers" (T.M., 752 F.3d at 171).

Once a pendency placement has been established, it can be changed: (1) by agreement between the parties; (2) by an unappealed IHO or court decision in favor of the parents; or (3) by an SRO decision that a unilateral parental placement is appropriate (34 CFR 300.518[a], [d]; 8 NYCRR 200.5[m][1], [2]; see Ventura de Paulino, 959 F.3d at 532; Bd. of Educ. of Pawling Cent. Sch. Dist. v. Schutz, 290 F.3d 476, 483-84 [2d Cir. 2002]; New York City Dep't of Educ. v. S.S., 2010 WL 983719, at *1 [S.D.N.Y. Mar. 17, 2010]; Student X, 2008 WL 4890440, at *23; Arlington Cent. Sch. Dist. v. L.P., 421 F. Supp. 2d 692, 697 [S.D.N.Y. 2006]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 86 F. Supp. 2d 354, 366 [S.D.N.Y. 2000], aff'd, 297 F.3d 195 [2d Cir. 2002]; Letter to Hampden, 49 IDELR 197 [OSEP 2012]). If there is an agreement between the parties on the student's educational placement during the due process proceedings, it need not be reduced to a new IEP, and the agreement can supersede the prior unchallenged IEP as the student's then-current educational placement (see Schutz, 290 F.3d at 483-84; Evans, 921 F. Supp. at 1189 n.3; Murphy, 86 F. Supp. 2d at 366; see also Letter to Hampden, 49 IDELR 197).

VI. Discussion

A. Compliance with Practice Regulations

The district contends that the request for review must be dismissed for failing to comply with State regulations governing the initiation of the review and the form requirements for pleadings (see 8 NYCRR 279.4[a]; 279.8[c][1]-[3]).[7]

[7] The parent served the request for review to a "drop box" located at a district office (see Oct. 31, 2022 Parent Aff. of Service). This method of service via "drop box" does not constitute personal service as required by State regulation (8 NYCRR 279.4[b], [c]). The parent has previously been informed of this fact (see Application of a Student with a Disability, Appeal No. 22-010), and, given the district's contention in at least one prior appeal

State regulations provide 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]). Additionally, the request for review "must conform to the form requirements in section 279.8 of this Part" (8 NYCRR 279.4[a]).

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 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[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]).

Here, the district argues that "the [r]equest for [r]eview fails to identify clearly and concisely the four issues purportedly identified in the [r]equest for [r]eview" (Answer ¶¶ 7, 8). The district further claims that the due process complaint notice contained a request for compensatory education to be awarded but argues that "[s]ince the [r]equest for [r]eview does not

initiated by the parent on the student's behalf that such service was improper, it seems unlikely that the district agreed to waive personal service (see Application of a Student with a Disability, Appeal No. 21-249). Ultimately, however, as the district does raise an issue with respect to proper service of the request for review in its answer, the parent's appeal will not be dismissed on this basis.

identify the issue of compensatory education as one of the four issues for review, the issue should be abandoned" (id. ¶ 12). The district further argues that the parent "has failed to indicate relief that should be provided," and thus the appeal should be dismissed (id. ¶ 18). The district also alleges that the "[r]equest for [r]eview fails to set forth any citations to documents contained in the [r]ecord on [a]ppeal" (id. ¶ 22). As a result, the district contends that the request for review must be dismissed for failure to comply with practice regulations.

The parent has failed to comply with the practice regulations in previous State-level administrative appeals to the extent that at least three of the parent's appeals were dismissed for the failure to comply with practice regulations (see Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019).[8] However, in this instance, for the reasons that follow, an examination of the parent's request for review fails to substantiate the majority of the district's arguments in support of dismissal for failure to comply with practice regulations.

Specifically, in the request for review, the parent numbers and identifies the IHO's rulings with which he takes exception (i.e., that his claims were precluded by res judicata or collateral estoppel) and sets forth reasons as to why he believes the findings should be reversed (see 8 NYCRR 279.4[a]; 279.8[c][2]). In support of its argument that the parent did not satisfy this requirement, the district argues that the parent misstates allegations from the due process complaint notice and findings from the IHO's decision; however, even if the parent's characterizations are not entirely consistent with his earlier allegations or the IHO's findings, the underlying intention of the appeal is apparent and the hearing record as a whole is reviewed to examine the merit and accuracy of the parent's representations. Next, while the parent does not state the relief sought in the underlying proceeding as required by State regulation (8 NYCRR 279.8[c][1]), as the ultimate relief sought in this matter is a remand to an IHO to consider the due process complaint notice, including, if necessary, whether the parent is entitled to the relief set forth therein, this is not an instance where the omission of such information warrants rejection or dismissal of the pleading. As for the relief the parent seeks from an SRO, the request for review sufficiently requests the relief of an order "to remand such claims back for appropriate adjudication" (Req. for Rev. ¶¶ 16, 17).

Finally, the parent's request for review contains multiple citations to pages and footnotes in the IHO's decision (Req. for Rev. ¶¶ 1, 2, 9, 11, 12). While the request for review does not cite

[8] In a footnote in the request for review, the parent expressed his frustration with the Office of State Review when appeals are dismissed on grounds related to "procedural issues." The parent argues that, by doing so, the Office of State Review thereby fails in its duty to impartially render decisions based on the merits of each individual case. However, the parent's characterization omits the multitude of occasions that the Office of State Review notified the parent of procedural requirements in an effort to give the parent the opportunity to remediate errors in future appeals (see Application of a Student with a Disability, Appeal No. 19-121; 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; Application of a Student with a Disability, Appeal No. 16-040).. While appearing as a pro se litigant before the Office of State Review, the parent is an attorney who should be fully knowledgeable regarding the import of compliance with the rules of procedure in New York State administrative and legal actions. Thus, without infringing on a parent's right to zealously advocate on behalf of his or her child, the failure to adhere to the procedural requirements governing practice before the Office of State Review applies to all litigants.

to the exhibits that contain the due process complaint notices underlying this and the prior matter, the IHO issued a decision prior to a substantive hearing and the only exhibits in evidence are IHO exhibits, which were not marked and entered into evidence on the record (see IHO Exs. I-VI). Under the circumstances, the parent's citations to the IHO's decision and reference to other documents by description complies with 8 NYCRR 279.8(c)(3).

Based on the foregoing, dismissal of the parent's request for review for failure to comply with State regulations governing the initiation of the review and the form requirements for pleadings is unwarranted.

B. Res Judicata

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata "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).[9] 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]).[10]

[9] While the IDEA allows a parent to file "a separate due process complaint on an issue separate from a due process complaint already filed" (20 U.S.C. § 1415[o]; 34 CFR 300.513[c]), "consolidation of multiple issues into a single complaint where such issues are known at the time of the filing of the initial complaint" are encouraged (Due Process Procedures for Parents and Children, 70 Fed. Reg. 35782 [June 21, 2005]). It has been noted in IDEA jurisprudence that "[a]lthough courts were initially hesitant to use res judicata in the administrative setting, the doctrine has consistently been applied to administrative hearings that reach a final judgment on the merits" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011]).

[10] The related 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.

Initially, it is undisputed that the prior pendency proceeding and the present matter involve the same parties and that the prior pendency proceeding resulted in an adjudication on the merits of the parent's allegations set forth therein (see IHO Ex. IV-A; IHO Ex. IV-B; Application of a Student with a Disability, Appeal No. 22-102). Accordingly, the only issue to be determined is whether the parent's claims pertaining to the special education teacher's conduct in implementing the student's pendency placement during the period of October 2021 through December 2021 and the district's response thereto were or could have been raised in the prior pendency proceeding. While allegations relating to implementation of the student's pendency placement during the 2021-22 school year were raised in the January 2022 due process complaint notice—specifically with regard to the instructional content of the after-school academic support period—in that proceeding, the parent did not assert that the student's special education teacher had been frequently tardy, absent, or unfit, or that the district had responded inappropriately to reports of the teacher's actions (see IHO Ex. IV-A). Therefore, the issue is whether such allegations could have been raised in the prior pendency proceeding as claims arising from the same nucleus of operative facts.

"In determining whether the same nucleus of facts is at issue," relevant considerations include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011] [internal quotations omitted]; see Dutkevitch v. Pittston Area Sch. Dist., 2013 WL 3863953, at *3 [M.D. Pa July 24, 2013] [identifying relevant considerations including whether the acts complained of and relief demanded were the same, whether the theory of recovery was the same, whether the material facts were the same, and whether the same witnesses and documentation would be required to prove the allegations]; see also Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 42 [D.D.C. 2013] [finding that a parent's claim that a school could not implement a student's IEP arose from the same nucleus of facts as a previously adjudicated claim that the school did not offer groups and minimal distractions]). "The fact that the suits differ in some respects, including the legal theories that [a party] is advancing and some of the facts [he or] she intends to use to prove [his or] her right to relief, is not enough to defeat a finding that the[] cases rely on the same fundamental transaction or series of transactions" (Ross v. Bd. of Educ. of Tp. High School Dist. 211, 486 F.3d 279, 283 [7th Cir. 2007]).

Here, the facts underlying the prior pendency proceeding and the current matter relate to implementation of the student's pendency placement during the same time period (compare IHO Ex. I, with IHO Ex. IV-A). The parent's theory for recovery for both matters was that the district violated the parties' agreement as to the student's pendency placement (compare IHO Ex. I, with IHO Ex. IV-A). Both matters sought compensatory education to make-up for alleged lapses or deviations from the pendency placement, with the January 2022 due process complaint notice additionally seeking an order that the district abide by the original terms of the pendency agreement and the May 2022 due process complaint notice additionally seeking removal of the CSE chairperson (compare IHO Ex. I at p. 9, with IHO Ex. IV-A at p. 2).

In addition, consistent with the IHO's findings, the hearing record supports the conclusion that the parent knew, or should have known, by the time he filed the due process complaint notice

Kaplan, 159 F.3d 715, 720 [2d Cir. 1998]).

in the prior pendency proceeding, January 2022, of the events alleged in the May 2022 due process complaint notice. For example, the parent affirmed in the May 2022 due process complaint that "[o]n or about December 20, 2021, after having an opportunity to read [the aide's] field notes, the complainant's parents inquired upon the defendant school district regarding what had occurred on December 15, 2021" (IHO Ex. I ¶ 38). The parent further affirmed that, on or about December 20, 2021, when they inquired to the district about the special education teacher's behavior, the district informed them of the details of the special education teacher's conduct on December 20, 2021 (id. ¶ 39). The parent stated that the district informed the parent that, on December 20, 2021, the CSE chairperson went to location where the student was receiving instruction to investigate the special education teacher and determined that no further investigation was required (id. ¶ 44). Additionally, the parent stated in the due process complaint notice that on October 29, 2021 the parents "forwarded a 'letter of concern'" to the district's superintendent "regarding their concerns relating to the scope of [the special education teacher's] performance" (id. ¶ 19). In other words, the parent's own statements reflect that he had concerns about the special education teacher's alleged lateness and attendance issues in late October 2021 and that he was aware of the conduct concerns regarding the special education teacher on or before December 20, 2021.

Furthermore, on January 13, 2022, the same date on which the parent filed the January 2022 due process compliant notice underlying the prior pendency proceeding, the parent also completed a verified notice of claim, which included allegations that encompassed the "[p]eriod of employment of [the special education teacher], as a special education teacher for [the student], ending in December, 2021" (IHO Ex. IV-D at p. 1). The parent's subsequent summons and complaint filed in the New York State Supreme Court, on February 22, 2022, contained the same allegations as set forth within the May 2022 due process complaint notice that initiated this proceeding (compare IHO Ex. I, with IHO Ex. IV-E).

Thus, a complete review of the hearing record supports the IHO's determination that the parent either knew or should have been aware of his concerns with the special education teacher before filing the January 2022 due process complaint notice in the prior pendency proceeding. Accordingly, the facts of this case support the IHO's finding that the allegations regarding the special education teacher's conduct, and the district's actions concerning the conduct, could have been litigated between the parties in the prior pendency proceeding.

The parent's attempt at piecemeal litigation to seek relief for alleged pendency violations for the same period of time achieves little, except to clog the due process system needlessly. The concerns underlying such an attempt is compounded in this matter since the sole claim underlying both the January 2022 due process complaint notice in the prior pendency proceeding and the May 2022 due process complaint notice in the present matter relates to pendency unconnected to the proceeding from which the student's right to a pendency placement arises. That is, because pendency operates as an automatic injunction that arises as a result of the filing of a due process complaint notice, it is not necessary for a party to assert or "invoke" the right to pendency in the due process complaint notice under the pendency provision (20 U.S.C. § 1415[j]). In other words, a pendency dispute cannot occur until after a due process complaint has been filed and, consequently, the student's right to the stay-put placement is not waived because a party fails to address it in the due process complaint notice. Instead, it is the district's responsibility upon the parent's filing of a due process complaint notice to implement the "then current educational placement" in accordance with 20 U.S.C. § 1415(j), and the parties should thereafter notify the

IHO if there is a dispute over which services constitute that educational placement so that the IHO can ensure that arrangements are made for the submission of any necessary evidence on the issue and the matter is decided while the underlying substantive claims then proceed to hearing and are resolved. Thus, as the SRO noted in the decision dismissing the appeal in the prior pendency proceeding:

> [T]he way this matter was litigated appears contrary to the intended purpose of the pendency provision and leads to a question as to what benefit a decision in this proceeding would actually have for the parties, as it is questionable whether the IHO's decision in this matter would be the controlling one with respect to other IHOs making decisions as to pendency in separate concurrent proceedings each arising out of a separate due process complaint notice. While some of the danger inherent in having concurrent proceedings that may address the same issue is mitigated here by the fact that the IHO in this proceeding is also appointed to preside over the other four proceedings involving the parties, in order to avoid the risk of having differing outcomes altogether, a better practice would have been to have consolidated this proceeding with one of the pending proceedings to at least append the pendency issue here to a specific due process complaint notice asserting substantive IDEA claims. Otherwise, not only are different outcomes concerning pendency in concurrent cases a possibility, but the existence of an essentially "free floating" pendency claim also runs the risk of acting as a de facto collateral attack on decisions in other proceedings which already have determined issues related to the validity of the September 2019 pendency agreement and the district's implementation of pendency thereunder.

(Application of a Student with a Disability, Appeal No. 22-102).

For the reasons stated above, the doctrine of res judicata applies to the matter at hand as the prior pendency proceeding between the same parties, namely the parent and the district, resulted in a decision based on the merits, and the claims alleged in the current matter arose from the same nucleus of operative facts and could have been raised in that prior proceeding.

VII. Conclusion

As discussed, the parent's appeal complied with State regulations governing the initiation of the review and the form requirements for pleadings. However, based on the above, neither the parent's arguments nor the evidence in the hearing record present a reason for departing from the IHO's determination that the doctrine of res judicata precluded the claims set forth in the parent's May 2022 due process complaint notice since those allegations could have been raised in the prior pendency proceeding.

In light of my determination, I need not address the parties' remaining arguments.[11]

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 2, 2022

STEVEN KROLAK
STATE REVIEW OFFICER

[11] In particular, having found that the underlying allegations that the district did not implement the student's pendency placement are barred by the doctrine of res judicata, it is unnecessary to review the IHO's separate finding that the parent's request for relief in the form of removal of the CSE chairperson was barred by collateral estoppel.