The University of the State of New York

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

No. 23-013

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

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Jennifer Magarinos, Esq.

The Law Offices of Neal H. Rosenberg, attorneys for respondents, by Elissa G. Stern, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from a decision of an impartial hearing officer (IHO) which determined that the respondents (the parents) resided in the district and that, therefore, the district was required to offer their son a free appropriate public education (FAPE) for the 2019-20 school year and a portion of the 2020-21 school year. The parents cross-appeal from that portion of the IHO's decision which denied in part their request for tuition reimbursement for the cost of the student's attendance at the Grove School (Grove) during the 2019-20 school year and a portion of the 2020-21 school year. The appeal must be sustained in part. The cross-appeal must be sustained.

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 attended a therapeutic wilderness program in the state of Utah from early June 2019 through the end of August 2019 (Dist. Ex. 3; see Dist. Ex. 10 at p. 1). While in attendance at the wilderness program, the student was observed to meet the criteria for the following diagnoses: persistent depressive disorder with major depressive episodes; generalized anxiety disorder; cannabis use disorder, in full remission in a controlled environment, severe; attention deficit hyperactivity disorder, predominantly inattentive presentation; other specified learning

disorder – executive functioning deficits and slow information processing; and, parent-child relational problem (Dist. Ex. 10 at p. 1). Upon discharge from the wilderness program, it was recommended that the student attend a therapeutic boarding school (id. at p. 4). The student enrolled in the therapeutic boarding program at Grove, a nonpublic school located in Connecticut, in September 2019, and on October 16, 2019, the parents executed an enrollment contract for the student's attendance (see Parent Exs. R; Q; Dist. Ex. 12).[1]

By letter dated October 18, 2019, the parent referred the student to the district's CSE for an initial evaluation and a determination of eligibility for special education (Parent Ex. M). The district asked the parents to produce proof of district residency during the initial evaluation process, and the parents did so to the satisfaction of the district (Tr. pp. 296-97; Dist. Exs. 5; 6; 39 at p. 1).

A CSE convened on February 11, 2020 and found the student eligible for special education as a student with an emotional disability (Dist. Ex. 1 at pp. 1, 19).[2] The resulting IEP, which had a projected implementation date of February 28, 2020, recommended that the student attend a 12:1+1 special class in a specialized school for 30 periods per week and receive two 45-minute sessions per week of individual counseling and one 45-minute session per week of group counseling services, all on a 12-month basis (id. at pp. 1, 12-13, 18).

In a letter dated February 28, 2020, the parents stated their understanding that the February 2020 CSE had recommended a "therapeutic day placement" and notified the district that they disagreed with the recommendation for a day placement given "clinical recommendations" for a residential placement and indicated that they had not yet received a finalized IEP or "heard from any programs" (Parent Ex. O at p. 1). "In the absence of an appropriate program recommendation," the parents notified the district of their intent to continue the student's unilateral placement at Grove and seek district funding of the costs thereof (id. at pp. 1-2).

Prior to the instant proceeding, the parents filed a due process complaint notice dated March 11, 2020 that asserted claims similar to those brought in the present matter (compare Dist. Ex. 31, with Parent Ex. X).[3]

[1] Grove is not approved as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[2] The student's eligibility for special education as a student with an emotional disability is not in dispute (see 34 CFR 300.8[c][4]; 8 NYCRR 200.1[zz][4]).

[3] The district offers, as additional evidence, a transcript of those proceedings (see Req. for Rev. SRO Ex. 1). Generally, documentary evidence not presented at an impartial hearing is considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Here, the evidence is not necessary to render a decision and, therefore, it has not been considered.

During school closures related to the COVID-19 pandemic beginning in March 2020, the student attended Grove remotely (Tr. pp. 201-03, 421).

By letter dated June 22, 2020, the parents sent the district another notice of unilateral placement in which they disagreed with the CSE's recommendation for a specialized school placement and indicated that they had not yet received notice of a school location (Parent Ex. P).

The student graduated from Grove on August 16, 2020 (see Dist. Ex. 24 at p. 10).

In a prior written notice and school location letter, both dated August 24, 2020, the district summarized the recommendations of the February 2020 CSE and notified the parents of the particular school location to which it assigned the student to attend (Dist. Ex. 36 at pp. 1-3, 8).

Based on the student's graduation in August 2020, an exit summary was prepared for the student dated December 8, 2020 (Dist. Ex. 41).

On February 16, 2021, the district concluded that the student was not entitled to attend its schools because the student had not been a district resident "as of October 18, 2019" (see Dist. Ex. 17 at pp. 2-3). On March 18, 2021, the parents filed a petition with the Commissioner of Education for review of the district's residency determination (Dist. Ex. 25; see Appeal of A.L. and E.A.-L., 61 Ed. Dep't Rep., Decision No. 18,041 [2021], available at http://www.counsel.nysed.gov/Decisions/volume61/d18041).

On March 19, 2021, the parents withdrew the March 2020 due process complaint without prejudice to refile (Dist. Ex. 33). The IHO memorialized the withdrawal in an order of termination, noting that the district did not object (id.).

On August 30, 2021, the Commissioner of Education issued a decision finding that the parents' petition that challenged the district's residency determination was moot, as the student had graduated, noting that, where the Commissioner can no longer award a petitioner meaningful relief, no live controversy remains and the appeal must be dismissed (Appeal of A.L. and E.A.-L., 61 Ed. Dep't Rep., Decision No. 18,041). Although the appeal was dismissed as moot, the Commissioner made two observations concerning the manner in which the district determined the student's residency (id.). First, the Commissioner noted that the district's argument that State regulations permit it to retroactively "correct prior residency determinations" was without merit because the regulation (8 NYCRR 100.2[y][4]) indicated that a district could make a residency determination at any time during the school year and notwithstanding any prior determination to the contrary (Appeal of A.L. and E.A.-L., 61 Ed. Dep't Rep., Decision No. 18,041 [quotations omitted]). The Commissioner noted that the regulation allows a district to make a residency determination without being bound by a previous determination but did not authorize determinations with retroactive effect (id.). Second, the Commissioner noted that the district's residency determination did not comply with State regulations providing that, prior to a residency determination, a parent or the student must be provided with an opportunity to submit information concerning the student's right to attend school in the district (id.). The parents have not appealed the August 30, 2021 decision of the Commissioner.

A. Due Process Complaint Notice

In a due process complaint notice dated November 3, 2021, the parents alleged that the district denied the student a FAPE for the 2019-20 and 2020-21 school years (Parent Ex. X). The parents alleged that their claim that the district denied the student a FAPE and their request for tuition reimbursement for the 2019-20 and 2020-21 school years was a live controversy and that, therefore, the IHO would need to make a determination regarding whether the district erred in making its retroactive residency finding (id. at p. 3). The parents contended that the district failed to recommend a timely placement for the student, and further asserted procedural and substantive claims with respect to the February 2020 IEP, including allegations relating to the parent's participation and the district's predetermination of the CSE's recommendations, the appropriateness of the February 2020 IEP's statement of the student's present levels of performance and annual goals and the recommendation for a specialized school, and the CSE's failure to recommend appropriate methodologies or a residential placement (id. at pp. 3-5). The parents also asserted that the unilateral placement at Grove was appropriate and that equitable considerations weighed in favor of an award of tuition reimbursement (id. at p. 5). The parents requested tuition reimbursement for the cost of the student's attendance at Grove during the 2019-20 and 2020-22 school years (id.).

B. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing and, on December 16, 2021, the IHO conducted a prehearing conference during which the parties discussed the prior matter that had been withdrawn without prejudice, the Commissioner's decision on the parents' appeal of the district's residency determination, and the remaining live issues before the IHO (Tr. pp. 1-16).

The impartial hearing continued on January 18, 2022, and concluded on October 28, 2022 after a total of ten hearing dates (Tr. pp. 17-471). At the January 18, 2022 hearing date, the parties submitted written and oral arguments concerning the IHO's jurisdiction on the issue of residency (Tr. pp. 17-57; see Parent Ex. Y; Dist. Ex. 42). On February 23, 2022, the IHO informed the parties of her finding that she had jurisdiction to consider the residency of the student and the parents for IDEA purposes and that, therefore, the district's motion to dismiss was denied (Tr. p. 59).

In a final decision dated December 23, 2022, the IHO reiterated her denial of the district's motion to dismiss the matter, determining that the parents could challenge the district's residency finding despite the Commissioner's dismissal of the parents' appeal as moot (IHO Decision at pp. 6-8). The IHO next considered the hearing record evidence concerning the parents' residency in the district and determined that the parents had proved residency in the district prior to and until March 20, 2020 (id. at pp. 8-10).

Turning to the parents' request for tuition reimbursement at Grove during the 2019-20 and 2020-21 school years, the IHO determined that the district failed meet its burden to prove that it offered the student a FAPE in that it did not "put on any witnesses to defend the[] IEP" and, further, had not offered evidence of "any school placement that was offered to the student" for either school year (IHO Decision at p. 15). Next the IHO determined that the unilateral placement of the student at Grove was appropriate because the residential placement and counseling it offered met the

student's needs for a therapeutic residential setting and the student made social/emotional and academic progress at Grove (id. at pp. 15-18). With regard to equitable considerations the IHO determined that the parents had cooperated with the CSE and that there were no grounds for a reduction or denial of tuition reimbursement (id. at p. 18).

For relief, the IHO ordered the district to reimburse the parents for tuition paid to Grove and to directly fund any remaining tuition balance during the 2019-20 school year "up until March 20, 2022, upon evidence of contract, attendance and payments" (IHO Decision at p. 18).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred in addressing the question of the student's residency because the parents' claim of residency was barred by the doctrine of res judicata. The district contends that the parents challenged the district's determination that they were not residents of the district in a proceeding before the Commissioner, who dismissed their claim as moot, and the parents have not appealed that decision. Relatedly, the district contends that State regulations provide for appeals of district residency determinations to be brought to the Commissioner and that, therefore, an IHO does not have jurisdiction or authority to rule on questions concerning district residency determinations. The district argues that, because the parents' appeal of the district's residency determination failed, the determination that the parents were not district residents during the time period in question stands, and the district was therefore not required to offer the student a FAPE.

Alternatively, the district argues that the IHO erred in finding that the parents resided in the district prior to and up to March 20, 2020 because the hearing record evidence showed they resided in a different district during the 2019-20 and 2020-21 school years.

For relief, the district requests a ruling reversing the IHO's findings that the district failed to offer the student a FAPE and the parents were entitled to tuition reimbursement for the student's attendance at Grove.

In an answer and cross-appeal, the parents contend that the IHO correctly determined that she had jurisdiction to rule on the student's residency for the purpose of determining which district was required to offer the student a FAPE. The parents assert that res judicata did not apply to their argument concerning residency because there was no finding on the merits of their appeal of the district's residency determination in the proceeding before the Commissioner, who ruled only that the appeal was moot due to the student's graduation. Relatedly, the parents argue that the district's February 2021 finding that the student was not a resident as of October 2019 could not be given effect because the law holds that residency determinations cannot apply retroactively. The parents also contend that State regulations provide that, prior to determining that a student is not a resident, the district must provide the parent or parents an opportunity to produce documents proving residency, which did not occur prior to the district's February 2021 residency determination. Moreover, the parents assert that prior to the December 2019 CSE they provided documentary proof of residency to the CSE, which went on to determine that the student was a resident of the district for purposes of developing an IEP for the student.

Next, the parents assert that the IHO correctly determined that the parents were residents of the district prior to March 20, 2020. However, in a cross-appeal the parents assert that the IHO erred in finding that their residency in the district did not continue after March 20, 2020 up to and including the time the student graduated on August 16, 2020. The parents assert that it was their intention to continue to reside in the district despite spending time both in the district and at property they owned outside the district due to circumstances related to the COVID pandemic. They assert the first evidence of their intention to abandon residency in the district was in January 2021 when they listed their in-district property for sale.

The parents assert that the IHO's finding on the merits that the district failed to offer the student a FAPE, that the unilateral placement at Grove was appropriate, and that equitable considerations favored reimbursement have not been appealed by the district and are therefore final and binding. For relief, the parents request a finding sustaining the IHO's decision except for the finding that the student's residency in the district ended on March 20, 2020. The parents request an order for full tuition reimbursement for the student's attendance at Grove during the 2019-20 and 2020-21 school years.

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. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an

administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). 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., 580 U.S. at 404 [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]).[4]

[4] 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., 580 U.S. at 402).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

1. Res Judicata

The district argues that the parents appropriately brought a challenge to the district's February 2021 residency determination to the New York State Education Commissioner and did not appeal the dismissal of that claim by the Commissioner. Thus, the district asserts that any claim the parents raised as to the student's residency status in the impartial hearing before the IHO should have been precluded from review under the doctrine of res judicata.

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

[5] In addition to res judicata, parties are also limited by the doctrine of collateral estoppel (or issue preclusion), which "precludes parties from litigating 'a legal or factual issue already decided in an earlier proceeding'" (Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426). To establish that a claim is collaterally estopped, a

Here I find that the parents' argument that res judicata should not apply—because the elements of res judicata have not been met—to be persuasive. When the Commissioner of Education found that the parents' petition challenging the district's residency determination was moot because the student had graduated there was no adjudication on the merits of the parents' residency claim and the Commissioner never reached the evidence or facts in order to make a substantive finding with respect to residency (Appeal of A.L. and E.A.-L., 61 Ed. Dep't Rep., Decision No. 18,041).

It has been held that a dismissal of a claim for mootness is not a final determination on the merits and, therefore, should not be accorded res judicata effect beyond the question decided in such dismissal (Hell's Kitchen Neighborhood Ass'n v. Bloomberg, 2007 WL 3254393, at *3 [S.D.N.Y. Nov. 1, 2007], citing Farkas v. New York State Dept. of Civ. Serv., 114 A.D.2d 563, 565 [3d Dep't 1985]; see Fieger v Corrigan, 602 F.3d 775, 777 [6th Cir. 2010]; K.C., 2017 WL 2417019, at *7 [noting that res judicata does not apply where a claim was dismissed for lack of jurisdiction]; Application of a Student with a Disability, Appeal No. 17-038; Application of a Student with a Disability, Appeal No. 09-091).[6] In other words, the first proceeding precludes re-litigation of the issue of justiciability actually determined—i.e., the question of whether the parents' appeal of the residency determination before the Commission was moot—but does not preclude the current proceeding on the same claim if the justiciability problem has been overcome—i.e., to the extent the addition of the FAPE claim and the request for tuition reimbursement may make the case real and live and not academic (cf. Lillbask v. Dep't of Educ., 397 F.3d 77, 89-90 [2d Cir. 2005]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *15 [E.D.N.Y. Oct. 30, 2008]).

Thus, the issue of the student's residency in the Commissioner's decision did not involve "an adjudication on the merits" under the doctrine of res judicata. Accordingly, res judicata cannot act as a bar to the parents' assertion before the IHO in the present matter that the student had been a district resident during the time period at issue.

2. Residency

State Education Law provides that an impartial hearing officer has jurisdiction to adjudicate a complaint with respect to any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student (NY Educ. Law § 4404 [1] see 20 U.S.C. § 1415[b][6][A]). Typically challenges to district

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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]).

[6] However, that in New York a dismissal based on untimeliness operates as an adjudication on the merits (see, e.g., Palmer-Williams v United States, 699 Fed. App'x 1, 3 [2d Cir. June 21, 2017]; Application of a Student with a Disability, Appeal Nos. 21-147 & 21-248).

determinations on residency are resolved by the Commissioner of Education (see Educ. Law § 310; 8 NYCRR 100.2[y][6]; see, e.g., Appeal of Students with Disabilities, Decision No. 17,687 [July 9, 2019], available at http://www.counsel.nysed.gov/Decisions/volume59/d17687; Appeal of a Student with a Disability, Decision No. 16,552 [Sept. 16, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16552.pdf; Appeal of a Student with a Disability, Decision No. 16,533 [Aug. 28, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16533.pdf.

However, here—where the district did not issue a residency determination until after the student's graduation and the question of residency for purposes of the student's attendance was no longer a live controversy justiciable before the Commissioner—the IHO had to resolve the issue of the student's residency as a threshold question in order to properly adjudicate the matters under her jurisdiction related to the identification, evaluation, educational placement and provision of a FAPE to the student. The responsibility for offering a FAPE to a student rests with the school district in which the student resides (N.Y. Educ. Law §§ 3202[1]; 4401-a; 4402[1][b][2]). In order to determine if the district was required to offer the student a FAPE, the residency of the student and his parents in the district had to be resolved (see A.P. v. Lower Merion Sch. Dist., 294 F. Supp. 3d 406, 410 [E.D. Pa. 2018] [finding that "the child's residence is a prerequisite to entitlement to FAPE provided by the school district" and, therefore, may be resolved through the administrative process under the IDEA]). Accordingly, I find that the IHO did not err in considering the student's residency and the district's obligation under the IDEA to offer the student a FAPE under the facts of the present matter.

State regulation provides that a board of education or its designee shall determine whether a child is entitled to attend a school district's schools (8 NYCRR 100.2[y][4]). When parents request enrollment of their child in a district, the district need not enroll the student if a determination of nonresidency is made on the date of the request of enrollment (8 NYCRR 100.2[y][3]). Parents must provide documentation and/or information to demonstrate residency no later than three business days after the student's initial enrollment and the district shall review the documentation and/or information "and make a residency determination . . . no later than the fourth business day after initial enrollment" (id.). Thereafter, during the school year, "and notwithstanding any prior determination to the contrary at the time of the child's initial enrollment or re-entry into the public schools of the district, the board of education or its designee may determine . . . that a child is not a district resident entitled to attend the schools of the district" (8 NYCRR 100.2[y][4]).

Here, as part of the district's initial evaluation of the student, the district social worker scheduled a social history interview with the parents and asked that they bring "two proofs of address," among other documents (Dist. Ex. 5 at p. 2). Within the December 19, 2019 social history report, the social worker noted that the parents "brought all proper documents" including proof of address (Dist. Ex. 39 at p. 1; see Dist. Ex. 6). Thereafter, the CSE proceeded to develop an IEP for the student that recommended a special class placement in a district specialized school (see Dist. Exs. 6; 34-36; 39).

However, over a year later, on February 16, 2021, the district provided the parents with notice of its determination that the student was "not eligible to attend [district] schools because [the student] was not a resident of the district as of October 18, 2019 and therefore will not be

allowed to attend during the 2020-21 school year" and further provided that the student was therefore "excluded from the schools of [the district] effective October 18, 2019" (Dist. Ex. 17 at p. 2).

I find that the February 2021 district residency determination, purporting to determine the student's residency in the district as of October 2019 to be impermissibly retroactive, and therefore null. As the Commissioner noted in dicta in the parents' initial appeal of the district's February 2021 residency determination, the district's argument that State regulations permit it to retroactively "correct prior residency determinations" was without merit because the regulation (8 NYCRR 100.2[y][4]) indicates that a district may make a residency determination at any time during the school year and notwithstanding any prior determination to the contrary (Appeal of A.L. and E.A.-L., 61 Ed. Dep't Rep., Decision No. 18,041 [quotations omitted]). The Commissioner noted that the regulation allows a district to make a residency determination without being bound by a previous determination but does not authorize determinations with retroactive effect (id.).

Accordingly, the February 2021 residency determination cannot be held to have retroactively modified the district's determination leading up to the February 2020 CSE meeting that the student was a district resident. At best, the February 2021 residency determination could have the effect of determining that the student was not a resident of the district as of February 2021. Based on this determination, I find it unnecessary to review the IHO's findings regarding the evidence of the family's residency during the 2019-20 school year or summer 2020. However, to the extent the IHO ordered tuition reimbursement for that portion of the 2019-20 school year that predated the district CSE's determination of eligibility—the timing of which is not at issue—the IHO's decision must be modified. In addition, since I find that the district's residency determination did not have retroactive effect, the parents' cross-appeal challenging the IHO's finding that the parents did not reside in the district after March 2020 is sustained. Thus, from February 2020 up to the student's graduation in August 2020, the student was a resident of the district eligible for special education, and the district was required to offer the student a FAPE.

As the district did not appeal from the IHO's findings on the merits that the district failed to offer the student a FAPE during the relevant portions of the 2019-20 and 2020-21 school years, that the unilateral placement at Grove during those time periods was appropriate, and that equitable considerations favored tuition reimbursement, the IHO's determination are final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

VII. Conclusion

Having found that the district's attempt to retroactively determine the student's residency is a nullity, the necessary inquiry is at an end, and the IHO's decision is modified with respect to the dates for tuition funding as set forth above.

I have considered the parties' remaining contentions and find I need not address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated December 23, 2022, is modified by vacating those portions of the decision which required the district to fund the costs of the student's tuition at Grove for the 2019-20 school year up until March 20, 2020; and

IT IS FURTHER ORDERED that the district is directed to fund the costs of the student's tuition at Grove for the period of February 2020, when the student was found eligible for special education as a student with a disability, through the date of graduation in August 2020.

Dated: **Albany, New York**
March 29, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER