The University of the State of New York

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

No. 23-086

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 Gil Auslander, Esq.

Law Offices of Nancy Rothenberg, PLLC, attorneys for respondent, by Nancy Rothenberg, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which denied its motion to dismiss respondent's (the parent's) due process complaint notice and awarded compensatory education to the parent's son for the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

Given the limited nature of the present appeal, a detailed recitation of the student's educational history is not necessary. Briefly, according to a 2020 neuropsychological evaluation of the student, after experiencing developmental and academic delays in preschool, during the fall of his kindergarten school year (2012) the student was determined to be eligible for special education as a student with a speech or language impairment and began receiving special education services (Parent Ex. E at pp. 1, 2). In December 2016, the student underwent a neuropsychological evaluation (id. at p. 2). The evaluator determined that the student "had average intellectual capability" and "also met diagnostic criteria for a Specific Learning Disorder in reading (with deficits noted in word reading accuracy, reading rate, and fluency and reading comprehension); Specific Learning Disorder in written expression including spelling accuracy, grammar and

punctuation, accuracy and organization of written expression; and Specific Learning Disability in mathematics: including number sense, memorization of arithmetic facts, accurate or weak calculation, [and] weak math reasoning" (id.). The evaluator "recommended a small, structured classroom for [the student], led by special education teachers experienced with teaching children with language-based learning disabilities" (id.).

Based on the evaluator's recommendations, the student began attending The Gateway School (Gateway), which the evaluator described as "a school for children with language-based learning disabilities" for fourth grade (2017-18 school year) (Parent Ex. E at p. 3). The student continued to attend Gateway for fifth grade (2018-19 school year) and sixth grade (2019-20 school year) (id. at p. 3)

On October 6, 2020, a CSE met to develop an IEP for the student with an implementation date of October 6, 2020 and a projected annual review date of October 6, 2021 (Parent Ex. C at pp. 1, 23). Finding the student eligible to receive special education as a student with an other health-impairment, the CSE recommended that the student attend a general education classroom in a non-specialized school and receive five periods per week of integrated co-teaching (ICT) services in each of the following subjects: English language arts (ELA), math, social studies and science (id. at pp. 16, 21). The CSE also recommended that the student receive five periods per week of special education teacher support services (SETSS) in a group to provide instruction in ELA, math, and writing in a separate location (id. at p. 16). With respect to related services, the CSE recommended that the student receive one 40-minute session per week of counseling in a group and two 40-minute sessions per week of speech-language therapy in a group (id.).

A. Due Process Complaint Notice

By due process complaint notice dated September 9, 2021, the parent alleged that the October 6, 2020 IEP was inappropriate and denied the student of a FAPE for the 2021-22 school year (Parent Ex. A). The parent contended that despite a clear need for the student to continue to receive "the support and structure" of Gateway, "the district only recommended a large general education class with ICT Services five times per week for Math, five times per week for ELA, five times per week for Social Studies, and five times per week for Sciences as well as SETSS five times per week for ELA, Math, and Writing" which was not appropriate for the student (id. at p 6). The parent also alleged that the district "recommended related services of group counseling one time per week for 40-minutes and group speech-language therapy two times per week for 40-minutes" which were not appropriate for the student (id. at pp. 6, 8, 9). The parent further claimed that the district failed to evaluate the student sufficiently and pay for the independent educational evaluations (IEEs) requested, failed to provide him with appropriate assistive technology and occupational therapy (OT), and failed to recommend appropriate annual goals (id. at pp. 8-10).

The parent asserted that Gateway was an appropriate unilateral placement for the student and he had demonstrated progress, and that equitable considerations favored the parent's request for public funding of Gateway for the 2021-22 school year (Parent Ex. A at pp. 10-11).

As relief, the parent sought an order directing the district "to fund Gateway for [the student]'s tuition and related costs, including transportation for [the student]'s attendance during the 2021-2022 school year" (Parent Ex. A at p. 12). The parent further requested as compensatory

related services: (a) a bank of private 1:1 counseling services at the enhanced rate offered by the district, by a provider of the parent's choosing, to make-up for a lack of appropriately individualized services; (b) a bank of private 1:1 OT services at the enhanced rate offered by the district, by a provider of the parent's choosing, to make-up for lack of appropriately individualized services; and (c) a bank of private 1:1 speech-language therapy services at the enhanced rate offered by the district, by a provider of the parent's choosing, to make-up for lack of appropriately individualized services (id. at pp. 12-13). The parent further requested that the IHO issue an interim order directing the district to pay for an independent speech-language evaluation and an independent assistive technology evaluation, both at specified rates (id. at p. 12).

B. Facts Post-Dating the Due Process Complaint Notice

The IHO issued an interim decision on pendency dated September 30, 2021, which stated that the student's pendency placement for the duration of the proceeding would be at Gateway (September 30, 2021 Interim IHO Decision at p. 12). Thereafter, the IHO issued an interim decision dated October 14, 2021, wherein he noted the parent's contention that "the district [] failed to convene a review since October 6, 2020, more than a full year ago, and as a consequence that the district did not have in place a current IEP at the start of the 2020-21 school year" (October 14, 2021 Interim Decision at p. 3). The IHO found that "[i]n the absence of an annual review or an IEP at the start of the school year I now [f]ind that the district has failed to provide this student a FAPE for 2021-22" (id.). The IHO further stated that "[w]e will reconvene to consider the merits of this case" and ordered that the district "must convene a new review of the student's clinical and academic performance and devise a new IEP going forward. The CSE must convene no later than November 1, 2021 to conduct an annual review, taking into account any and all clinical assessments the family may have provided to them as well as their own assessments" (id.).[1] The IHO also issued another interim decision dated October 14, 2021, which ordered the district to "pay the cost of the requested independent Speech/Language and Assistive Technology assessments [at] reasonable market rates, or such lower cost as the district may have paid to the same provider for substantially similar services during the 2020-21 school year, whichever is lower" (October 14, 2021 Interim Decision on IEEs at pp. 3-4).

On October 26, 2021, a CSE met to develop an IEP with an implementation date of November 3, 2021 and a projected annual review date of October 26, 2022 (Parent Ex. B at pp. 1, 26). Finding the student remained eligible to receive special education as a student with an other health-impairment, the CSE recommended a 12:1 special class placement in a non-specialized school for "[a]ll [c]ore [s]ubjects" (id. at pp. 1, 18, 25). With respect to related services, the CSE recommended that the student receive one 40-minute session per week of counseling in a group and two 40-minute sessions per week of individual speech-language therapy (id. at p. 18).

On December 17, 2021, the parent filed a due process complaint notice challenging the October 2021 IEP, which the parent described as "the program of services and support offered during the 2021-2022 and proposed for the 2022-2023 school year" (Dist. Mot. to Dismiss, Ex. 2 at pp. 1, 7-10). The parent asserted he informed the October 2021 CSE that the student, who would

[1] As previously noted, the October 6, 2020 IEP had an implementation date of October 6, 2020 and a projected annual review date of October 6, 2021; accordingly, it remained the operative IEP in place at the time the 10-month 2021-22 school year began in September 2021.

be aging out of Gateway at the end of the 2021-22 school year, had been accepted to a New York State approved nonpublic school for the 2022-2023 school year (id. at p. 7). The parent alleged that despite this information, the CSE recommended an inappropriate program for the student consisting of "a 12:1 special education class in a community school five times per week for all core subjects, with related services of group counseling one time per week for 40-minutes and group speech-language therapy two times per week for 40-minutes" (id.). The parent contended that the inappropriate program recommended by the CSE deprived the student of a FAPE for the 2021-22 and 2022-23 school years (id. at pp. 7-10). As relief, the parent requested an order placing the student at the approved nonpublic school that had accepted him for the 2022-23 school year and to provide transportation to and from the school (id. at p. 10). The parent also requested an order directing the CSE to convene and "create meaningful and measurable goals to address [the student's] social, emotional, behavioral, and academic deficits, and develop an IEP to specify a narrowly tailored program to address his individual needs in a non-public school placement, specifically [the approved nonpublic school which had accepted student for the 2022-23 school year], inclusive of [OT], speech-language therapy, and counseling as well as special transportation and any other service recommended by the independent evaluators" (id.).

On January 3, 2022, the IHO issued a non-consolidation order with respect to the due process complaint notice dated September 9, 2021 and the December 17, 2021 due process complaint notice, noting that he had "been assigned to hear the more recently filed of these matters outside the normal rotation because I have open before me (or had open before me in the district's database) another matter concerning the same child" but that "[a]bsent a motion from either party to the contrary, and upon consultation with both," the IHO concluded "that there would be no benefit and some detriment to be achieved by consolidation" and he "decline[d] to consolidate these matters" at that time (Jan. 3, 2022 IHO Non-Consolidation Order).

The matter arising from the December 17, 2021 due process complaint notice proceeded to an impartial hearing on April 28, 2022 and concluded on that day (Dist. Mot. to Dismiss Ex. 12). In a decision dated April 28, 2022, the IHO noted at the outset that "[t]he district submitted no documentary or testimonial evidence, declined to cross-examine or seek the testimony of any witnesses, and did not articulate any challenge to the allegations made in the [c]omplaint, or to the written record in support of the family's burden, nor did it articulate any challenge to the equities here that would diminish the amount of any reimbursement remedy awarded" (id. at p. 3). Having found that the district had "not even tried to meet its burden" regarding its provision of a FAPE to the student, the IHO determined that the parent had "met the basic challenge of providing a prima facie case in support of the propriety of the unilateral placement. The district has not challenged that case and it must accordingly prevail" (id. at p. 10).

As relief for the district's denial of FAPE to the student, the IHO ordered the district "to reconvene its CSE for the purpose of referring th[e] student to its Central Based Support Team for placement in an approved non-public school, with related services of [s]peech[-language therapy], [c]ounseling, and [OT], as supported by his current clinical assessments, for placement in the coming 2022-23 school year," as well as to provide "appropriate special education transportation" to and from the placement (Dist. Mot. to Dismiss, Ex. 12 at p. 11). The IHO also ordered the district, "by way of injunction, (1) to continue to place the student at the private school identified unilaterally by the [parent] and presently attended pursuant to pendency in another proceeding concerning th[e] student, for the entire 2020-21 school year . . . (2) to reimburse the [parent] for

[his] out of pocket costs for the child's placement (inclusive of the costs, if any, of all items that would routinely be included on the student's IEP pursuant to law and regulation, such as related services, augmentative equipment, and special education transportation) for that entire school year, if any; and (3) to pay directly to the school any outstanding amount as yet unpaid for the program and services for that period" (Dist. Mot. to Dismiss Ex. 12 at pp. 10-12).

Thereafter, on July 1, 2022, the district moved to dismiss the September 9, 2021 due process complaint notice in this proceeding on the grounds of res judicata and mootness and also sought recusal of the IHO (Notice of Dist. Mot. to Dismiss). The parent filed a brief in response (Parent's Response to Dist. Mot. To Dismiss) and the district filed a reply to the parent's response (Dist. Reply Mem. of Law).

As relevant herein, by a decision dated February 20, 2023, the IHO declined to dismiss the September 9, 2021 due process complaint notice on the ground of res judicata (February 20, 2023 Interim IHO Decision at pp. 10, 13). In finding that res judicata was not applicable, the IHO opined that "nothing in the law of res judicata - either issue preclusion or claim preclusion - precludes a party from seeking to litigate an entirely new case asserting a new claim (about an IEP filed after the prior claim was commenced) against the same opponent, so lo[]ng as that new claim could not have been filed at the time the first case was filed" (id. at p. 10). The IHO continued that the December 2021 due process complaint notice "was necessarily filed well after this case was filed, subsequent to when the CSE review it seeks to challenge took place" (id.). In addition, the IHO noted that prior to the filing of the December 2021 due process complaint notice, he "had in fact ruled in this case via Interim Order, about the propriety of the 2021-22 program and placement offered, but, because Interim Orders may not be appealed until the underlying case concludes with a Final Order, there was no final and binding decision on the merits for the claim (which would have rendered the decision here res judicata with respect to [the December 2021 due process complaint notice])" (id.). The IHO further reasoned that "[w]hether final or not, 2021-22 was not addressed in [the December 2021 due process complaint notice], and it is not res judicata here. This case owns that question; that question has been decided in an Interim Order here; and that Interim Order will be rendered final when this case concludes" (id.). Finally, the IHO concluded that "[r]es judicata is neither binding nor relevant here" (id.).

C. Impartial Hearing Officer Decision

On March 31, 2023, the substantive portion of the impartial hearing for the September 9, 2021 due process complaint notice commenced and, thereafter, concluded on April 6, 2023 after two days of hearing (Tr. pp. 85-189). By decision dated April 8, 2023, the IHO determined that the student was entitled to an award of compensatory education based on the district's denial of a FAPE to the student for the 2021-22 school year (IHO Decision at pp. 44, 47-48). The IHO noted that the district had "chosen not to defend its burden without conceding the case as a whole, a notion that is, at best, problematic" (id. at p. 42). He further stated that although it was not the parent's burden to demonstrate that the student was entitled to receive compensatory education as a remedy for the district's FAPE denial, the parent nonetheless had "provided detailed support" for a compensatory education award (id. at pp 44-45). The IHO found that "the unsettled relief here amounts to the [parent]'s claim that during 2021-22 the student should have received [OT], [a]ssistive [t]echnology assistance for the student and the family, and [s]peech[-language] services, none of which he received in large measure as a result of the district's uncontested failure

adequately to have evaluated the student in these areas" and determined that independent assessments "in these areas" supported the compensatory education sought by the parent (id. at p. 45). Further, the IHO rejected the district's claim, asserted through district's counsel during the impartial hearing, that the parent had not demonstrated that an assistive technology award was warranted as part of the student's compensatory education award (id. at pp. 45-47). As compensatory education, the IHO awarded "60 hours of [s]peech[-l]anguage services[,] 40 hours of [OT,] 40 hours of [a]ssistive [t]echnology instruction for the student [and] 20 hours of [a]ssistive [t]echnology instruction for the family" (id. at pp. 47-48).

IV. Appeal for State-Level Review

The district appeals. The district asserts that the IHO erroneously failed to grant its motion to dismiss the due process complaint notice on the ground of res judicata. The district contends that both matters at issue involved the same parties and that the matter arising from the December 2021 due process complaint notice resulted in a final decision on the merits thus fulfilling the first two elements of res judicata. With respect to the third element, whether the claims in this proceeding could have brought at the time of the prior proceeding, the district argues that "all claims averred in [the September 2021 due process complaint notice] were, or could have been, raised in [the December 2021 due process complaint notice." The district argues that both due process complaint notices pertain to claims and seek relief for the district's purported denial of a FAPE to the student for the 2021-22 school year. Further, the district contends that the operative facts of each due process complaint notice, "and the evidence the [p]arent would require to support his claims for relief, are essentially identical." The district notes that "[w]hile [the September 2021 due process complaint notice] was filed before [the December 2021 due process complaint notice], the 'prior action' for a res judicata analysis" is the December 2021 due process complaint notice because the IHO's finding of fact and decision in that matter was issued first. As such, the district asserts that, at the time of its motion to dismiss, there was an IHO decision arising from the December 2021 due process complaint notice, but there was no IHO decision regarding the claims in the September 2021due process complaint notice.

The district also argues that because the student received tuition funding at Gateway for the 2021-22 school year, the IHO improperly awarded the student compensatory education for the same school year. The district further contends that the IHO's award of assistive technology services to the student and parent as compensatory education was improper because the hearing record lacked evidence that the student or parent needed assistive technology services in order to access the compensatory speech-language therapy and OT ordered by the IHO.

The parent answers and generally argues for the IHO decision be upheld in its entirety.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v.

T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 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 403 [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]).[2]

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

In this case, the district acknowledges that it does not challenge the IHO's findings that the district denied the student a FAPE for the 2021-22 school year or that an award of speech-language therapy and OT services as compensatory education was a substantively appropriate remedy for the district's denial of a FAPE to the student. Accordingly, these unappealed findings have become final and binding upon the parties (see 34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The only remaining disputes between the parties are whether the IHO erred by denying the district's motion to dismiss the due process complaint notice on the ground of res judicata, whether the

[2] 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).

compensatory education awarded by the IHO was improperly duplicative because the student obtained funding for his unilateral placement during the 2021-22 school year either through pendency or an award in a prior proceeding, and whether the IHO improperly awarded assistive technology services to the student and his parent as compensatory education.

A. Res Judicata

The district contends that the IHO erred by failing to dismiss the parent's due process complaint notice on the ground of res judicata. The district argues that both the due process complaint notice underlying the proceeding at issue here and the prior proceeding regarding the December 2021 due process complaint notice concerned the same parties, the proceeding involving the December 2021 due process complaint notice was resolved by a final adjudication on the merits and because both the instant proceeding and the prior proceeding concerned claims related to the 2021-22 school year, the parent could have brought any claims asserted in the instant action in the December 2021 due process complaint notice.

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]).[3]

Here, even assuming for the sake of argument that the district established the first two elements of the res judicata principles, the district cannot establish that the claims brought by the parent in the proceeding involving the December 2021 due process complaint notice emerge from the same nucleus of operative facts as the claims raised in the September 2021 due process

[3] "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]).

complaint notice at issue in this proceeding. While the district attempts to elide all of the parent's claims stemming from both due process complaint notices into one school year, 2021-22, a review of the due process complaint notices reveals that the claims in this proceeding arise from a completely different (and earlier created) IEP than the IEP underlying the claims raised in the December 2021 due process complaint notice. Specifically, the December 2021 due process complaint notice explicitly challenges an IEP dated October 26, 2021 (Dist. Mot. To Dismiss Ex. 2; see Parent Ex. B). The IEP challenged in the underlying proceeding here is dated October 6, 2020 and was in place at the beginning of the 2021-22 school year when the parent had to decide whether to reject the recommended program and seek relief based on an alleged denial of FAPE for the 2021-22 school year (see Parent Exs. A; B). Where, as here, the annual review of the student's educational programming is not scheduled to occur before the start of the school year, it is quite possible that multiple IEPs will cover portions of the same school year or begin during one school year and extend into the next one.

The parent's claims for the 2021-22 school year related to the October 2020 IEP, and, as such, accrued at the beginning of the 2021-22 school year as that was the IEP in place at the time the parent decided to place the student at Gateway. Likewise, the parent could not have anticipated in September 2021 when she filed the due process complaint notice challenging the October 2020 IEP what, if any, claims she would have with respect to the CSE process or any future IEP developed after the CSE's next annual review, which occurred in October 2021. Rather, the parent was compelled to challenge the two separate IEPs in different proceedings based on the information she had available to her at the time and the IHO declined to consolidate the two due process complaint notices. Accordingly, the December 2021 due process complaint notice contained claims that could not have been asserted previously when the parent filed her due process complaint notice dated September 6, 2021 and the IHO did not allow the earlier filed claims to be consolidated with the proceeding related to the December 2021 due process complaint notice.

Moreover, the two IEPs in question involved separate CSE meetings and the programs recommended differed significantly (compare Parent Ex. B at p. 18, with Parent Ex. C at p. 16). As a result, given the timing and nature of the parent's claims which were asserted in two separate due process complaint notices directed at two distinct IEPs, and which sought relief for different school years, the district's argument that the parent's claims raised in this proceeding for the 2021-22 school year should be barred under res judicata because she could and should have raised all of her allegations pertaining to the 2021-22 school year in the proceeding brought pursuant to the December 2021 due process complaint notice must fail.

B. Compensatory Education

The district also argues that the IHO's award of compensatory education to the student is "duplicative and improper" because the parent had already obtained tuition reimbursement for the student's unilateral placement for the 2021-22 school year through pendency. This argument must also fail.

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 451 [2d Cir. 2014];

Newington, 546 F.3d at 123; Newington, 546 F.3d at 123 [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme, 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

Some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5–7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]; I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that a compensatory award could include retroactive reimbursement for tuition expenses as well as prospective relief]).

The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with Doe v. E. Lyme, 790 F.3d 440, 456-57 [2d Cir. 2015] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student

with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services are required in order for the placement to provide the student with a FAPE (see V.W., 2022 WL 3448096, at *5–7 [court endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period]).

As previously discussed, the prior decided matter has no res judicata effect on the instant proceeding in terms of any issue decided or relief granted. Moreover, to the extent the student's tuition at Gateway was funded through pendency for the 2021-22 school year, pendency is an automatic injunction to preserve the status quo and provide the student with a stay-put placement during the pendency of the underlying proceeding (see 20 U.S.C. § 1415[j]; Educ. Law §§ 4404[4]; 34 CFR 300.518[a]; 8 NYCRR 200.5[m]; see also Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 531 [2d Cir. 2020]; T.M., 752 F.3d at 170-71; 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]). Accordingly, a pendency placement does not constitute a substantive award of relief for a FAPE denial.

Moreover, the IHO did not award tuition reimbursement or direct funding of tuition at Gateway as relief for the FAPE denial in this proceeding, rather that was awarded as a part of the pendency award so there was no finding that Gateway, itself, was an appropriate placement for the student. The IHO ordered compensatory education consisting of "60 hours of [s]peech[-l]anguage services[,] 40 hours of [OT,] 40 hours of [a]ssistive [t]echnology instruction for the student [and] 20 hours of [a]ssistive [t]echnology instruction for the family" (IHO Decision at pp. 47-48). With the exception of the assistive technology award, the district does not argue that the compensatory education ordered is inappropriate for the student and as the only objection is that it is duplicative of tuition at Gateway, the district has not provided sufficient basis for overturning the award.

With respect to the assistive technology awarded by the IHO, the district argues that it is inappropriate because there is no evidence that the student required assistive technology in order to access the instructional components of his speech-language and OT compensatory education award. The IHO, however, stated in the decision that he largely based his assistive technology award on a March 2023 compensatory services plan (IHO Decision at pp. 45-47; see Parent Exhibit G). According to the March 2023 plan, it was developed "to determine how to make [the student] whole again after receiving inappropriate programming and support" during the 2021-22 school year (Parent Ex. G at p. 1). With respect to assistive technology, the March 2023 Plan references that an assistive technology evaluation dated July 15, 2022 was reviewed and its recommendations were included as one of the compensatory services that the student needed in order to remediate the denial of FAPE based on the inappropriate programming recommended by the district for the 2021-22 school year (id. at p. 2). Specifically, the March 2023 plan noted that the student "was not provided with an appropriate [a]ssistive [t]echnology device and services during the school year 2021-2022" and that he required "an intensive bank of compensatory hours to be able to even access his device" (id. at p. 17). Based on this assessment, it was recommended that the student receive "40 hours of [c]ompensatory [a]ssistive [t]echnology [t]raining (1 hour weekly for 40 weeks, for 1 year) to facilitate [him] to be in a position where he can utilize his device effectively, allowing it to be most impactful" (id.). Based on the assistive technology evaluation, the March

2022 Plan also recommended that the student's parents receive "20 hours of [c]ompensatory [a]ssistive [t]echnology [p]arental [t]raining (.5 hours weekly for 40 weeks, for 1 year) for ongoing parental training to enhance device understanding, knowledge, and carryover for [the student's] assistive technology device" (id. at p.18). Overall, the March 2023 plan noted that the recommended compensatory assistive technology training was an appropriate part of the student's bank of compensatory education as it was "individualized and specific" to the student "based upon his deficits, overall presentation, performance, what is necessary to support his access to his curriculum and skills acquisition" (id. at pp. 17-18). Based on the foregoing, the district's arguments that the award of compensatory education by the IHO was duplicative to the student's receipt of tuition funding at Gateway either through pendency in this proceeding or as an award in a different proceeding, and that an award of assistive technology services is not supported by the hearing record, are unavailing and there is no basis for reversing the IHO's award.

VII. Conclusion

Having found that the IHO did not err by denying the district's motion to dismiss the parent's due process complaint notice on the ground of claim or issue preclusion and that the district's arguments for overturning the IHO's award of compensatory education to the student are not sufficient to warrant reversal of the IHO's determinations, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
July 5, 2023

STEVEN KROLAK
STATE REVIEW OFFICER