The University of the State of New York

The State Education Department
State Review Officer
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No. 23-138

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Westhampton Beach Union Free School District

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the

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

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

III. Facts and Procedural History

The student in this case has been the subject of 19 prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 23-093; Application of a Student with a Disability, Appeal No. 23-022; Application of a Student with a Disability, Appeal No. 22-168; Application of a Student with a Disability, Appeal No. 22-163; Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102; Application of a Student with a Disability, Appeal No. 22-010; Application of a Student with a Disability, Appeal No. 21-249; Application of a Student with a Disability, Appeal No. 21-181; Application of a Student with a Disability, Appeal No. 21-019; Application of a Student with a Disability, Appeal No. 20-135; Application of a Student with a Disability, Appeal No. 19-121; Application of a Student with a Disability, Appeal No. 19-021; Application of a Student with a Disability, Appeal No. 18-110; Application of a Student with a Disability, Appeal No. 18-075; Application of a Student with a Disability, Appeal No. 18-064; Application of a Student with

a Disability, Appeal No. 17-079; Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Accordingly, the parties' familiarity with the facts and procedural history preceding this case—as well as the student's educational history—is presumed and, as such, they will not be repeated herein unless relevant to the disposition of this appeal.

As set forth in previous appeals, due to the nearly continuous nature of the administrative due process proceedings and State-level administrative appeals—and related federal district court proceedings—involving this student, he has been receiving his special education program under various pendency placements since approximately the 2015-16 school year (see generally Application of a Student with a Disability, Appeal No. 22-147; Application of a Student with a Disability, Appeal No. 22-102). During the 2022-23 school year, the student's pendency placement arose as a result of an agreement between the parties, which was formally documented in a letter dated September 20, 2019 (September 2019 pendency agreement) and which included, in relevant part, that the student would receive special education instruction at the local library from a special education teacher (see IHO Ex. II-7 at pp. 1-3; see generally Application of a Student with a Disability, Appeal No. 22-147).[1]

On September 16, 2022, the student's special education teacher resigned, and the student received instruction from a substitute teacher who was not certified in special education while the district sought a replacement; the parent objected to this arrangement (IHO Ex. II-5 ¶¶ 33, 35, 41).

The parent objected via email on October 20, 2022 and "expressed an intent to file a due process complaint" against the district alleging a violation of the IDEA (IHO Ex. II-2). On October 21, 2022, in response to his email, the district stated that, because it had been unable to locate a replacement teacher, it would "withdraw all of its instruction for the [student], beginning on October 24, 2022" and further suggested that the parent should consent to the implementation of the October 2022 IEP, which included a special class program in an out-of-district placement (IHO Ex. II-3). In the meantime, the district indicated it would continue to search for a replacement teacher (id.). On October 24, 2022, the district's superintendent wrote to the parent reiterating that the district was "actively seeking a replacement" teacher but suggesting that the parent should consent to implementation of the October 2022 IEP (id.).

The parties appeared before the District Court for the Eastern District of New York on October 28, 2022 for a hearing regarding injunctive relief sought by the parent (IHO Ex. II-7 at p. 1). After hearing arguments from both parties, the court denied the parent's request for injunctive relief because "issuing an order to show cause compelling the school district to immediately provide a special ed[ucation] teacher for [the student] c[ould]not prevent irreparable harm as the school district simply c[ould]not secure such a teacher, despite its best efforts" (id. at p. 15). The court also pointed out that the parent had "two viable options" of either continuing to use the substitute teacher for instruction or accepting the recommendation from the October 2022 IEP (id. at pp. 14, 16). Ultimately, at the end of the hearing, the parent agreed to have the substitute teacher continue to provide the student academic instruction until a replacement special education teacher

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

could be located (id. at pp. 17, 24). As of October 31, 2022, the student resumed receiving instruction at the public library from a substitute teacher (IHO Ex. II-5 ¶ 52).

The parent filed a due process complaint notice dated October 31, 2022, alleging that the district "breached" the 2019 pendency agreement by not providing the student with a certified special education teacher for the student's academic instruction (IHO Ex. III-11). Additionally, the parent asserted that the district "prohibited" the student's educational consultant from providing instruction to the student's substitute teacher (id.). As relief, the parent sought an finding that the district violated the IDEA and requested compensatory education for any regression sustained by the student (id.). The October 2022 due process complaint notice was addressed in an impartial hearing with other consolidated matters (see Application of a Student with a Disability, Appeal No. 23-093).[2]

On December 8, 2022, the district notified the parent that a special education teacher had been appointed to provide the student with academic instruction (IHO Ex. II-5 ¶ 62).

A. Due Process Complaint Notice

By due process complaint notice dated March 10, 2023, the parent alleged that "circumstances unfold[ed]" after the district failed to provide an appropriately certified special education teacher to instruct the student during the 2022-23 school year (IHO Ex. I at p. 1). The parent argued that the district's decision to withdraw the student's instruction "was abjectly retaliatory" in violation of the IDEA, section 504 of the Rehabilitation Act of 1973 (section 504), "and other federal laws as well" (id. at p. 2). The parent alleged that the affidavit and testimony of the director of pupil personnel services in a prior matter demonstrated that the district's decision was retaliatory in nature and "negatively impacted the provision" of a free appropriate public education (FAPE) to the student, and "as a result of the . . . district's actions, the [student] ha[d] suffered damages (id.). As a proposed resolution, the parent requested a declaration that the district had violated the IDEA and section 504 "by committing an act of interference/retaliation" and that the district be compelled "to cease from engaging in such types of retaliatory conduct" (id.). The parent additionally requested "an award for back-end compensatory education" and an order removing the director of pupil personnel services from the student's CSE (id.). As relief for the alleged violation of section 504, the parent requested compensatory damages (id.).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on May 26, 2023 (Tr. pp. 1-11). In a discussion on the record, the IHO indicated that a full hearing on the events of fall 2022 had recently concluded and that he believed another hearing would be duplicative (Tr. p. 6). The IHO also noted that he had received the district's answer to the due process complaint notice and motion

[2] The IHO issued a decision in that matter on April 28, 2023, and found that, while the use of a substitute teacher did not breach the pendency agreement, a lapse in pendency did occur when the district withheld instruction from October 24, 2022 through October 28, 2022; therefore, the IHO ordered the district to provide the student with compensatory services for the period of time in which instructional pendency services were not provided (IHO Ex. III-12). These portions of the IHO's decision were not disturbed on appeal (see Application of a Student with a Disability, Appeal No. 23-093).

to dismiss (Tr. p. 4). The IHO further indicated his preference for resolving the matter by motion (Tr. p. 6).

By decision dated June 22, 2023, the IHO granted the district's motion and dismissed the parent's March 10, 2023 due process complaint notice (IHO Decision at p. 17). Turning to the parent's specific claims, the IHO determined that he lacked subject matter jurisdiction to review the parent's IDEA and section 504 retaliation claims and further found that he had not been appointed by the district to hear any section 504 claims (id. at p. 12). The IHO cited authority that the IDEA did not protect individuals from retaliation for attempting to enforce the IDEA and further found that the parent had not offered any authority to the contrary (id. at p. 13). The IHO also determined that the parent's retaliation claims did not state a claim for a denial of a FAPE as they lacked sufficient allegations regarding the identification evaluation, or educational placement of student, upon which relief could be granted (id. at p. 13). With regard to the parent's claim that withdrawal of the student's instruction breached the student's pendency rights and request for compensatory education as a remedy, the IHO found that the parent's claim in this regard was raised in the parent's October 31, 2022 due process complaint notice and adjudicated on the merits by the IHO in a decision dated April 28, 2023 (id. at pp. 13, 15). As a result, the IHO determined that the doctrines of res judicata and collateral estoppel barred the parent from relitigating his pendency implementation and compensatory education claims (id. at pp. 13-15). As for the parent's request for the removal of the director of pupil personnel services from the student's CSE, the IHO also found that the parent had raised that claim in prior proceedings and he had previously found the parent had failed to state a claim upon which relief could be granted (id. at pp. 15-16). Thus, the IHO found that the parent's request to remove the director of pupil personnel services from the student's CSE was barred by the doctrine of collateral estoppel (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in granting the district's motion to dismiss. The parent alleges that he was denied due process when the IHO dismissed the due process complaint notice without holding an evidentiary hearing. The parent asserts that the IHO omitted pertinent facts related to the parent's alleged consent to receiving pendency services from the district's substitute teacher. With regard to the parent's retaliation claims, the parent challenges the IHO's determinations that the Second Circuit does not recognize IDEA-based retaliation claims and that the parent's due process complaint did not raise a cognizable claim under the IDEA. The parent also challenges the IHO's determinations that he lacked the authority to remove the district's director of pupil personnel services from the CSE and that the parent's claim was barred by the doctrine of collateral estoppel. Lastly, the parent challenges the IHO's finding that the balance of the parent's claims in the due process complaint notice were without merit. As relief, the parent seeks reversal of the IHO's decision, a declaration that the district violated the IDEA and an award of "back-end compensatory education."

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety. The district also argues that the parent's request for review should

be dismissed for failing to comply with State regulations governing appeals before the Office of State Review.[3]

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

[3] In the request for review, the parent numbers and identifies the IHO's rulings with which he takes exception (i.e., that his claims were precluded by res judicata or collateral estoppel and that he did not set forth a cognizable claim under the IDEA) and sets forth reasons as to why he believes the findings should be reversed (see 8 NYCRR 279.4[a]; 279.8[c][2]). The parent generally complies with State regulations governing form requirements for pleadings by setting forth issues presented for review by numbering each issue and using bold text to highlight the specific issue, which distinguishes the issue presented from the argument in support of each issue (see generally Req. for Rev.). Next, while the district correctly notes that the parent does not state the relief sought in the underlying proceeding as required by State regulation (8 NYCRR 279.8[c][1]), this is not an instance where the omission of such information warrants rejection or dismissal of the pleading. Finally, the parent's request for review contains multiple citations to pages in the IHO's decision (Req. for Rev. at pp. 1-4, 6-7). Under the circumstances of this matter, which was decided upon motion before testimony or documentary evidence was offered by the parties, the parent's citations to pages of the IHO's decision is sufficient. Based on the foregoing, dismissal of the parent's request for review for failure to comply with State regulations governing the form requirements for pleadings is unwarranted.

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]).[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).

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

Turning to the issues raised by the parent, upon careful review, the hearing record reflects that the IHO, in a well-reasoned and well-supported decision, correctly dismissed the parent's due process complaint notice (see IHO Decision at pp. 10-18). The IHO accurately recounted the facts of the case, addressed the issues identified in the parent's due process complaint notice, and set forth the proper legal standards when determining that the parent did not assert cognizable retaliation claims and that his request to remove the director of pupil personnel services from the CSE was barred by the doctrines of res judicata and collateral estoppel (id. at pp. 1-18).[5, 6] Furthermore, an independent review of the entire hearing record reveals that the IHO did not err in granting the district's motion to dismiss and he conducted the impartial hearing in a manner consistent with the requirements of due process. There being no reason appearing in the hearing record to modify the IHO's ultimate conclusions, the conclusions of the IHO are hereby adopted (see 20 U.S.C. § 1415[g][2]; 34 CFR 300.514[b][2]).

I will further address the question of res judicata to highlight that, in addition to the IHO's findings that res judicata and/or collateral estoppel barred the parent's claims relating to the district's violation of the student's pendency rights and the parent's request for removal of the director of pupil personnel services from the CSE—and even if the parent could assert cognizable retaliation claims under the IDEA—the parent's alleged retaliation claim was also barred by res judicata because, while based on a different theory, the claim arose from the same transaction or

[5] As noted above, the IHO found that the parent's claim that the district's withdrawal of instruction in October 2022 constituted a breach of the student's pendency rights for which the parent sought compensatory education was barred by the doctrines of res judicata and collateral estoppel (IHO Decision at pp. 13-15). The parent has not appealed this determination by the IHO and has limited his appeal to the IHO's finding that the parent's request for the removal of the district's director of pupil personnel services from the student's CSE was barred by collateral estoppel (Req. for Rev. at p. 6). Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (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]).

[6] While the IHO is correct that district court authority has stated that the IDEA does not protect individuals from retaliation for attempting to enforce the IDEA (see Collins v. City of New York, 156 F. Supp. 3d 448, 457 [S.D.N.Y. 2016]; see also T.L. v. Penn. Leadership Charter Sch., 224 F. Supp. 3d 421, 436 [E.D. Pa. 2016] [finding that, while "[i]t is well-established that individuals who face retaliatory conduct for exercising their IDEA-granted rights can bring claims under Section 504[,] [t]here is, however, no express anti-retaliation provision in the IDEA itself or in its implementing regulations"]), there is authority outside of the Second Circuit that supports the parent's view that an IDEA retaliation claim may be cognizable (Weber v. Cranston Sch. Comm., 212 F.3d 41, 51 [1st Cir. 2000] [finding that a parent's claim that a school committee retaliated against her for complaints regarding education of her child, who had been classified as disabled, fell within the zone of interests protected by IDEA]; Batchelor v. Rose Tree Media Sch. Dist., 759 F.3d 266, 273 [3d Cir. 2014]; M.T.V. v. DeKalb Cnty. Sch. Dist., 446 F.3d 1153, 1158 [11th Cir. 2006]; Burke v. Brookline Sch. Dist., 2007 WL 836820, at *1 (D.N.H. Mar. 15, 2007]; Millay v. Surry Sch. Dep't, 2009 WL 5184388, at *29 n. 31 [D. Me. Dec. 22, 2009], adopted 707 F. Supp. 2d 56 [D. Me. 2010]). Given the alternative grounds for upholding the IHO's dismissal of the parent's retaliation claim, it is unnecessary to resolve this question.

series of transactions as the October 2022 lapse in pendency services, which the IHO ruled upon in the prior matter.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties; and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).[7] 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]).

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

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

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

Here, the facts underlying the parent's retaliation claim were already litigated and decided in the parent's favor when, in the prior matter, the IHO found that the district breached the pendency agreement by withholding instruction from October 24, 2022 through October 28, 2022 and ordered the district to provide the student with compensatory services for the period of time in which instructional pendency services were not provided (IHO Ex. III-12). To the extent the parent alleges that new information subsequently revealed a retaliatory motive underlying those

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

actions, this simply attempts to assert a claim based upon the same transaction or series of transactions but based on a different theory and seeking a different remedy (see M.F. v. N. Syracuse Cent. Sch. Dist., 2019 WL 1432768, at *9 [N.D.N.Y. Mar. 29, 2019] ["In New York, 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'"], quoting O'Brien v. City of Syracuse, 54 N.Y.2d 353, 357 [1981]). The parent essentially conceded that his claims are based on the same underlying actions but based on a different theory, stating that:

> [T]he defendant district's action clearly related to the petitioner's educational placement and/or the provision of his [FAPE], and thus falls under the ambit of the IDEA. Again, the assigned IHO already determined as much by holding the defendant district culpable in this regard. As such, the petitioner respectfully submits that the only question remaining is whether or not the defendant district's action also profiled as being violative of the IDEA for being retaliatory in nature.

(Parent Mem. of Law at p. 3). Therefore, the parent's retaliation claim was also barred by the doctrine of res judicata.

As removal of the district's director of pupil personnel services from the student's CSE was sought by the parent as a remedy for the alleged retaliation (see IHO Ex. I at p. 2), dismissal of the underlying retaliation claim is sufficient to also warrant dismissal of the associated relief sought. However, the IHO was also correct that the parent has sought similar relief in prior matters, which has been rejected on legal grounds, and that, therefore, the parent was barred by collateral estoppel from relitigating the issue again (IHO Decision at pp. 15-16).

VII. Conclusion

Having concluded that there is insufficient basis to overturn the IHO's decision to dismiss the parent's due process complaint notice, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 16, 2023

SARAH L. HARRINGTON
STATE REVIEW OFFICER