The University of the State of New York

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

No. 23-232

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 Ezra Zonana, Esq.

Gulkowitz Berger LLP, attorneys for respondent, by Shaya M. Berger, 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 ordered it to reimburse respondent (the parent) for her son's transportation costs incurred while traveling to and from privately-obtained special education teacher support services (SETSS) during the 2021-22 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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

For all periods of time relevant to this appeal, the student was attending a religious nonpublic school at the parent's expense. CSEs convened on July 25, 2017 and November 18, 2019, found the student eligible for special education as a student with a learning disability, and

developed IESPs for the student that recommended the student receive seven periods per week of group special education teacher support services (SETSS) in Yiddish (Parent Ex. B; Dist. Ex. 2).[1]

The student was the subject of a prior administrative due process proceeding concerning the 2020-21 and 2021-22 school years (prior matter) (see Dist. Ex. 6). Underlying the prior matter, the parent filed due process complaint notices dated September 16, 2020 and September 13, 2021, claiming that the district "failed to provide adequate special education teacher services for the student for the" 2020-21 and 2021-22 school years (Dist. Exs. 3 at p. 1; 4 at p. 1). In particular, the parent alleged that the July 2017 IESP was the last IESP developed for the student with which the parent agreed; that the student needed individual rather than group SETSS for the 2020-21 and 2021-22 school years; and that the district did not assign a provider and the parent was not able to locate a provider to deliver SETSS to the student at the district's "standard rate" (Dist. Exs. 3 at p. 1; 4 at p. 1). For relief, the parent sought district funding for the costs of privately-obtained SETSS "at an enhanced rate" (Dist. Exs. 3 at p. 2; 4 at p. 2). An IHO consolidated the September 2020 and September 2021 due process complaint notices, held an impartial hearing, and issued a final decision dated July 10, 2022, ordering the district to "fund SETSS at the enhanced market pendency rate for the entirety of" the 2020-21 and 2021-22 school years (Dist. Exs. 5; 6).

During the 2021-22 school year, the student received SETSS from a private agency, Aim Further, Inc., that invoiced the district for the costs thereof (see Parent Ex. C).

A. Due Process Complaint Notice

Turning to the present matter, in a due process complaint notice dated June 27, 2023, the parent alleged that, for the 2021-22 school year, the district failed to assign a provider to deliver the student's SETSS, the parent identified a private provider to deliver the services, but the private provider was "only available at a designated location outside of the student's home and school" and that, therefore, the student had to "travel from home or school to the designed location where the services were delivered and back to school or home" (Parent Ex. A at p. 1).[2] The parent asserted that she had to pay "out of pocket" for the transportation costs in order for the student to receive the services (id.). The parent sought an order requiring the district to reimburse the parent for the costs of transporting the student to receive his SETSS during the 2021-22 school year (id. at p. 2).

B. Impartial Hearing Officer Decision

An IHO from the Office of Administrative Trials and Hearings (OATH) was assigned to preside over the parent's due process complaint notice (see IHO Ex. III). On August 1, 2023, the IHO held a prehearing conference and issued a prehearing conference summary and order (prehearing order) that, among other things, scheduled a hearing on the merits on August 16, 2023, set forth the IHO's case management directives that any motion be made at least five business days

[1] There is reference in the hearing record to an additional IESP developed on August 1, 2019 (see Dist. Ex. 7 at p. 1); however, a copy of an August 2019 IESP was not included in the hearing record.

[2] The hearing record contains two copies of the parent's June 2023 due process complaint notice (compare Parent Ex. A, with Dist. Ex. 1). For purposes of this decision, only the parent exhibit is cited.

before the scheduled hearing and that affirmative defenses be stated within 10 calendar days of the prehearing order (IHO Ex. III). On August 16, 2023, the district submitted a motion to dismiss the parent's due process complaint notice, arguing that the claims alleged were barred by res judicata, mootness, and the statute of limitations and, further, that transportation was not an equitable service available to the student (IHO Ex. I; Dist. Mot. to Dismiss). The impartial hearing convened and concluded on August 16, 2023 (Tr. pp. 1-40).

During the impartial hearing, the IHO stated that she would not consider the district's motion to dismiss as it was untimely submitted per the directives of the IHO's prehearing order (Tr. p. 9; see IHO Ex. III ¶¶ 14-15). Accordingly, the IHO indicated that the hearing would go forward (Tr. p. 9). The IHO received the parties' exhibits into evidence, no testimonial evidence was presented, and the parties gave closing statements (Tr. pp. 10-39; Parent Exs. A-E; Dist. Exs. 1-7). For its closing statement, the district summarized its arguments as set forth in the motion to dismiss (compare Tr. pp. 18-34, with Dist. Mot. to Dismiss at pp. 7-19). The IHO took issue with the counsel for the district's attempt to make the arguments set forth in the motion as the closing statement and reiterated that the district's motion was "denied" (Tr. p. 34). The IHO indicated her intent to "rul[e] for the Parent" unless the district could identify a reason outside of those identified in the motion to dismiss why the parent's claims were "barred by law" (Tr. pp. 34-35). The district's attorney responded that the grounds for dismissal argued in the motion to dismiss were the "same arguments that [the district] would be arguing anyway in a due process hearing" (Tr. p. 35). The parent's attorney summarized the parent's position and responded to the district's arguments (Tr. pp. 35-39). In particular, regarding res judicata, the parent's attorney asserted that relief in the form of "payment for a SETSS provider" was a "[t]otally separate issue" from transportation and opined that a parent would not be permitted to seek transportation in the same proceeding in which payment for a SETSS provider was sought (Tr. pp. 37-38). Next, the parent's attorney argued that the statute of limitations would not have run from a CSE meeting that did not result in a recommendation for special transportation but instead would run from the date the parent "started paying out of pocket" (Tr. p. 39).

In a final decision dated September 20, 2023, the IHO reiterated her determination denying the district's motion to dismiss as it was untimely filed in contravention of the terms of the prehearing order (IHO Decision at pp. 3-4, 7-8). However, the IHO addressed the district's arguments in the alternative (see id. at pp. 8-9). Regarding res judicata, the IHO found that the due process complaint notice and the IHO's decision from the prior matter made "no mention of transportation" and that the parent did not know for the prior matter that the privately obtained SETSS would necessitate transportation (id. at p. 8). The IHO found that the district's argument about mootness "require[d] some sort [of] forward looking guesswork" on the parent of the parent "that transportation would be required in the future" and was without merit (id.). Finally, regarding the statute of limitations, the IHO ruled that the date on which the parent knew or should have known about the "issue with regards to transportation" was the date of the IHO's decision in the prior matter and, accordingly, the parent's claim in the present matter was not time barred (id. at pp. 8-9).

Turning to the merits, the IHO found that the district failed to meet its burden to prove that it provided the student with transportation to and from his SETSS for the 2021-22 school year and that the parent's requested relief was appropriate (IHO Decision at pp. 3-4, 6-7). Accordingly, the

IHO ordered the district to reimburse the parent for the costs of transportation costs incurred during the 2021-22 school year (id. at p. 9).

IV. Appeal for State-Level Review

The district appeals arguing that the IHO abused her discretion by refusing to entertain the district's motion to dismiss and erred in not dismissing the parent's due process complaint notice as barred by res judicata and/or the statute of limitations. In an answer, the parent responds to the district's material allegations and argues that the IHO's decision should be upheld in its entirety.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[3] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.).[4] Thus, under State law, an eligible New

[3] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[4] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further

York State resident student may be voluntarily enrolled by a parent in a nonpublic school but at the same time be enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Waiver of Defenses

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

Here, as summarized above, the parent filed her due process complaint notice on June 27, 2023, a prehearing conference took place on August 1, 2023, and, at the prehearing conference, an impartial hearing was scheduled to take place on August 16, 2023 at 2:00 pm (see Parent Ex. A; IHO Ex. III at p. 1). The IHO's August 1, 2023 prehearing order stated that its purpose was "to set firm expectations of the Parties to resolve the matter fairly and efficiently" (IHO Ex. III at p. 1). As relevant here, the prehearing order provided that "all . . . motions or requests for orders by either party shall be made in writing, at least five business days before the scheduled hearing, and shall include any affidavits or exhibits relied upon" (id. ¶ 14). The order further warned that "[i]f parties offer any motions, other than requests for an extension of the timeline, after this deadline, they will be deemed waived, and the undersigned Hearing Officer will not consider them" (id.). Relatedly, the IHO's order also required that "[a]ny known or knowable affirmative defense must be articulated within 10 calendar days of the date of this order, or within 10 calendar days of the

provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

earliest date the affirmative defense was knowable to the moving Party, (whichever occurs later) via email" and warned that "[a]ny affirmative defense not articulated within the timelines of this provision shall be considered waived and deemed evidentiarily irrelevant at a hearing on the merits" (id. ¶ 15). The order provided that a party could object to the terms of the order within 10 calendar days (id. at p. 4).

On August 16, 2023, the date on which the impartial hearing was scheduled to take place, the district emailed the IHO and the parent's attorney at approximately 11:30 am, stating the district's "plan to file a Motion to Dismiss" before the 2:00 hearing upon receipt of the approval of her "client" (IHO Ex. II). In an email sent at 1:58 pm, the district's attorney submitted the district's motion to dismiss (IHO Ex. I). It is undisputed that the district's motion was submitted on the day of the scheduled impartial hearing rather than at least five business days prior (i.e., on or before August 9, 2023) as required by the IHO's prehearing order (compare IHO Ex. I, with IHO Ex. III ¶ 14). Similarly, the district did not raise affirmative defenses within 10 days of the IHO's order (i.e., on or before August 11, 2023) (compare IHO Ex. I, with IHO Ex. III ¶ 15). There is also no indication in the hearing record that either party objected to the IHO's prehearing order or requested that the IHO amend the deadlines therein.

In response to the IHO's inquiry about the timing of the motion, the district's counsel stated that the district had needed time "to investigate th[e] matter" and, once it determined its position that the parent's claim should be precluded, it "need[ed] time to put everything together and to get the client to review that" (Tr. p. 5). The IHO responded by noting that the resolution period was also an appropriate time for "investigation to occur" and that the parent's due process complaint notice had been filed in June (Tr. p. 8). Indeed, the IDEA specifically contemplates a resolution period, which allots 30 days from the receipt of the due process complaint notice for the district to resolve some or all of the issues in the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B]; see 8 NYCRR 200.5[j][2][v]). According to the IHO, the parties reported that no resolution meeting took place "and there was no discussion amongst the parties during the resolution period" (Tr. p. 8).[5]

The IHO also noted that the district "could have asked" for more time to file the motion if needed but that it failed to do so (Tr. p. 9). As the IHO alluded to, a party may seek a specific extension of time of the 45-day timeline in which an IHO must render and transmit a final written decision to the parties, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The IHO's prehearing order further set forth

[5] In addition to not investigating the matter during the resolution period, it also appears that the district did not submit a response to the due process complaint notice in which the district could have raised its defenses. State and federal regulation provides that, if the school district has not sent a prior written notice to the parent regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] see 34 CFR 300.508[e]). The IHO's prehearing order also directed that the district "immediately provide the Petitioner with a written response to the Due Process Complaint if one has not already been provided" (IHO Ex. III ¶ 14). While the district's failure to submit a response to the due process complaint notice, on its own, did not affect a waiver, it is yet another example of an opportunity the district had to preserve its defenses that it did not utilize (see R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011] [finding that the district was not required to state its defenses in a response to the due process complaint notice]).

expectations and requirements for a party seeking to adjourn the scheduled impartial hearing date and/or requesting to extend the timeline (IHO Ex. III ¶¶ 5, 9).

During the impartial hearing, the district's attorney opined that the defenses of res judicata, mootness, and statute of limitations could "be brought up at any time before or during an adjudication" of the matter (Tr. pp. 5, 10). The IHO noted that, if the district was correct that the motion could properly be filed "minutes before the hearing begins," there was no way for the parent's attorney to be prepared to respond (Tr. p. 9). In its appeal, the district continues to argue that the defenses could be raised at any point during the impartial hearing. However, the authority cited by the district stands for the unremarkable proposition that an affirmative defense shall be deemed waived if it is raised for the first time on appeal (see, e.g., M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304 [S.D.N.Y. 2014]). Contrary to the district's argument, the general proposition that affirmative defenses must be raised during the impartial hearing does not invalidate an IHO's reasonable directives and deadlines for the presentation of such defenses, which permit for sufficient notice to the nonmoving party (cf. R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *5 [S.D.N.Y. Sept. 16, 2011] [finding the district did not waive its defense where it raised it "well in advance of the due process hearing" and the parent "was plainly on notice of the arguments that Defendants intended to advance"]). Moreover, as the IHO pointed out, the district made little or no use of the resolution period and did not seek extensions of the deadlines imposed by the IHO in the prehearing order before the hearing on the merits to assert its defenses and thus has no one but itself to blame. The district's approach of ignoring the IHO's prehearing order and then attempting to spring its defenses on the IHO and the opposing side in its motion two minutes before the hearing on the merits was manifestly unreasonable behavior for an impartial hearing process.

As the IHO noted in the prehearing order, directives setting forth expectations and deadlines for the purpose of allowing fair and efficient resolution of disputes are "a reasonable method for balance the system's need for efficiency with fairness to the parties" (IHO Ex. III at p. 1, quoting Application of a Student with a Disability, Appeal No. 22-162). As the district did not abide by the IHO's reasonable directives with regard to filing a motion and raising affirmative defenses, the IHO did not abuse her discretion in deeming the district's defenses waived. Accordingly, the IHO's decision will not be disturbed.

B. Alternative Findings

While the IHO's determination that the district waived the defenses will not be disturbed, the district's appeal of the IHO's alternative findings warrants further discussion.

1. 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).

Contrary to the IHO's determination that res judicata did not apply, the parent's request for transportation costs, while not raised in the due process complaint notice in the prior matter (Dist. Exs. 3-4), arose from the same allegations pertaining to the district's failure to deliver SETSS to the student for the 2021-22 school year, which were fully adjudicated on the merits in the prior matter (compare Dist. Ex. 4 at p. 1, with Parent Ex. A at p. 1). That the parent's private provider could only deliver SETSS to the student in a separate location to which the student had to travel is not a separate violation by the district of Education Law § 3602-c; rather, the parent's request for transportation costs associated with their privately-obtained services is simply additional relief sought to remedy the same failure by the district to implement equitable services and, therefore, falls under the umbrella of claim preclusion (GV v. Bd. of Educ. of W. Genesee Cent. Sch. Dist., 2017 WL 3172417, at *3 n.6 [N.D.N.Y. July 25, 2017] [noting that, even if the IHO in the prior matter could not have awarded the relief the plaintiff sought in the action before the court, "'[a] party cannot avoid the preclusive effect of res judicata by asserting . . . a different remedy'"], quoting Brown Media Corp. v. K&L Gates, LLP, 854 F.3d 150, 157 [2d Cir. 2017]; see also Chen v. Fischer, 6 N.Y.3d 94, 100 [2005] ["[P]rinciples of res judicata require that '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 could have requested transportation costs in the prior matter, including by presenting evidence of the same to the IHO in the prior matter as the impartial hearing remained pending between October 2021 and July 2022, while the parents were purportedly incurring transportation costs (compare Dist. Ex. 6 at p. 1, with Parent Exs. D-E).[6] Further, if the parents felt that the IHO in the prior matter failed to order sufficient relief, the parent's recourse was to appeal that decision (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

[6] State and federal regulations require only that the due process complaint notice state a "proposed resolution of the problem to the extent known and available to the party at the time " (8 NYCRR 200.5[i][1] [emphasis added]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]). Thus, if the parent thereafter came to realize after filing her September 13, 2021 due process complaint notice in the prior matter that she would also want to seek transportation costs as relief, she would not necessarily have been constrained to the relief sought in the September 2021 due process complaint notice and could have articulated her request and offered evidence of the transportation costs during the impartial hearing in the prior matter. Moreover, as the district notes, as of the date of the September 13, 2021 due process complaint notice, it appears that the parent had already begun to pay transportation costs out of pocket, which would tend to show that she did know that transportation costs were being incurred even before the September 13, 2021 due process complaint notice (see Parent Ex. D at p. 1 [reflecting charges for a car service "Round Trip" for the weeks of August 29, 2021 through September 26, 2021]). However, for reasons that are not explained in the hearing record, vouchers completed in March 2023 for the transportation costs to be submitted to the district did not include dates prior to September 14, 2021 (Parent Ex. E at pp. 1-2).

Based on the foregoing, had the district not waived its affirmative defenses, the parent's June 2023 due process complaint notice would have been barred by res judicata. Indeed, the principals of judicial efficiency promoted by the IHO's use of clear directives and deadlines will no doubt be undermined if multiple proceedings are permitted to go forward regarding the same underlying violations. The parent's actions of commencing multiple due process proceedings to request different but related relief for the same underlying implementation violations for the same time frame achieves little except to clog the due process system needlessly.

2. Statute of Limitations

As for statute of limitations, the IDEA requires that, unless a state establishes a different limitations period under state law, a party must request a due process hearing within two years of when the party knew or should have known of the alleged action that forms the basis of the complaint (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114 n.8 [2d Cir. 2008] [noting that the Second Circuit applied the same "knows or has reason to know" standard of IDEA claim accrual both prior to and after codification of the standard by Congress]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *17 [S.D.N.Y. Mar. 29, 2013], aff'd, 554 Fed. App'x 56, 57 [2d Cir Feb. 11, 2014]; R.B. v. Dept. of Educ. of the City of New York, 2011 WL 4375694, at *2, *4 [S.D.N.Y. Sept. 16, 2011]; Piazza v. Florida Union Free Sch. Dist., 777 F. Supp. 2d 669, 687-88 [S.D.N.Y. 2011]). New York State has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]). Determining when a parent knew or should have known of an alleged action "is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]).

The IHO's analysis of the statute of limitations suffered from the same idea that the action that formed the basis of the parent's complaint was something other than the district's failure to implement equitable services (see IHO Decision at pp. 8-9). In particular, the IHO indicated the date of the IHO's decision in the prior matter was the date the parent knew or should have known about the need to seek transportation as relief (see id.). While perhaps, as of the date of the IHO's decision in the prior matter, the parent came to know that she wanted more relief than was ordered, that would have been an appropriate subject for an appeal, not a new proceeding. The district's argument on appeal, however, is also not convincing. The district argues that the statute of limitations began to run as of June 1, 2021, when the parent should have but did not request equitable services pursuant to Education Law § 3602-c and instead determined to seek district funding of private services including transportation. However, as with its other defenses, the district did not raise at the impartial hearing a defense alleging that it was not required to deliver equitable services to the student since the parent did not meet the June first deadline, and the IHO's prehearing order specifically listed this defense as among those that the district was required to raise within 10 days of the order (IHO Ex. III ¶ 15).

Instead, the June 27, 2023 due process complaint notice was properly submitted within two years of the alleged implementation failures that began in September 2021 (see Parent Ex. A). Accordingly, had the district not waived the defense, the IHO's decision regarding statute of limitations would nonetheless have been affirmed, albeit based on different reasoning.

VII. Conclusion

In summary, the evidence in the hearing record reflects that the IHO did not abuse her discretion by deeming the district's affirmative defenses waived when it failed to comply with the deadlines set forth for motions and raising defenses set forth in her prehearing order.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
November 28, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER