The University of the State of New York

The State Education Department
State Review Officer
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No. 25-081

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 New York City Department of Education

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 denied her requests to have respondent (the district) fund an independent speech-language evaluation and a nonpublic school placement for the student for the 2025-26 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

The parties' familiarity with this matter is presumed, and, therefore, the facts and procedural history of this case and the IHO decision will not be recited in detail. Briefly, a CSE convened on September 30, 2022 to develop an IEP for the student with a projected implementation date of October 6, 2022, and found the student eligible for special education as a student with a speech or language impairment (Dist. Ex. 2 at pp. 1, 24).[1] The September 2022 CSE recommended three periods per week of direct group special education teacher support services (SETSS) in English-language arts (ELA); two periods per week of direct group SETSS in

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

math; and two 30-minute sessions per week of speech-language therapy in a group of three (id. at p. 19).[2]

In a letter dated October 6, 2022, the parent requested that the district convert an IEP dated October 30, 2020, to an individualized education services program (IESP) for the 2022-23 school year (Dist. Ex. 4). The parent also requested that a social history of the student be performed (id.).

A CSE convened on October 21, 2022 to develop an IESP for the student with a projected implementation date of November 4, 2022 (Dist. Ex. 5 at pp. 1, 15). The October 2022 CSE recommended that the student receive eight periods per week of individual SETSS and three 30-minute sessions of individual speech-language therapy (id. at p. 13).

On or about February 28, 2023, the parent filed a due process complaint notice alleging that the district failed to provide the student a free appropriate public education (FAPE) during the 2022-23 school year (IHO Ex. I at p. 3). The February 2023 due process complaint notice was the subject of a prior impartial hearing, which resulted in an IHO decision dated June 21, 2023 that ordered the district to: fund an independent speech-language evaluation from an evaluator of the parent's choosing at the provider's customary rate; provide and fund a bank of compensatory SETSS and speech-language therapy; and reconvene a CSE within two weeks of receiving the speech-language evaluation and locate an approved nonpublic school that could accommodate the student's unique educational needs (id. at p. 13). Additionally, the parent filed a due process complaint notice on or about June 27, 2024 alleging that the district failed to provide the student with SETSS and speech-language therapy during the 2023-24 school year, which resulted in a prior IHO decision dated October 10, 2024 that ordered the district to fund a bank of compensatory SETSS and speech-language therapy for the student at a reasonable market rate, as determined by the district's implementation unit, to expire on August 31, 2026 (IHO Ex. II at pp. 3, 12).

A. Due Process Complaint Notice

In a due process complaint notice dated September 16, 2024, the parent alleged that the district failed to conduct evaluations and assessments requested by the parent (Dist. Ex. 1 at p. 2).[3] Additionally, the parent alleged that the district failed to implement the nonpublic school placement that was ordered in the prior June 2023 IHO decision (id.). As her proposed resolution, the parent sought the student's placement in a nonpublic school with SETSS and speech-language therapy; independent evaluations of the student paid for by the district; the student's educational records including all assessments, evaluations, and reports; and that the district comply with the previously-issued IHO decisions (id.).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] At all relevant times during this matter, from the filing of the September 2024 due process complaint notice to the filing of the request for review and reply, the parent appeared and proceeded pro se.

B. Impartial Hearing Officer Decision

On October 3, 2024, the parent sent a letter requesting that the impartial hearing be initiated based on the district's failure to hold a resolution meeting (Parent Ex. C). On October 23, 2024, the parent added a request for a default judgment against the district to her application, indicating that the district failed to schedule and hold a resolution meeting and that the district's response to the parent's due process complaint notice was not timely provided to the parent, was not signed, and was "plagued with untrue facts" (Parent Ex. D).[4] The IHO denied the parent's application (IHO Decision at p. 3).

A prehearing conference for this matter was held on October 29, 2024, a status conference was then held on November 12, 2024, and an impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on December 3, 2024 (Tr. pp. 1-89). In a decision dated January 2, 2025, the IHO found that the district failed to present evidence regarding any attempt to reconvene the CSE for the 2024-25 school year and, therefore, had failed to provide the student a FAPE for the 2024-25 school year (IHO Decision at pp. 6-7, 9). The IHO also found that the district made "no laudable arguments" during the impartial hearing regarding an appropriate compensatory education remedy that would place the student in the position he would have been in but for the denial of a FAPE (id. at pp. 10-11).

Next, the IHO summarized the parent's requested relief (IHO Decision at p. 11). According to the IHO, the parent sought a physical therapy (PT) evaluation, an occupational therapy (OT) evaluation, a neuropsychological evaluation, and a speech-language evaluation of the student at the district's expense; placement of the student in a nonpublic school; and compensatory education services for the student (id.). The IHO noted that she informed the parent that the IHO did not have the authority to enforce prior orders; thus, the IHO denied the parent's request for a placement at a nonpublic school based on the prior IHO decision issued in June 2023 (id.). Regarding the parent's request for the district to fund an independent speech-language evaluation for the student, the IHO found that the parent's request was barred by the doctrine of res judicata because the parent had previously been awarded funding for an independent speech-language evaluation based on the prior IHO decision issued in June 2023 (id. at pp. 11-12). However, "[w]ith respect to the other evaluations. . . [the IHO] f[ou]nd that the parent [] sufficiently demonstrated that she was in disagreement with the October 2022 IESP" (id. at p. 12).

Lastly, the IHO found that the parent's request for compensatory education services was an appropriate request as the district had failed to provide the student a FAPE for the 2024-25 school year (IHO Decision at p. 12). In addition, given that the student had spent an entire school year without services, the IHO found that ordering "a comprehensive evaluation" was an appropriate remedy to determine the student's present levels of functioning and appropriate services going forward (id.). As relief, the IHO ordered the district to fund: eight periods of direct group SETSS per week for the 36-week 2024-25 school year, three 30-minute sessions of individual speech-language therapy for the 36-week 2024-25 school year; a metro card for the student and the parent to travel to and from the service providers providing the awarded compensatory services; a

[4] The district submitted a response to the parent's due process complaint notice, dated October 10, 2022 (Dist. Response. to Due Proc. Compl. Not.).

neuropsychological evaluation to be conducted by a provider selected by the parent at a rate not to exceed $7,000; an OT evaluation to be conducted by a provider selected by the parent at a rate not to exceed $2,500; a PT evaluation to be conducted by a provider selected by the parent at a rate not to exceed $2,500; and further ordered the CSE to reconvene within the first of 45 days from the date of the IHO decision or 15 days after the ordered evaluations were completed (id. at pp. 13-14).

IV. Appeal for State-Level Review

The parent appeals, raising a number of allegations of IHO error. The parent alleges that the IHO did not comply with the timelines for initiating a hearing and rendering a decision, improperly advised the district's attorney during the impartial hearing and denied the parent's request for a subpoena, erred in denying the parent's request for default judgement due to the district's failure to schedule a resolution meeting, and erred with respect to the district's assertion of an affirmative defense and by not addressing all of the parent's requests. Further, the parent alleges that the IHO erred in failing to order the district to fund an independent speech-language evaluation at a market rate. Finally, the parent alleges that the IHO erred in dismissing the matter with prejudice because the district has not yet complied with the previously-issued IHO orders.

In its answer, the district argues that the IHO properly dismissed the parent's request for the district to fund an independent speech-language evaluation under the doctrine of res judicata. The district also argues that the remaining arguments made by the parent should be disregarded, arguing that the impartial hearing commenced in a timely manner; that there is no evidence in the hearing record to support the parent's claim that the IHO was improperly advising the district's attorney; that the IHO properly denied the parent's request to subpoena a district school superintendent to testify because the parent could not explain how the superintendent's testimony would be relevant or material; that the parent is not entitled to a default judgment due to the district's failure to schedule and hold a resolution meeting, but rather that such a failure would expedite the impartial hearing timeline; that the IHO ruled in favor of the parent regarding the district's June 1 affirmative defense so the parent was not aggrieved by any finding of the IHO regarding affirmative defenses; and that the IHO correctly found that she lacked authority to enforce prior hearing officer's orders.

In reply to the district's answer, the parent reiterates her request for an independent speech-language evaluation to be funded at the district's expense and argues that the IHO erred by barring the parent's claim under the doctrine of res judicata. Additionally, the parent restates many of the arguments that she asserted in her request for review.[5]

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

[5] State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6 [a]).

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]).[6]

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

The parties do not dispute the IHO's findings that the district denied the student a FAPE for the 2024-25 school year and that the district waived its June 1 affirmative defense. Accordingly, these findings have 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]).

A. Preliminary Matters

1. Request for Default Judgement

The parent alleges that the IHO erred by failing to grant her motion for a default judgement due to the district's failure to schedule a resolution meeting.

The IDEA, as well as State and federal regulations provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of

[6] 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 facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). If the district fails to convene the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]). If a parent does not feel that their concerns have been adequately addressed at the resolution meeting, the parent is free to proceed with the due process proceedings and seek what they feel will adequately remedy them (see Polanco v. Porter, 2023 WL 2242764 at *5 [S.D.N.Y. Feb. 27, 2023] [noting that the resolution period is a time where the district may remedy any alleged deficiencies in the IEP without penalty, but if the parent feels their concerns have not been adequately addressed, and a FAPE has still not been provided, then the parent may continue with the due process proceeding and seek reimbursement]).

Here, the parent's due process complaint notice was dated September 16, 2024, allowing the parent to seek the intervention of the IHO to begin the due process hearing timeline as early as October 1, 2024 due to the district's failure to convene a resolution meeting (Dist. Ex. 1 at p. 3). In a letter dated October 3, 2024, the parent requested that the IHO begin the due process hearing timeline due to the district's failure to schedule and hold a resolution meeting (Parent Ex. C). Subsequently, in a letter dated October 23, 2024, the parent requested that a default judgment be granted against the district for the district's failure to schedule and hold a resolution meeting (Parent Ex. D).

The parent also claimed in her October 23, 2024 letter that the district failed to respond to her due process complaint notice within 10 days and that the district's response to her due process complaint notice was invalid because it was unsigned and contained false statements (Parent Ex. D). State regulation provides that "[i]f the school district has not sent a prior written notice . . . to the parent regarding the subject matter in the parent's due process complaint notice, [the] district shall, within 10 days for receiving the complaint, send the parent a response" (8 NYCRR 200.5[i][4][i]). The parent's due process complaint notice was dated September 16, 2024 and there is no evidence in the hearing record that the district sent the parent a prior written notice, thus the district was required to send the parent a response to her due process complaint notice by September 26, 2024 (Dist. Ex. 1 at p. 3). The district's due process response was dated October 10, 2024, and thus was in violation of the timeframe set forth in State regulation (see Dist. Response to Due Process Compl. Not. at p. 2).

The IHO denied the parent's request for a default judgment (IHO Decision at p. 3).

Upon review, to the extent the parent sought a default judgment based on the district's failure to schedule and hold a resolution meeting, such a remedy is not contemplated under State regulation, which specifically provides that "[i]f the school district fails to hold the resolution meeting within 15 days of receipt of the parents' due process complaint or fails to participate in the resolution meeting, the parent may seek the intervention of the impartial hearing officer to begin the due process hearing timeline" (8 NYCRR 200.5[j][2][vi][b]). Additionally, authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to a due process complaint notice tends to lean against entry of a default judgment in the absence of a substantive violation, and the appropriate remedy

is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. Of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]).

Here, an impartial hearing, along with a full and fair opportunity to be heard, has been afforded to the parent at this point. Thus, the IHO did not err in denying the parent's motion for a default judgement.

2. Hearing Timeline

The parent also alleges that the IHO failed to follow timelines outlined by State regulations in initiating the hearing and issuing her decision. When a parent files a due process complaint notice, the impartial hearing or prehearing conference must commence within 14 days of the IHO receiving the parties' written waiver of the resolution meeting, or the parties' written notice that mediation or a resolution meeting failed to result in agreement, or the expiration of the 30-day resolution period; unless the parties agree in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][1]-[4]). An IHO is required to render a decision not later than 45 days after the expiration of the resolution period (34 CFR 300.510[b], [c]; 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may be granted consistent within regulatory constraints, the IHO must ensure that the hearing record includes documentation setting forth the reason for each extension, and each extension "shall be for no more than 30 days" (8 NYCRR 200.5[j][5][i]). Absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts, avoidable witness scheduling conflicts or other similar reasons" (8 NYCRR 200.5[j][5][iii]). Moreover, an IHO "shall not rely on the agreement of the parties as a basis for granting an extension" (id.). If an IHO has granted an extension to the regulatory timelines, State regulation requires that the IHO issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]). Pursuant to State regulation, an IHO shall determine when the record is closed and notify the parties of the date the record is closed (8 NYCRR 200.5[j][5][v]).

As the IHO did not advance the initiation of the hearing at the parent's request as discussed above, the 30-day resolution period would have expired on October 16, 2024 based on the parent's due process complaint being dated September 16, 2024 (see Dist. Ex. 1 at p. 3). On September 20, 2024, the IHO was appointed to the matter, and approximately two weeks after the expiration of the resolution period on October 29, 2024, a prehearing conference was held (Tr. p. 1; IHO Decision at p. 3). A status conference for the matter was held on November 12, 2024, when the IHO granted the district's 30-day extension request on the basis of witness availability (Tr. pp. 17; 51-52). The impartial hearing was held on December 3, 2024, less than 30-days after the district's extension was granted (Tr. p. 54). Since the IHO granted an extension to one of the parties, the IHO was required to issue her decision with 14 days of the IHO closing the hearing record. Here, the IHO decision indicates that the IHO set January 2, 2025 as the record close date and she issued her decision on the same date (IHO Decision at p. 1). Thus, the IHO followed the timelines outlined by State regulations and there is no basis to overturn the IHO's decision on this ground.

3. IHO Bias

The parent further alleges that the IHO demonstrated bias against the parent by asking clarifying questions to the district's attorney. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]; C.E. v. Chappaqua Cent. Sch. Dist., 695 Fed. App'x 621, 625 [2d Cir. June 14, 2017]). State regulations do not impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (8 NYCRR 200.5[j][3][vii]).

Upon a careful and full review of the hearing record, including the IHO's interactions with the parties and the language of her decision, I find that the evidence does not support the parent's contention that the IHO acted with bias against her. Throughout the impartial hearing, the IHO recommended that the parent consult with an attorney for this matter (Tr. pp. 27-28; 32; 47-48). Additionally, the IHO provided the parent with procedural advice during the impartial hearing (Tr. pp. 72-74; 86-87). The IHO also provided the parent with ample time to state her claims and case throughout the impartial hearing (Tr. pp. 38-40; 64-68; 73-83). Thus, the IHO conducted the impartial hearing within the bounds of standard legal practice and the hearing record does not support a finding of bias (Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 311 [D. Conn. 2016] [rejecting the parent's claim of IHO bias and noting that conduct that was described as "curt" and "harsh" nevertheless did not amount to bias]).

4. Parent's Witness Subpoena

The parent further alleges that the IHO erred by denying the parent's request to subpoena a superintendent of the district to testify at the impartial hearing. State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). In addition, an IHO has the authority to issue a subpoena if necessary (see 8 NYCRR 200.5[j][3][iv]).

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 (Letter to Anonymous, 23 IDELR 1073). 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.

Based upon a review of the hearing record, the IHO acted within her broad discretion to deny the parent's request for a subpoena to compel the testimony of the superintendent of the district. During the impartial hearing, the parent sought to compel the superintendent to testify about the district's failure to provide services to the student and about who was going to provide a nonpublic school placement for the student (Tr. pp. 38-40). The IHO has the authority to "limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). Ultimately, the IHO ruled in the parent's favor finding that the district denied the student a FAPE for the 2024-25 school year.

Even if the IHO did err in failing to issue a subpoena for the superintendent to testify at the impartial hearing, the parent is not clear on appeal regarding what additional evidence the witness would have provided or how the parent was harmed by the denial of her subpoena request, particularly as the parent was not aggrieved by the IHO's finding that the district failed to provide the student a FAPE for the 2024-25 school year.

5. Dismissal With Prejudice

Next, the parent alleges that the IHO erred by dismissing the matter with prejudice because, as the parent alleges, it would deny the student the right for future due process. The IHO's decision in this matter states that "any relief not specifically discussed in this decision is denied, and all the [p]arent's remaining claims not discussed herein are dismissed with prejudice" (IHO Decision at pp. 12-13). Thus, it must be emphasized that the IHO did not dismiss the entire matter with prejudice, rather, the IHO awarded the parent much of the relief she sought including compensatory education for the student including a metro card for the parent and student to use to travel to and from the awarded services; funding for a neuropsychological evaluation, a PT evaluation, and an OT evaluation; and a reconvene of the CSE within a set period of time to create an appropriate educational program for the student (id. at p. 13). The parent has not specified on appeal what claims she may have made in the due process complaint notice or at the hearing that were not discussed in the IHO's order and, which therefore may have been dismissed with prejudice based on the IHO's catch all finding as to "any relief no specifically discussed." Accordingly, the parent has not indicated how the IHO erred in dismissing the unaddressed claims with prejudice. To the extent that the parent asserts on appeal a concern that the IHO's dismissal of the parent's remaining claims denies her a right for "future due process," the parent is not precluded from filing a due process complaint notice relating to the identification, evaluation,

educational placement, or provision of a FAPE to the student for claims that were not a part of the same set of operative facts as the claims raised in this proceeding, which were limited to the 2024-25 school year. Accordingly, any claims related to the upcoming 2025-26 school year are not barred by the IHO's dismissal with prejudice in this proceeding.

B. Res Judicata

The parent alleges that the IHO erred by failing to order the district to fund an independent speech-language evaluation. The IHO declined to award the parent funding for an independent speech-language evaluation under the doctrine of res judicata (IHO Decision at pp. 11-12).

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]).

Here, the IHO relied on a prior IHO decision dated June 21, 2023 to determine that the parent's request for funding for an independent speech-language evaluation was barred by res judicata. In the June 2023 IHO decision, the IHO ordered the district to fund a speech-language evaluation sought by the parent (IHO Ex. I at pp. 4, 12-13). In both the current matter and in the June 2023 IHO decision, the parent challenged the October 2022 IESP (compare IHO Decision at p. 5, with IHO Ex. I at p. 7). Thus, all three elements of res judicata have been established: the prior June 2023 IHO decision involved an adjudication on the merits; the June 2023 IHO decision involved the same parties, both the parent and the school district; and the request for an independent speech-language evaluation was raised in the prior proceeding in which the IHO awarded the parent funding (IHO Ex. I at p. 13). Additionally, as the IHO in this matter correctly notes, the "[p]arent already has a prior order that [the] parent may utilize to find a speech [evaluation]" (IHO Decision at p. 12 n.24). Thus, the IHO was correct to bar the parent's claim for an independent speech-language evaluation.

As to the IHO's finding that she did not have authority to enforce a prior impartial hearing order, it is true that, generally, neither IHOs nor SROs have authority to enforce prior decisions rendered by administrative hearing officers (see Educ. Law §§ 4404[1][a]; [2]; see, e.g., A.R. v. New York City Dep't of Educ., 407 F.3d 65, 76, 78 n.13 [noting that IHOs do not retain jurisdiction to enforce their orders and that a party who receives a favorable administrative determination may

enforce it in court]; A.T. v. New York State Educ. Dep't, 1998 WL 765371, at *7, *9-*10 & n.16 [E.D.N.Y. Aug. 4, 1998] [noting that SROs have no independent "administrative enforcement" power and granting an injunction requiring the district to implement a final SRO decision]). Accordingly, to the extent that the parent's underlying claims relate to enforcement of an IHO's decision, such claims are outside the jurisdiction of this administrative process. Should the district not comply with the order to fund an independent speech-language evaluation awarded to the parent in the June 2023 IHO decision or any other part of the prior IHO decisions, the parent may pursue enforcement either through the judicial system (see SJB v. New York City Dep't of Educ., 2004 WL 1586500, at *4-*5 [S.D.N.Y. July 14, 2004] [finding that parties need not initiate additional administrative proceedings to enforce prior administrative orders]).

B. Additional Relief

Having addressed the preliminary matters above, the remaining issue is the extent to which the parent's request for review may be read as seeking additional relief based on the IHO's finding that the district denied the student a FAPE for the 2024-25 school year by not convening the CSE to develop an educational program for the student for the 2024-25 school year.

As relief for the denial of FAPE for the 2024-25 school year, the IHO awarded compensatory education services and directed the district to reconvene the CSE to develop an appropriate educational program for the student after completion of ordered evaluations (IHO Decision at pp. 13-14).

To the extent the parent seeks a finding for a prospective placement at a nonpublic school for the 2025-26 school year, generally, a parent's request for specific prospective services through IEP amendments can, under certain circumstances, have the effect of circumventing the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]). This is particularly so when the school year at issue is over and, in accordance with its obligation to review a student's IEP at least annually, a CSE should have already produced an IEP for the following school year, which has not been the subject of a due process proceeding (see also Eley v. Dist. of Columbia, 2012 WL 3656471, at *11 [D.D.C. Aug. 24, 2012] [noting that prospective placement is not an appropriate remedy until the IEP for the current school year has been completed and the parent challenges the IEP for the current year]).

The parent's September 16, 2024 due process complaint notice commencing the instant proceeding concerned the 2024-25 school year, and it would be premature for the parent to have challenged a future school year, the 2025-26 school year, in September 2024 (see Eley, 2012 WL 3656471, at *11). Considering that the district has also been directed to fund additional independent evaluations and consider them at the next CSE meeting to assess the student's educational needs as well as to consider whether a nonpublic school placement is appropriate for

the student going forward, it must be assumed that the CSE will convene, or has already convened, to develop an IEP for the student for the 2025-26 school year. Therefore, I decline to find that this is one of the rare cases where a prospective placement at a nonpublic school for a school year that has not yet been the subject of an administrative determination, the 2025-26 school year, is warranted.[7]

VII. Conclusion

Based on the foregoing, the arguments presented by the parties and the hearing record, as a whole, do not present sufficient reason to modify the IHO's decision dated January 2, 2025.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 16, 2025

STEVEN KROLAK
STATE REVIEW OFFICER

[7] As previously noted, should the parent have concerns about the educational placement recommended for the student for the 2025-26 year, she may file a new due process complaint notice and, if her concerns involve the district's failure to comply with prior decisions, she may proceed through the judicial system to enforce prior favorable administrative decisions.