The University of the State of New York

The State Education Department
State Review Officer
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No. 23-317

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:
Law Office of Erika L. Hartley, attorneys for petitioner, by Erika L. Hartley, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 the decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice regarding her son's educational program for the 2023-24 school year. Respondent (the district) cross-appeals seeking to uphold the IHO's dismissal of the parent's case. The appeal must be sustained in part. The cross-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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called

for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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 the case and the IHO's decision will not be recited here in detail. The student has received diagnoses of autism spectrum disorder (ASD); language disorder – receptive and expressive language delays; specific learning disorder with impairments in reading, written

expression, and mathematics; and developmental coordination disorder (Parent Ex. K at pp. 28-30). The CSE convened on August 1, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Parent Ex. C).[1] The August 2022 CSE recommended that the student attend a 12:1+1 special class in English language arts (ELA), math, social studies, and science and a program of adapted physical education three periods per week (id. at pp. 23-24, 31). In addition, the August 2022 CSE recommended that the student receive related services of one 30-minute session per week of group counseling, one 30-minute session per week of individual counseling, two 30-minute sessions per week of individual occupational therapy (OT), one 30-minute session per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy (id. at pp. 24, 31). The CSE also recommended that the parent receive four 60-minute sessions per year of parent counseling and training (id.).

In a prior proceeding, the parent filed a due process complaint notice dated December 30, 2022 alleging that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. B at p. 2). In a decision dated July 1, 2023, the IHO (IHO 1) found that the district failed to meet its burden of proof that it offered the student a FAPE for the 2022-23 school year and found that the student was entitled to compensatory education services (id. at pp. 4, 6, 15). IHO 1 awarded compensatory education services of 400 hours of tutoring and 200 hours of executive functioning coaching (id. at pp. 4-7, 15-16). Additionally, IHO 1 found that the parent was entitled to reimbursement/direct funding of an independent educational evaluation (IEE) in the form of a neuropsychological evaluation (id. at pp. 15-16). As recommended by the neuropsychologist, IHO 1 also ordered the district to conduct the following evaluations: PT, occupational therapy/sensory, speech-language therapy, central auditory processing, and assistive technology (id.). Further, IHO 1 ordered the CSE to reconvene and consider the evaluations "within 20 days of receipt of said evaluations" and develop an IEP (id. at p. 16). If, however, the district failed to conduct the evaluations within 45 days, IHO 1 directed that the parent may "obtain an evaluation and be reimbursed by the [district]" (id.).

On July 24, 2023, the district sent the parent a prior written notice dated July 24, 2023 of its recommendation for the 2023-24 school year that reflected the program detailed above in the August 2022 IEP (Parent Exs. C at pp. 23-25; H at p. 1). Additionally, on July 24, 2023, the district sent the parent a school location letter advising the parent of the school in which the student was recommended to attend to receive his special education services for the 2023-24 school year (Parent Ex. I at p. 1).

On or about August 9, 2024, the parent appealed IHO 1's July 1, 2023 decision to the Office of State Review in Application of a Student with a Disability, Appeal No. 23-169. The district sought specific extensions of time to respond to the parent's challenges to IHO 1's decision

[1] An annual review was held on June 7, 2022 wherein the CSE recommended a 12:1+1 special class in a district specialized school with related services of speech-language therapy, counseling, physical therapy, and occupational therapy (Parent Ex. C at p. 2). The parent disagreed with the recommended program and requested an "additional evaluation" from the district (id.). The June 2022 IEP was not included in the hearing record.

pursuant to Part 279 of the practice regulations and the parties commenced settlement negotiations.[2]

A. August 2023 Due Process Complaint Notice and Impartial Hearing

While the appeal of IHO 1's decision was pending in the Office of State Review, the parent filed another due process complaint notice, dated August 17, 2023, alleging that the district failed to offer the student a FAPE for the 2023-24 school year because the recommended program for the 2023-24 school year was based upon the same August 2022 IEP that IHO 1 concluded had denied the student a FAPE for the 2022-23 school year (see generally Parent Ex. A). Additionally, the parent alleged that as of the date of the due process complaint notice, the district had not conducted any new evaluations of the student as ordered by IHO 1, which amounted to a denial of a FAPE for the 2023-24 school year (id. at pp. 2-3). According to the parent's allegations in the August 2023 due process complaint notice, "[t]he [district] did not appeal any of the findings of fact and determinations made in [July 1, 2023 IHO decision. The parent] has not appealed the FAPE determinations in the [July 1, 2023 IHO decision]. The findings and determinations concerning FAPE denials to [the student] given the [district's] procedural and substantive deficiencies in developing the August 2, 2022 IEP are final and binding on the [district] and [the parent]." As relief, the parent sought a finding by an IHO that the student was denied a FAPE for the 2023-24 school year and an "order staying the placement recommended in the July 24, 2023 [prior written notice] and school location letter" (id. at p. 5).

After a prehearing conference on September 22, 2023 and status conference on September 29, 2023, an impartial hearing convened before IHO 2 appointed by the Office of Administrative Trials and Hearings (OATH) on October 12, 2023 and concluded on October 20, 2023, after two days of proceedings (Tr. pp. 1-115). During the impartial hearing, the parties noted that IHO 1's decision was the subject of an appeal for State-level review (Tr. pp. 7, 14-15).

At or about the time of the conclusion of the impartial hearing in October 2023, the parties reached a settlement in the State-level Review proceeding regarding the challenge to IHO 1's decision in Application of a Student with a Disability, Appeal No. 23-169 and the parent withdrew the appeal prior to the time for the district to file its responsive pleadings. Accordingly, no decision was issued on the merits and the matter was closed as withdrawn. The parent's November 10, 2023 closing brief submitted to IHO 2 included a statement that "[i]t is respectfully brought to the attention of [IHO 2] that the parent and DOE have recently made an agreement on the appeal as to the funding of evaluations for [the student] and the evaluations are proceeding as ordered" (Parent Post Hr'g Br. at p. 2).

In a decision dated December 1, 2023, IHO 2 said she could not determine whether the district offered the student a FAPE for the 2023-24 school year because the parent's "claim [was]

[2] To the extent necessary for a thorough review of the issues relevant to this proceeding, relevant evidence in the hearing record underlying the discontinued appeal in Application of a Student with a Disability, Appeal No. 23-169 may be considered (see Anderson v. Rochester-Genesee Reg'l Transp. Auth., 337 F.3d 201, 205 n.4 [2d Cir. 2003] [taking judicial notice of record in prior litigation between same parties]). However, I make no findings regarding IHO 1's decision which is not the subject of this appeal.

not yet ripe" for adjudication (IHO Decision at pp. 7, 10). IHO 2 held that she was unable to determine whether the district offered the student a FAPE for the 2023-24 school year based upon the information in the hearing record (IHO Decision at p. 7). IHO 2 noted that prior proceeding before IHO 1 involved the same parties and addressed the 2022-23 school year (id.). However, IHO 2 found no evidence in the hearing record that the evaluations that IHO 1 ordered the district to conduct had been completed or that the CSE had convened to develop an updated IEP for the student (IHO Decision at pp. 7-8). IHO 2 further reasoned that "if the CSE had convened [a CSE] meeting prior to the completion and consideration of the evaluations, then the [d]istrict would have been in violation of the" directives contained in IHO 1's July 1, 2023 decision (id. at p. 8).

Next, IHO 2 considered the parent's argument that the prior written notice and school location letter both dated July 24, 2023 recommending the program from the August 2022 IEP were evidence that the district failed to conduct the previously ordered evaluations and therefore showed that the district denied the student a FAPE for the 2023-24 school year (IHO Decision at p. 8; see generally Parent Exs. H-I). IHO 2 rejected the parent's argument and instead found that the July 2023 prior written notice and school location letter "were merely procedural attempts" by the district to recommend a program for the 2023-24 school year (IHO Decision at p. 8). IHO 2 relied on information from the district representative that a CSE meeting was scheduled and the parent's representation that the evaluations were being conducted (id.). Furthermore, IHO 2 found that although the July 2023 prior written notice and school location letter relied on the August 2022 IEP, she agreed with the district that it offered the student a FAPE for the 2023-24 school year based upon the information that it had available at the time (id.). Accordingly, IHO 2 found it "premature" to make a finding whether the district denied the student a FAPE for the 2023-24 school year (id.).

IHO 2 found it was "premature" to make a finding with respect to an offer of a FAPE for the 2023-24 school year because the district had not yet complied with IHO 1's July 1, 2023 order that it conduct updated evaluations and develop a new IEP for the student (id. at pp. 7-8).[3] IHO 2 also addressed the parent's argument that the doctrines of res judicata and collateral estoppel barred the district from "relitigating the sufficiency of the August 2022 IEP and whether FAPE was provided to the [s]tudent" (id. at p. 9). IHO 2 found that the doctrine of collateral estoppel did not apply to the present matter (id. at p. 10). Lastly, IHO 2 found "no authority or caselaw that authorize[d] an IHO to issue an Order 'staying' a [d]istrict's recommendations" (id. at p. 11). Based upon the foregoing, IHO 2 dismissed the parent's due process complaint notice without prejudice (id.).

[3] IHO 2 incorrectly referred to a 2021 IEP in her decision (see IHO Decision pp. 8, 10). It appears that IHO 2 was referring to the August 2022 IEP as there was no 2021 IEP mentioned throughout the proceedings or contained in the hearing record.

IV. Appeal for State-Level Review

The parent appeals from IHO 2's determinations.[4] The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer thereto and cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The parent's main allegations on appeal are that IHO 2 improperly dismissed the due process complaint notice on the basis that she found the parent's claim was not yet ripe, that she ignored the fact that the August 2022 IEP had already been found to have denied the student a FAPE, and that she erred in holding that the doctrines of res judicata and collateral estoppel were not applicable in this matter.

The district filed an answer denying the material allegations contained in the request for review and asserts defenses and a "cross-appeal" seeking affirmance of IHO 2's decision. The district's responsive pleading does not contain any challenges to the IHO's decision and thus counsel for the district should not have captioned it as including a "cross-appeal." In its response, the district asserts that the parent failed to seek "any valid form of relief" for the district's denial of a FAPE for the 2023-24 school year. The district further asserts that the evaluations ordered in the prior proceeding are pending and a CSE meeting has been scheduled to review the evaluations. Lastly, the district argues that the doctrines of res judicata and collateral estoppel are not applicable to the instant proceeding because the claims in the prior proceeding involved a different school year and the issues in both proceedings are not the same.

The parent submitted an answer to the district's cross-appeal, arguing that the district recycled the August 2022 IEP for the program recommendation for the 2023-24 school year and failed to convene an annual review, thereby failing to meet its burden that it offered the student a FAPE for the 2023-24 school year.

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]).

[4] At the time of submission, the request for review failed to include a notarized verification as required by State regulations (see 8 NYCRR 279.7). This deficiency occurred despite parent's counsel noting in the electronic filing system that the verification to the request for review had been attached. Parent's counsel corrected the procedural deficiency after the Office of State Review sent two letters to parent's counsel dated January 5, 2024 and February 2, 2024 to advise of the missing verification. Counsel for the parent is cautioned that all pleadings must be verified in appeals to the Office of State Review and that failure to submit the required filings in compliance with State practice regulations may result in dismissal of a request for review (see 8 NYCRR 279.7[b]).

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]).[5]

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 main issue presented in this appeal is whether IHO 2 erred in dismissing the parent's due process complaint notice because her claims as they relate to the 2023-24 school year were premature for adjudication.

A. Annual Review

Turning first to the parent's allegations on appeal that IHO 2 failed to address the parent's claims that the district failed to reconvene the CSE to revise the student's IEP, upon my independent review of the hearing record, I find that IHO 2 had legitimate concerns over wading into the parties continuing conflict over the relief ordered by IHO 1, but IHO 2 erred in another respect when she dismissed the parent's due process complaint notice based on her finding that it was "premature" to determine whether the district offered the student a FAPE for the 2023-24 school year (IHO Decision at p. 8). The mere presence of continuing litigation does not, by itself, relieve a school district from complying with the continuing statutory requirement to meet and revise a student's IEP periodically, but not less than annually. The IDEA and State regulations require the CSE to meet "at least annually" to review and, if necessary, to revise a student's IEP (see 20 U.S.C. § 1414[d][4][A]; 34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]); however, there is no requirement that an IEP be produced at a parent's demand (Cerra, 427 F.3d at 194). Further, the regulations do not preclude additional CSE meetings, specifically prescribe when the CSE meeting

[5] 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).

should occur, or prevent later modification of an IEP during the school year through use of the procedures set forth for amending IEPs in the event a student progresses at a different rate than anticipated (20 U.S.C. § 1414[d][3][D], [F]; 8 NYCRR 200.4[f]-[g]). The IDEA's implementing regulations and State regulations require that a district must have an IEP in effect at the beginning of each school year for each child in its jurisdiction with a disability (34 CFR 300.323[a]; 8 NYCRR 200.4[e][1][ii]; Cerra, 427 F.3d at 194; K.L. v. New York City Dep't of Educ., 2012 WL 4017822, at *13 [S.D.N.Y. Aug. 23, 2012], aff'd, 530 Fed. App'x 81 [2d Cir. July 24, 2013]; B.P. v. New York City Dep't of Educ., 841 F. Supp. 2d 605, 614 [E.D.N.Y. 2012]). As a matter of State law, the school year runs from July 1 through June 30 (see Educ. Law § 2[15]). Failure to provide a finalized IEP before the beginning of the school year is a procedural violation that may result in a finding that the district failed to offer the student a FAPE (see Application of a Student with a Disability, Appeal No. 15-099 [finding that a district's failure to finalize an IEP until after start of school year contributed to a denial of FAPE despite evidence of the parties' extensive efforts to locate an appropriate placement]).

Here, it is undisputed that there is no evidence in the hearing record of an IEP that was developed or revised after the August 2022 IEP (see generally Parent Exs. A-N).[6] Although the parent referenced a June 15, 2023 CSE meeting in her due process complaint notice, neither party submitted into evidence a June 2023 IEP and a June 15, 2023 CSE meeting is not otherwise mentioned in the hearing record (see Parent Ex. A at p. 4). The August 2022 IEP had an implementation date of September 8, 2022 and a projected date of annual review of August 1, 2023 (Parent Ex. C at p. 1). Thus, there is no evidence that the CSE convened to develop an IEP for the 2023-24 school year in accordance with its statutory obligations. Although the district argued that it was in the process of conducting evaluations that were ordered by IHO 1, the district may not simply cease IEP planning for the student simply because the parent has challenged a preceding IEP (see Letter to Watson, 48 IDELR 284 [OSEP 2007] [explaining that "There is nothing … that relieves a public agency of its responsibility under 34 CFR § 300.324(b)(1) to convene a meeting of the IEP Team, periodically, but not less than annually, to review, and if appropriate, revise, an IEP for a child with a disability, even if the public agency is required to maintain the child's current educational placement while administrative or judicial proceedings are pending"]; see also Town of Burlington v. Dep't of Educ., 736 F.2d 773, 794 [1st Cir. 1984], aff'd 471 U.S. 359 [1985] ["pending review of an earlier IEP, local educational agencies should continue to review and revise IEPs in accordance with applicable law"]). Nothing in IHO 1's decision directing reevaluation of the student and ordering a CSE meeting thereafter to consider the new information relieved the district of its statutory annual review and IEP revision obligations (see Parent Ex. B). Based on the foregoing, the district failed to meet its burden to show that it convened a CSE meeting or timely offered an IEP for the student for the 2023-24 school year in accordance with its federal and State obligations to review a student's IEP at least annually.

Moreover, it cannot even be said that such a meeting would have been fruitless. With respect to the district's obligation to review a student's IEP at least annually, the hearing record demonstrates that the district already had updated information from the parent to consider when developing an IEP for the 2023-24 school year. The parent provided unrefuted direct testimony

[6] The district did not submit any documentary or testimony evidence into the hearing record.

by affidavit that she provided the March 2023 private neuropsychological evaluation to the CSE through her attorney in June 2023 (Parent Ex. M ¶ 11).[7] IHO 2's finding that at the time the district issued its July 2023 prior written notice the district only had the August 2022 IEP failed to also take into account that the district was in receipt of the March 2023 private neuropsychological evaluation (see IHO Decision at p. 8). The July 2023 prior written notice indicates that it was based on a July 2022 psychoeducational assessment and makes no reference of the March 2023 private neuropsychological evaluation (Parent Ex. H; see Parent Ex. M ¶ 11). In addition to the district's general obligation to review the IEP of a student with a disability at least annually, federal and State regulations require the CSE to revise a student's IEP as necessary to address "[i]nformation about the child provided to, or by, the parents" during the course of a reevaluation of the student (34 CFR 300.324[b][1][ii][C]; 8 NYCRR 200.4[f][2][ii]), and State regulations provide that if parents believe that their child's placement is no longer appropriate, they "may refer the student to the [CSE] for review" (8 NYCRR 200.4[e][4]). Here, there is no evidence to show that the district considered the March 2023 private neuropsychological evaluation that the parent provided to the district. Given the district's failure to consider information provided to it by the parent and its failure to convene a CSE meeting and develop an IEP for the 2023-24 school year in conformity with its annual review obligations, I find the district denied the student a FAPE for the 2023-24 school year.

B. Res Judicata and Collateral Estoppel

As for the next argument raised by the parent that IHO 2 erred in finding that the doctrines of res judicata and collateral estoppel were not applicable in this matter, the parent's argument is without merit. 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

[7] A CSE must consider independent educational evaluations whether obtained at public or private expense, provided that such evaluations meet the district's criteria, in any decision made with respect to the provision of a FAPE to a student (34 CFR 300.502[c]; 8 NYCRR 200.5[g][1][vi]). However, consideration does not require substantive discussion, or that every member of the CSE read the document, or that the CSE accord the private evaluation any particular weight or adopt their recommendations (Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018], citing T.S. v. Ridgefield Bd. of Educ., 10 F.3d 87, 89-90 [2d Cir. 1993]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]; see Michael P. v. Dep't of Educ., State of Hawaii, 656 F.3d 1057, 1066 n.9 [9th Cir. 2011]; K.E. v. Indep. Sch. Dist. No. 15, 647 F.3d 795, 805-06 [8th Cir. 2011]; Evans v. Dist. No. 17, 841 F.2d 824, 830 [8th Cir. 1988]; James D. v. Bd. of Educ. of Aptakisic-Tripp Community Consol. Sch. Dist. No. 102, 642 F. Supp. 2d 804, 818 [N.D. Ill. 2009]).

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]).[8]

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 parent's argument is without merit because, as the district points out, the parent's prior claims and current claims involve two different school years. The parent brought a prior proceeding regarding the 2022-23 school year that challenged the August 2022 IEP and the parent already prevailed in that proceeding, while in the instant proceeding regarding the 2023-24 school year the evidence shows that approximately one year later the district failed to convene a CSE at all and failed to issue an IEP. Thus, the IHO did not err due to a misapplication of the doctrines because the parent failed to establish the first element of collateral estoppel, that the identical issue was raised in the previous proceeding, and the third element of res judicata, that the claim could have been raised in the prior proceeding because it arose from the same nucleus of operative fact.[9] Furthermore, because I have determined that the district failed to offer the student a FAPE for the

[8] "In determining whether the same nucleus of facts is at issue," relevant considerations include "whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations of business understanding or usage'" (Theodore v. Dist. of Columbia, 772 F. Supp. 2d 287, 293 [D.D.C. 2011] [internal quotations omitted]; see Dutkevitch v. Pittston Area Sch. Dist., 2013 WL 3863953, at *3 [M.D. Pa July 24, 2013] [identifying relevant considerations including whether the acts complained of and relief demanded were the same, whether the theory of recovery was the same, whether the material facts were the same, and whether the same witnesses and documentation would be required to prove the allegations]; see also Turner v. Dist. of Columbia, 952 F. Supp. 2d 31, 42 [D.D.C. 2013] [finding that a parent's claim that a school could not implement a student's IEP arose from the same nucleus of facts as a previously adjudicated claim that the school did not offer groups and minimal distractions]).

[9] It's unclear whether IHO 2 was reluctant to rely on collateral estoppel or res judicata when IHO 1's decision had been challenged in a State-level review. The parent's assertions in the August 2023 due process compliant notice asserting what was final and binding upon the parties versus those issues that were nonfinal in the appeal was, at best, anticipatory since the time for the district to respond in the appeal had not elapsed at any point prior to the parties' settlement agreement reached in October 2023. The hearing record indicates that very little information was provided to IHO 2 by the parties and the information provided was vague.

2023-24 school year as described above on other grounds, it is unnecessary to further discuss the applicability of these doctrines to the present matter.

C. Relief

Lastly, I will address the relief requested by the parent. As relief, the parent seeks a finding that the district denied the student a FAPE for the 2023-24 school year (Req. for Rev. at p. 10; Parent Ex. A at p. 5; Parent Hr'g Br. at p. 11). The district argues that the parent failed to request "meaningful relief" and the parent's request did not "constitute a form of relief that would cure" the district's denial of a FAPE for the 2023-24 school year (Answer ¶ 9).[10]

For the reasons set forth more fully below, no further relief is appropriate because the evidence concerning the student's needs does not support further relief. At the time of the due process complaint notice in August 2023, the parent sought continuation of the student's placement in the nonpublic school as the student's pendency placement and the parent indicated that the student's pendency placement has been at the HeartShare School (HeartShare) (Parent Ex. A at pp. 1, 5). The student's pendency placement at HeartShare, which is a State-approved nonpublic school, has continued at district expense for the duration of this appeal.[11, 12]

However, a student's placement pursuant to the pendency provision of the IDEA is evaluated independently from the appropriateness of the program offered the student by the CSE (Mackey v. Bd. of Educ. for Arlington Cent. Sch. Dist., 386 F.3d 158, 160-61 [2d Cir. 2004]; Zvi D. v. Ambach, 694 F.2d 904, 906 [2d Cir. 1982]; Bd. of Educ. of Poughkeepsie City Sch. Dist. v. O'Shea, 353 F. Supp. 2d 449, 459 [S.D.N.Y. 2005] [noting that "pendency placement and appropriate placement are separate and distinct concepts"]), and stay put placements only last for the duration of the proceedings. As equitable relief on the merits, the appropriateness of the student's continued placement at HeartShare is not supported by the evidence. According to the limited information in the hearing record, it appears that the student attended HeartShare for the 2020-21, 2021-22, 2022-23 and 2023-24 school years in an 8:1+3 special class with related services of speech-language therapy, counseling, PT, and OT (Parent Exs. C at p. 2; K at pp. 1, 4, 6). However, in reviewing the hearing record in the prior administrative proceeding related to the 2022-23 school year and filed in Application of a Student with a Disability, Appeal No. 23-169 before withdrawal, there was information contained in the prior written notice dated June 8, 2022

[10] With respect to relief, State and federal regulations require the due process complaint notice to 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]; see 20 U.S.C. §1415[b][7][A][ii]; 34 CFR 300.508[b]).

[11] At the prehearing conference, there was a discussion regarding pendency and the parent requested pendency at a nonpublic school which was not disputed by the district (Tr. pp. 16-17). However, there is no indication in the hearing record that the parties or IHO 2 revisited the topic of the student's pendency since that time (see Tr. pp. 1-115; IHO Exs. I-IV).

[12] The Commissioner of Education has approved Heartshare (also known as The Heartshare Education Center) as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7; see also Parent Ex. A at p. 1).

which described the June 7, 2022 CSE meeting that HeartShare was no longer appropriate for the student, and he was moving to a less restrictive setting (see Parent Ex. D at p. 2).

Moreover, the information from the private neuropsychologist in March 2023 also supports a finding that HeartShare is no longer appropriate for the student (see generally Parent Ex. K). More specifically, the private neuropsychologist questioned the July 27, 2022 psychological assessment conducted by the district with respect to the student's intellectual functioning (id. at p. 32).[13] The private neuropsychologist indicated that the student had made "dramatic improvement" and it was unclear why the July 2022 psychological assessment did not find this noted improvement (id.). Further, the neuropsychologist stated that given the student's "remarkable progress" in his then-current placement at HeartShare "the request for the neuropsychological should have been granted, particularly after the psychoeducational evaluation operated on an inaccurate assumption that he still was intellectually disabled" (id.). The private neuropsychologist noted that the July 2022 psychological assessment did not contain an adaptive measure "which [wa]s required for the diagnosis of intellectual disability" and would have "ruled out" an intellectual disability (id.). Additionally, the private neuropsychologist stated that the "psychologist should have considered how such dramatic progress was possible to occur with an intellectual disability" which would have been "compelling in light of the change in placement notably requested by his school" (id.). He opined that the results from his neuropsychological evaluation "corroborate[d] the school's opinion that [the student][wa]s no longer a candidate for this school setting" because it was for students with autism together with an intellectual disability (id.). But the neuropsychologist also concluded that an integrated co-teaching (ICT) setting would not be appropriate for the student (id.). Lastly, the private neuropsychologist recommended a nonpublic school with applied behavior analysis (ABA) with counseling, a behavior intervention plan, and other appropriate related services to address his "high functioning autism" (id. at p. 33).

Accordingly, in reviewing the hearing record in the prior proceeding together with the recommendations of the private neuropsychologist, the student's continued placement at HeartShare lacks support because there is no evidence suggesting that it continues to be appropriate for the student.

Therefore, the recourse that I find appropriate is for the CSE to reconvene and consider all relevant evaluative information including the March 2023 private neuropsychological evaluation and evaluations ordered in IHO 1's July 1, 2023 decision and develop an IEP. Since the parent has expressed disagreement with the district's recommendation for a district specialized school at both the June and August 2022 CSE meetings, that the CSE detail the parent's disagreement in the prior written notice sent after the reconvened meeting (see Parent Exs. C at p. 2; M ¶4; Application of a Student with a Disability, Appeal No. 23-169 [withdrawn]; see also Parent Ex. R ¶¶ 6, 10).[14] It is

[13] The July 27, 2022 psychological assessment was not contained in the hearing record (see Parent Exs. A-N).

[14] Pursuant to State and federal regulation, a prior written notice must include a description of the action proposed or refused by the district; an explanation of why the district proposed or refused the action; a description of the other options that the CSE considered and the reasons why those options were rejected; a description of each evaluation procedure, assessment, record, or report the CSE used as a basis for the proposed or refused action;

further incumbent on the CSE and parent to invite the private neuropsychologist and staff from HeartShare to discuss programming for the student. While the CSE is required to consider reports from any privately retained experts, it is not required to adopt their recommendations (see, e.g., Mr. P. v. W. Hartford Bd. of Educ., 885 F.3d 735, 753 [2d Cir. 2018]; G.W. v. Rye City Sch. Dist., 2013 WL 1286154, at *19 [S.D.N.Y. Mar. 29, 2013]; C.H. v. Goshen Cent. Sch. Dist., 2013 WL 1285387, at *15 [S.D.N.Y. Mar. 28, 2013]; T.B. v. Haverstraw-Stony Point Cent. Sch. Dist., 933 F. Supp. 2d 554, 571 [S.D.N.Y. 2013]; Watson v. Kingston City Sch. Dist., 325 F. Supp. 2d 141, 145 [N.D.N.Y. 2004] [noting that even if a district relies on a privately obtained evaluation to determine a student's levels of functional performance, it need not adopt wholesale the ultimate recommendations made by the private evaluator], aff'd, 142 Fed. App'x 9 [2d Cir. July 25, 2005]). While the private neuropsychologist recommended a nonpublic school as described above and appeared to disfavor a special class setting in a public school, his reasoning is not entirely clear on that point and does not appear to factor in the CSE's obligation to consider placing the student in public school programming before resorting to a nonpublic school. Thus, the parent, any private evaluators, and district staff should be prepared to discuss the range of options on the continuum of alternative placements after considering all of the updated evaluative information.

Finally, with respect to the parent's participation in CSE meetings, the hearing record indicates that the parent's native language is not English and she has limited-English proficiency (see e.g., Parent Exs. A at p. 4, N at p.1; Tr. pp 20-21). The IDEA sets forth procedural safeguards that include providing parents an opportunity "to participate in meetings with respect to the identification, evaluation, and educational placement of the child" (20 U.S.C. §1415[b][1]). Federal and State regulations governing parental participation require that school districts take steps to ensure that parents are present at their child's IEP meetings or are afforded the opportunity to participate (34 CFR 300.322; 8 NYCRR 200.5[d]). In addition, the district "must take whatever action is necessary to ensure that the parent understands the proceedings of the [CSE] meeting, including arranging for an interpreter for parents [who are hearing impaired] or whose native language is other than English" (34 CFR 300.322[e]; 8 NYCRR 200.5[d][5]; see also Application of the Dep't of Educ., Appeal No. 12-215; Application of a Child with a Disability, Appeal No. 05-119). I remind the district of its obligations to provide the parent with interpreter services in conformance with the established regulatory scheme.

VII. Conclusion

Having determined that IHO 2 erred by finding that this case was not yet ripe for adjudication and having found that the district failed to offer the student a FAPE for the 2023-24 school year, the necessary inquiry is at an end.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

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and a description of the other factors relevant to the CSE's proposal or refusal (34 CFR 300.503[b]; 8 NYCRR 200.5[a][3]).

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that IHO 2's decision, dated December 1, 2023, is modified by reversing those portions which found that the parent's claim was not ripe and it could not be determined whether the district offered the student a FAPE for the 2023-24 school year, and

IT IS FURTHER ORDERED that the district shall reconvene the CSE with 30 days in accordance with this decision.

Dated: **Albany, New York**
April 24, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER