



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 15-101

**Application of a STUDENT WITH A DISABILITY, by his parents, 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:**

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorneys for respondent, Lisa R. Khandhar, Esq., of counsel

## **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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO), which dismissed their due process complaint notice "with prejudice." The appeal must be sustained.

### **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**

#### **A. Due Process Complaint Notice**

By due process complaint notice, dated July 24, 2015, the parents alleged that respondent (the district) failed to conduct an assistive technology evaluation of the student, failed to provide the student with related services as recommended in an IEP, and failed to provide the student with transportation services to access his related services (see Answer Ex. 1 at p. 1).<sup>1</sup> The parents also asserted that the student had not attended school for "over 14 months," and the district failed to provide "any home provisions or related services" during that time (id.). Additionally, the parents alleged that, due to the closure of the student's previous school, the student did not have a school to attend and that the district "grossly" failed to offer the student a free appropriate public education

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<sup>1</sup> Pursuant to a request by the undersigned, the district submitted a copy of the parents' due process complaint notice with its answer (see Answer Exs. 1-2).

(FAPE) "numerous times" (id. at pp. 1-2). As relief, the parents requested an assistive technology evaluation of the student and for the district to provide "car service vouchers" for the student to obtain his related services and so the parents could tour "prospective schools" (id. at p. 3).

### **B. Events Post-Dating the Due Process Complaint Notice**

Upon appointment on July 28, 2015, the IHO scheduled an impartial hearing in this matter for August 28, 2015 (see IHO Decision at p. 1). In an e-mail sent to the parents on August 19, 2015, a district "case manager" notified the parents about the impartial hearing scheduled for August 28, 2015, and further requested that the parents contact the case manager to "confirm" their attendance at the impartial hearing (see IHO Ex. B at p. 1). In part, the e-mail also advised the parents that "only the party who requested the hearing c[ould] contact th[at] office to withdraw the request and cancel the hearing" (id.). On August 27, 2015, a district "Operations Manager" sent a "reminder" e-mail to the parents regarding the impartial hearing scheduled for August 28, 2015, and later on the same date, the same operations manager left a voicemail message for the student's mother to remind her about the impartial hearing—noting that, if the parents did not "show up for the hearing, their case w[ould] be dismissed by the hearing officer" (IHO Ex. A; see Pet. Ex. C).

At approximately 2:27 a.m. on August 28, 2015, the parents sent an e-mail to the district case manager, the district representative, the "ihosystem," and the IHO presiding at the scheduled impartial hearing (Pet. Ex. C at pp. 1-2; compare Pet. Ex. C at p. 1, with Tr. p. 9). In a letter attached to the e-mail, dated August 27, 2015, the parents requested to withdraw the request for an impartial hearing "without prejudice" because the "issues" pertaining to the impartial hearing request had been "addressed" and therefore, rendered "moot" (Pet. Ex. C at p. 3). The parents also indicated that since "these issues" no longer existed, there was "no longer any need to proceed" with the impartial hearing (id.).

### **C. Impartial Hearing Officer Decision**

On August 28, 2015, a district representative appeared at the impartial hearing on behalf of the district, but neither the parents nor any representative or advocate for the parents appeared on their behalf (see Tr. pp. 1-3).<sup>2</sup> At the impartial hearing, the IHO elicited testimonial and documentary evidence concerning the district's efforts to notify the parents about the impartial hearing scheduled for that date (see Tr. pp. 1-11; IHO Exs. A-B). Upon questioning by the IHO about whether the parents contacted the district representative, the district representative stated that the parents sent a "few emails in the last two weeks . . . regarding different issues"—indicating, in particular, that the impartial hearing was "moot," but not withdrawing their request for an impartial hearing "at that time" (Tr. p. 8).<sup>3</sup> The IHO then indicated that she, herself, "previously had hearings" or "a hearing" regarding this student, stating further that the parents were "very familiar with the process of withdrawing or filing" and with the "hearing process" (id.). The IHO

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<sup>2</sup> The individual appearing as the district representative at the impartial hearing was the same "district representative" to whom the parents sent the e-mail on August 28, 2015 (compare Tr. pp. 1-3, 9, with Pet. Ex. C at p. 1).

<sup>3</sup> The evidence in the hearing record does not include these particular e-mails mentioned by the district representative (see Tr. pp. 1-11; IHO Exs. A-B).

also indicated, however, that "it [was her] information that [the parents] did not withdraw" the case (Tr. pp. 8-9). Upon further questioning by the IHO, the district representative testified that she received an e-mail from the parents at approximately 10:28 p.m. on August 27, 2015, at which time the parents requested to withdraw the matter "without prejudice" (Tr. p. 9).

After receiving evidence, the IHO indicated that "[e]very effort ha[d] been made, to accommodate these parents, and bring them to the Impartial Hearing, or, in the alternative, to have them withdraw the hearing, if that [was] in fact what they did" (Tr. p. 9). In addition, the IHO stated that the parents' "[n]otice to [the district representative], at 10:38 p.m. [sic] [was] not notice to this office," and the parents could have contacted "this office, or [the district representative], for that matter, during the business hours" (Tr. pp. 9-10). Consequently, the IHO found that "this [was] actually abuse of the process," and therefore, the IHO stated that she would dismiss the case "with prejudice" (id.).

In a decision dated August 28, 2015, the IHO indicated that although the parents received notice of the impartial hearing through a variety of means—a letter mailed to the parents' home address, e-mails, and telephone messages—the parents did not respond to these efforts (see IHO Decision at p. 1). The IHO also noted, however, that at approximately 10:30 p.m. on August 27, 2015, the parents sent an e-mail "withdrawing the case" (id.). Noting the parents' "familiar[ity] with filing impartial hearing complaints and the process since they ha[d] filed previously," the IHO found that the parents "intentionally did not communicate with the Impartial Hearing Office on August 27, 2015 or any other day to inform the Hearing Office of their intent to withdraw or provide any information regarding this case" (id.). Based upon the foregoing, the IHO dismissed the parents' due process complaint notice with prejudice (id.).

#### **IV. Appeal for State-Level Review**

The parents appeal and assert that the IHO erred in dismissing the due process complaint notice with prejudice. As relief, the parents seek an order dismissing the due process complaint notice without prejudice.

In an answer, the district responds to the parents' allegations and argues to uphold the IHO's decision in its entirety.<sup>4</sup> Alternatively, the district argues that the parents' case must be dismissed as moot. As relief, the district seeks an order dismissing the parents' petition with prejudice.

In a reply to the district's answer, the parents reject the district's contentions and generally argue in further support of the petition.<sup>5</sup> In addition, the parents allege that the district

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<sup>4</sup> The district also indicated that the petition failed to include a verification consistent with State regulation (see 8 NYCRR 279.7). However, the parents' petition filed with the Office of State Review did include an affidavit of verification.

<sup>5</sup> To the extent that the parents' reply exceeds the permissible scope, it will not be considered (see 8 NYCRR 279.6 [limiting a reply to any "procedural defenses interposed by respondent or to any additional documentary evidence served with the answer"]).

misconstrues the basis of the mootness argument in the petition and the issue presented in the petition remains justiciable on appeal.<sup>6</sup>

## V. Discussion

### A. Mootness

In support of the contention that the parents' appeal must be dismissed as moot, the district argues that—consistent with the parents' assertion in the request to withdraw the due process complaint notice without prejudice—the parties resolved the issues in the due process complaint notice. Therefore, the district asserts that, according to the mootness doctrine, an SRO need not decide issues no longer in controversy or make a determination that would have no actual effect on the parties. In response, the parents argue that, contrary to the district's argument, they do not appeal the issues in the withdrawn due process complaint notice. Rather, the parents argue that, because mootness constituted a legitimate basis upon which to request a withdrawal of the due process complaint notice "without prejudice," the IHO erred in dismissing the due process complaint notice "with prejudice."

Generally, a dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at \*3-\*4 [W.D.N.Y. Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Student with a Disability, Appeal No. 14-168; Application of a Child with a Disability, Appeal No. 07-139). Here, the dispute between the parties—namely, whether the IHO erred in dismissing the parents' due process complaint notice with prejudice—remains "real and live" regardless of whether the parties resolved one or more of the issues set forth in the due process complaint notice. Moreover, the parents' mootness argument on appeal pertains to whether the IHO's dismissal of the matter should have been without prejudice and not, as the district contends, whether the instant appeal is moot because the parties resolved the issue or issues raised in the due process complaint notice. Additionally, the hearing record contains no evidence that the parties resolved the parents' request for an assistive technology evaluation of the student or the request for transportation services in order for the student to access his related services (see Tr. pp. 1-11; IHO Exs. A-B; Pet. Exs. A-C, G; Answer Exs. 1-2). Even assuming for the sake of

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<sup>6</sup> Both parties submitted additional documentary evidence with their respective pleadings for consideration on appeal (see Pet. Exs. A-I; Dist. Exs. 1-2). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (Application of a Student with a Disability, Appeal No. 08-030; see 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Except for that evidence which is duplicative of materials in the hearing record, consisting of the transcript of the impartial hearing or excerpts of other complete exhibits to the petition (see Pet. Exs. D-F; H), the remaining documents could not have been offered at the time of the impartial hearing as a consequence of the disposition of the impartial hearing proceedings (see Pet. Exs. B-C; G; Answer Exs. 1-2) or because they post-date the impartial hearing (e.g., evidence offered to establish whether this proceeding was timely initiated) (see Pet. Ex. A). I have deemed the latter documents necessary to render a decision and accept them as part of the hearing record (see Pet. Exs. A-C; G; Answer Exs. 1-2).

argument that the parties resolved all of the issues in the parents' due process complaint notice, the resolution of these issues would only be one factor to weigh in deciding whether the IHO erred in dismissing the parents' due process complaint notice with prejudice—which is the ultimate issue raised in the parents' appeal. As such, the district's request to dismiss the parents' appeal as moot must be dismissed.

## **B. IHO Bias and the IHO's Decision**

The parents assert that, in dismissing the due process complaint notice with prejudice, the IHO ignored evidence and applicable State regulation. The parents further assert that the IHO's bias and "personal intent" toward the parents contributed to the IHO's decision to dismiss the due process complaint notice with prejudice. More specifically, the parents assert that the impartial hearing transcript supports a finding that the parties received the parents' request to withdraw the due process complaint notice without prejudice prior to the impartial hearing, yet the IHO ignored the request based, in part, upon the IHO's "personal intent."<sup>7</sup> The parents further assert that the IHO demonstrated "personal intent" and bias toward the parents by proceeding with the impartial hearing without attempting to contact the parents and without checking her own e-mail pertaining to the impartial hearing.

The district rejects the parents' assertions and argues that the IHO acted fairly and impartially and, thus, properly dismissed the action with prejudice. The district contends that the parents' demonstrated pattern of filing and withdrawing multiple due process complaint notices reflected an abuse of the impartial hearing system, which supported the IHO's decision to dismiss the due process complaint notice with prejudice. In addition, the district argues that, while a party may voluntarily withdraw a due process complaint notice pursuant to State regulation, the parents' failed to provide reasonable notice to the district and to the IHO regarding their intention to withdraw the impartial hearing request.

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see Application of a Student with a Disability, Appeal No. 12-066; Application of a Student with a Disability, Appeal No. 11-144; Application of the Bd. of Educ., Appeal No. 10-097; Application of a Student with a Disability, Appeal No. 10-018; Application of a Student with a Disability, Appeal 10-004). An IHO must also render a decision based on the hearing record (see, e.g., Application of a Student with a Disability, Appeal No. 09-058; Application of a Student with a Disability, Appeal No. 08-036). 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, and shall not, by words or conduct, manifest bias or prejudice, according each party the right to be heard (see, e.g., Application of a Student with a Disability, Appeal No. 12-064; Application of a Student with a Disability, Appeal No. 07-090).

Upon review and consideration, the evidence in the hearing record does not support a finding that the IHO ignored evidence, acted unfairly, or demonstrated bias toward the parents or,

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<sup>7</sup> The parents also point to a nearly identical decision rendered by the same IHO in a prior administrative proceeding involving the same student, which was reversed in a State-level administrative appeal, as evidence of this IHO's alleged bias or "personal intent" toward the parents (Pet. ¶¶ 17-18; see generally Pet. Ex. G).

as the parents contend, that the IHO's alleged bias or "personal intent" toward the parents contributed to the IHO's decision to dismiss the due process complaint notice with prejudice. In this case, the evidence reflects that, as previously noted, the parents did not appear at the impartial hearing scheduled for August 28, 2015, and, as asserted by the parents, the IHO proceeded with the impartial hearing without attempting to contact the parents or checking her own e-mail to ascertain why the parents had not appeared at the impartial hearing (see Tr. pp. 1-11; IHO Exs. A-B; Pet. Exs. A-C; G; Answer Exs. 1-2). Additionally, the evidence in the hearing record reflects that, although the district representative informed the IHO that she received an e-mail from the parents at approximately 10:28 p.m. on August 27, 2015, within which the parents requested to withdraw the matter "without prejudice," the IHO did not seek—nor did the district representative offer—to review the parents' e-mail or to enter the e-mail into the hearing record as evidence, notwithstanding the fact that the IHO solicited both testimonial and other documentary evidence at the impartial hearing (Tr. p. 9; see Tr. pp. 1-11; IHO Exs. A-B; Pet. Ex. C at pp. 1-2). However, even though the IHO did not seek to obtain the parents' e-mail as documentary evidence, the IHO did note in the decision that the parents sent an e-mail on August 27, 2015 at approximately 10:30 p.m. to withdraw the case (compare Tr. pp. 1-11, with IHO Decision at p. 1). Thus, contrary to the parents' assertion, it does not appear that the IHO ignored this evidence; rather, it appears that the IHO afforded very little, if any, weight to this evidence in reaching the decision to dismiss the parents' due process complaint notice with prejudice. To the extent that the parents disagreed with the conclusions reached by the IHO—or with the weight afforded to evidence presented at the impartial hearing—such disagreement does not provide a basis for finding actual or apparent bias by an IHO (see, e.g., Application of a Student with a Disability, Appeal No. 15-033; Application of a Student with a Disability, Appeal No. 13-083). Similarly, although the IHO did not attempt to contact the parents prior to proceeding with the impartial hearing, this fact, alone, does not establish that the IHO acted unfairly or demonstrated bias toward the parents.

On the other hand, the IHO did appear to ignore applicable State regulation in dismissing the parents' due process complaint notice with prejudice. Pursuant to State regulation, a party may withdraw a due process complaint notice or request for an impartial hearing prior to the commencement of the impartial hearing, and such voluntary withdrawal "shall be without prejudice unless the parties otherwise agree" (8 NYCRR 200.5[j][6][i]).<sup>8</sup> "Except for withdrawals in accordance with subparagraph (i) of this paragraph, a party seeking to withdraw a due process complaint shall immediately notify the [IHO] and the other party" (8 NYCRR 200.5[j][6][ii]). According to the same State regulation, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (id.).<sup>9</sup>

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<sup>8</sup> "For purposes of this paragraph, the commencement of the hearing shall not mean the initial prehearing conference if one is conducted, but shall mean the first date the hearing is held after such conference" (8 NYCRR 200.5[j][6][i]).

<sup>9</sup> State regulation also mandates that "[i]f the party subsequently files a due process complaint within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint that was previously withdrawn by the party, the school district shall appoint the same [IHO] appointed to the prior complaint unless that [IHO] is no longer available to hear the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

Here, a review of the parents' e-mail reveals that, consistent with State regulation, the parents sent notice of their intention to withdraw the due process complaint notice to the district case manager, the district representative, the "ihosystem," and the IHO presiding at the scheduled impartial hearing prior to the impartial hearing (compare Pet. Ex. C at pp. 1-2, with 8 NYCRR 200.5[j][6][i], [ii]). The district argues that the parents' e-mail—sent hours prior to the start of the scheduled impartial hearing (and as the IHO stated at the impartial hearing, outside normal business hours)—did not provide reasonable notice of their intention to withdraw the due process complaint notice. But as the parents correctly point out, neither the procedural safeguards notice nor the plain language of the State regulation proscribe or provide instruction or guidance about a specific time period required for withdrawing a due process complaint notice prior to the commencement of the impartial hearing (see 8 NYCRR 200.5[j][6]; see generally Pet. Ex. C).

Nevertheless, even if the timing of the parents' request to withdraw the due process complaint notice without prejudice could not be considered as occurring prior to the impartial hearing, the hearing record does not contain evidence that the IHO exercised the appropriate discretion in dismissing the parents' due process complaint notice "with prejudice" under the facts and circumstances of this case (see Tr. pp. 1-11; IHO Exs. A-B; Pet. Exs. A-C; G; Answer Exs. 1-2). In pertinent part, State regulation grants an IHO the discretion to dismiss a due process complaint notice with prejudice, but only if the "other party"—here, the district—made such request, and if the parents had "notice" and an "opportunity . . . to be heard" (8 NYCRR 200.5[j][6][ii]). The evidence in the hearing record reveals that the district representative did not request that the IHO dismiss the parents' due process complaint notice with prejudice (see Tr. pp. 1-11; IHO Exs. A-B; Pet. Exs. A-C; G; Answer Exs. 1-2). The evidence also reveals that the IHO did not attempt to contact the parents during the impartial hearing to provide them with notice of her intention to dismiss the due process complaint notice with prejudice or to provide the parents with an opportunity to be heard on the matter (id.). Absent such prerequisites, the IHO improperly dismissed the parents' due process complaint notice with prejudice.

Finally, a review of the evidence in the hearing record does not support the district's argument that the parents' alleged pattern of filing and withdrawing multiple due process complaint notices reflected an abuse of the impartial hearing system and, thus, supported the IHO's decision to dismiss the due process complaint notice with prejudice. In this instance, while the IHO indicated a degree of familiarity with the parents and the student based upon at least one previous hearing, and the IHO further expressed her opinion about the parents' purported familiarity with the "process of withdrawing or filing" and with the "hearing process," neither the district representative nor the IHO referenced what the district now argues on appeal regarding the number of due process complaint notices filed and subsequently withdrawn by the parents (Tr. p. 8; see generally Tr. pp. 1-11; IHO Exs. A-B). In addition, although the IHO noted this information in the decision, the IHO did not further explain or analyze this information in the context of any legal standard or in reaching the decision to dismiss the parents' due process complaint notice with prejudice (see IHO Decision at p. 1). While perhaps vexing for a district and an IHO, State regulation contemplates both the filing of subsequent or multiple due process complaint notices (see 8 NYCRR 200.5[j][3][ii][a]), as well the subsequent voluntary withdrawal of due process complaint notices (see 8 NYCRR 200.5[j][6]). As such, the district's argument must be dismissed.



## **VII. Conclusion**

For the reasons discussed above, the parents' due process complaint notice, dated July 24, 2015, is dismissed without prejudice.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED THAT** the IHO's decision, dated August 28, 2015, is hereby modified by reversing that portion which dismissed the parents' July 24, 2015 due process complaint notice with prejudice.

**Dated:**            **Albany, New York**  
                      **December 7, 2015**

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**SARAH L. HARRINGTON**  
**STATE REVIEW OFFICER**