



The University of the State of New York

The State Education Department

State Review Officer

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No. 18-111

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

Appearances:

Hodgson Russ LLP, attorneys for respondent, by Andrew J. Freedman, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which dismissed the parent's due process complaint notice. Respondent (the district) cross-appeals from that portion of the IHO's decision which dismissed the parent's due process complaint notice without prejudice. The appeal must be dismissed. 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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal related to the 2012-13, 2013-14, 2014-15, and 2015-16 school years, and, as a result, the parties' familiarity with his earlier educational history and prior due process proceeding is assumed and will not be repeated here in detail (see Application of a Student with a Disability, Appeal No. 16-050). Further, given the state of the hearing record in the present matter, a full recitation of facts relating to the student is not possible but is, in any event, unnecessary due to the procedural posture of the impartial hearing proceedings and the limited nature of the appeal. Briefly, at the time of the impartial hearing in the present matter, the student was classified as a student with autism and attended a board of cooperative educational services (BOCES) 8:1+1 special class with related services for the 2017-

18 school year (June 27, 2018 Dist. Mot. to Dismiss Ex. 23 at p. 3; Request for Rev. Ex. AA; see Due Process Compl. Notice at p. 1).¹

A. Due Process Complaint Notice

By due process complaint notice dated January 18, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year based upon alleged procedural and substantive violations (see Due Process Compl. Notice). For relief, the parent sought, among other things: (1) a reconvene of the CSE to be conducted with particular procedural requirements and to result in an IEP with specified recommendations; (2) compensatory educational services, including at least 36 hours of appropriate transitional support services; and (3) any other relief deemed appropriate by the IHO (id. at pp. 7-11).

B. Events Post Dating the Due Process Complaint Notice

By letter dated January 31, 2018, the district advised the parent that a resolution session meeting would take place on February 5, 2018 at the district building (June 27, 2018 Dist. Mot. to Dismiss Ex. 2).² By letter to the parent dated February 6, 2018, the district rescheduled the resolution session meeting to February 8, 2018 at the parent's request and stated the district's understanding that the parent's advocates would review the student's records prior to the meeting (June 27, 2018 Dist. Mot. to Dismiss Ex. 4). The IHO was appointed to hear the matter on February 15, 2018 (June 27, 2018 Dist. Mot. to Dismiss Ex. 7).³ In an email to the IHO, dated February 26, 2018, the district's attorney requested a phone conference and alleged that the parent's advocates attended the resolution session meeting on February 8, 2018 but left after about an hour, having refused to engage in the resolution process because they claimed the student's educational records were not complete (June 27, 2018 Dist. Mot. to Dismiss Ex. 8).⁴

The IHO conducted a prehearing conference via telephone on March 20, 2018 and provided a summary thereof to the parties in an email dated March 27, 2018 (IHO Decision at p. 1; June 27, 2018 Dist. Mot. to Dismiss Ex. 14). The IHO's summary stated that the parties agreed that

¹ Since the IHO dismissed the parents' due process complaint notice prior to the receipt of testimonial or documentary evidence from the parties, the record on appeal consists of the parent's due process complaint notice, motion papers with exhibits submitted to the IHO, and the IHO's written decisions, as well as transcripts of the proceedings held with one or both of the parties and the IHO. The parent attached additional documents to her request for review, which shall be considered on appeal to the extent discussed below.

² The notices for the resolution session meetings indicated that the coordinator of special education for the district would be in attendance (June 27, 2018 Dist. Mot. to Dismiss Exs. 2; 4; 13). The meeting notices also referenced the district's understanding that the parent's advocates would participate at the resolution session (June 27, 2018 Dist. Mot. to Dismiss Exs. 2; 4; 13).

³ A different IHO was originally appointed to the matter but recused himself upon the parent's request (June 27, 2018 Dist. Mot. to Dismiss Exs. 1; 3; 5; 6).

⁴ At various times in the hearing record, either one or both of the parent's advocates appear or communicate on the parent's behalf. For ease of reference, this decision will refer to the "parent's advocates" plural whether the appearance or communication is by one or both of the advocates.

"[d]istrict papers on location of hearing/interpreter issue due today for both sides; [d]istrict motion to dismiss due 3/30; parent response due 4/6; hearing date 4/13" and to "[p]lease confirm" (June 27, 2018 Dist. Mot. to Dismiss Ex. 14).⁵

In a letter to the parent dated March 23, 2018, the district scheduled a second resolution session meeting to take place at the district school on March 29, 2018 (June 27, 2018 Dist. Mot. to Dismiss Ex. 13 at p. 2). In an email to the IHO dated March 29, 2018, the parent's advocates indicated that they attended the second resolution session meeting but that an interpreter for the parent was not in the room as requested and the district representatives in attendance did not have authority to enter into a written agreement to resolve the issues in the parent's complaint (June 27, 2018 Dist. Mot. to Dismiss Ex. 16). The parent's advocates also requested the conclusion of the resolution period and that the IHO schedule additional hearing dates (id.).

In an email to the IHO dated March 29, 2018, the district's attorney requested that the parent's due process complaint notice be dismissed with prejudice for the parent's failure to participate in the resolution meeting (June 27, 2018 Dist. Mot. to Dismiss Ex. 17 at p. 1).

The IHO communicated to the parties in an email dated March 30, 2018 that "[t]here were no papers submitted" (on the issues of location of hearing and interpreter), that he was assuming that the hearing would take place at the school district, and that he would suggest the district obtain a new interpreter (June 27, 2018 Dist. Mot. to Dismiss Ex. 18 at p. 1). Further, the IHO stated that there was no motion submitted on the lack of resolution but that, in any event, the parent had "probably done enough" to allow the matter to continue without dismissal (id.). Finally, the IHO stated that the impartial hearing was scheduled for April 13, 2018 and suggested other dates that he would be available as well (id.).

On March 30, 2018, the district responded to the parent's due process complaint notice (June 27, 2018 Dist. Mot. to Dismiss Ex. 19). On the same date, the district filed a partial motion to dismiss regarding the scope of the parent's due process complaint notice, to which the parent responded on April 6, 2018 (March 30, 2018 Dist. Partial Mot. to Dismiss; April 06, 2018 Parent Response to Partial Mot. to Dismiss at pp. 1-2). Within the response, the parent requested the physical attendance of an interpreter during the impartial hearing, as well as a location "off school grounds at another location that is a more neutral site" for the impartial hearing (id. at p. 3).

In an email to the IHO dated April 10, 2018, the parent's advocates requested a different location for the impartial hearing (June 27, 2018 Dist. Mot. to Dismiss Ex. 23 at pp. 3-4). The reason given for the request were that it would have been most appropriate to have the hearing somewhere close to the BOCES location where the student attended school (id. at p. 3). In addition, the advocates described an incident that occurred during the second resolution session meeting on March 29, 2018, whereby the district coordinator of special education ("district

⁵ In response to the IHO's email summarizing the March 27, 2018 prehearing conference and a March 28, 2018 email from the IHO requesting an update on the case, the district clarified that it was not expecting to submit papers regarding the location of the hearing or the interpreter because it did not raise those issues (June 27, 2018 Dist. Mot. to Dismiss Ex. 15). The IHO responded to both parties on March 29, 2018, inquiring "[p]erhaps we need another call?" and soliciting the advocates' "view" on the district's representation (June 27, 2018 Dist. Mot. to Dismiss Ex. 21 at p. 3). It does not appear that the parent's advocates responded to the IHO.

coordinator") accompanied the parent and her advocates out of the building, followed them very close behind, and interrupted a private conversation, such that parent and her advocates "felt annoyed, alarmed, harassed, intimidated [sic], and threatened" (id. at pp. 3-4). The district responded in an email to the IHO on the same date, denying the parent's allegations and asking that the IHO decline the parent's request for a change of location of the impartial hearing as the parent failed to submit papers regarding such a request, which were due on March 27, 2018 (id. at p. 2).

On April 11, 2018, the IHO responded to the parties stating that he previously requested that the parent provide "correspondence" regarding the change of location for the impartial hearing, but none was received (June 27, 2018 Dist. Mot. to Dismiss Ex. 24 at p. 1). The IHO further indicated that because it was too late to find a new location, he would "make sure that the parent feels comfortable in the room" (id.). In addition, the IHO further indicated that if they could find an alternative location for the next date, that would be "preferable" (id.).

In emails to the IHO and the district on April 11, 2018, the advocates objected to any need for submissions on the issue of location of the impartial hearing based on their position that procedural safeguards mandated a location reasonably convenient to the parent and the student and did not require that the parent state "a valid reason" for a request for a different location (June 27, 2018 Dist. Mot. to Dismiss Ex. 24 at p. 3; Request for Rev. Ex. 10 at p. 6). Additionally, the advocates indicated that "[they] c[ould] not and w[ould] not assist the parent or participate in a location [where they] d[id] not feel safe or comfortable" (Request for Rev. Ex. 10 at p. 6). The advocates "strongly encourage[d]" that the IHO identify a different location for the parent to present her case after the district rested (id.).

On April 11, 2018, the district's attorney advised the IHO that he was ill and could not attend the impartial hearing date scheduled for April 13, 2018 (June 27, 2018 Dist. Mot. to Dismiss Ex. 25 at pp. 3-4). In emails to the parties dated April 13, 2018 and April 28, 2018, the IHO rescheduled the impartial hearing date to May 10, 2018 (June 27, 2018 Dist. Mot. to Dismiss Ex. 25 at pp. 3-4, Ex. 27 at p. 1).

On May 9, 2018, the day before the scheduled impartial hearing date—after the IHO and the district confirmed the date, time, and location of the hearing at the district—the parent's advocates sent an email to the IHO expressing their concerns with the process thus far (June 27, 2018 Dist. Mot. to Dismiss Ex. 29). The advocates acknowledged that the IHO had requested that they submit a request for a change in location based on a discussion that occurred at the March 20, 2018 prehearing conference (id. at p. 2). The advocates also acknowledged that, on April 10, 2018, they sent an email indicating why a change of location was necessary, and stated that they did not make a submission earlier because they believed, based on an email from the IHO, that another conference call "might" occur to address the issue (id.). In response to the advocates' letter, the IHO inquired as to whether the parent was moving to adjourn the impartial hearing scheduled for the following day (June 27, 2018 Dist. Mot. to Dismiss Ex. 32 at p. 1). The parent's advocates responded to the IHO's email of same date indicating that they "expected [the IHO] to follow through with [his] previous directive to the district to schedule the hearing at a[n] alternate location" (id.). The parent's advocates further indicated that the email was to document their "directives and expectations," assuming that the IHO would go forward without the parent and/or her representatives (id.). The IHO responded that he did not want to go forward without the parent

and that he had required a formal motion to change venue but that none was filed (Req. for Rev. Ex. 6 at p. 5).

On May 10, 2018, the IHO conducted a conference call with the district's attorney and the parent's advocates (May 10, 2018 Tr. pp. 1-16). The IHO indicated that he had previously requested that the parent submit a motion to explain why the location of the impartial hearing should be moved (May 10, 2018 Tr. p. 5). The advocates indicated that they would not attend a hearing at the district as long as the district coordinator was "involved" (May 10, 2018 Tr. pp. 4-5). The IHO scheduled the impartial hearing for June 6, 2018 indicating that the "parties have to try to work this out" and that "[h]opefully, the parties can come up with some kind of agreement" (May 10, 2018 Tr. p. 10).

On May 29, 2018, the IHO decided the district's partial motion to dismiss and found that the parent's January 18, 2018 due process complaint notice only related to challenges pertaining to the student's June 2017 IEP for the 2017-18 school year (Interim IHO Decision at p. 4).

On June 6, 2018, the impartial hearing convened at the district building (June 6, 2018 Tr. p. 1). The IHO and the district's attorney were in attendance (June 6, 2018 Tr. p. 2). The IHO sent an email to the parent's advocates after the parent and the advocates did not arrive at the impartial hearing at the scheduled time, inquiring whether the parent or her advocates would be attending, but there was not response (June 6, 2018 Tr. p. 2; June 27, 2018 Dist. Mot. to Dismiss Ex. 38). The IHO indicated that "unless there's a really good reason not to show up today, the case will likely be dismissed" and stated his intention to entertain a motion by the district to dismiss the case with prejudice (June 6, 2018 Tr. pp. 5, 7-8). Subsequent to the impartial hearing, the IHO sent an email to the parties indicating that "[t]he hearing is over" and that the advocates had until June 27, 2018 to submit papers explaining their non-appearance and to respond to the district's motion to dismiss with prejudice (June 27, 2018 Dist. Mot. to Dismiss Ex. 40; see June 6, 2018 Tr. p. 9).

On June 7, 2018 the advocates sent a response letter to the IHO indicating that there was no requirement that the parent or her advocates attend the impartial hearing (Req. for Rev. Ex. 4 at p. 6). The advocates emphasized their consistent objection to the hearing taking place at the district and acknowledged that the IHO "continue[d] to insist and demand" that a legal motion or brief be submitted on the issue (id. at pp. 2-3). The advocates further indicated that, at the May 10, 2018 conference call, they indicated that neither the parent nor her advocates would attend any hearings on district property and that at no point did they instruct the IHO or the district not to proceed with the hearing (id.). Accordingly, the advocates requested that the IHO not dismiss the parent's due process complaint notice and that the hearing scheduled for June 29, 2018 take place at the BOCES location that housed the student's program (id. at pp. 6-7).

In an email to the IHO dated June 22, 2018, the parent's advocates indicated their understanding that, when the IHO sent the email indicating that "the hearing [wa]s over," the IHO meant that day of the hearing and not the whole matter (Req. for Rev. Ex. 2 at p. 2). The advocates also indicated that they were confused by the IHO's demand for "motion papers" on the issue of the location of the hearing as they "are not attorneys and do not submit '[m]otion [p]apers' per se" (id.). The advocates indicated that they were preparing a submission explaining their request for a different location for the hearing "as [the IHO] ha[d] demanded" and also requested that the impartial hearing take place on June 29, 2018 (id.). The IHO responded to the advocates' email

on the same date indicating that he would allow responsive papers to the district's motion to dismiss with prejudice but that all other requests were "inconsistent" with his prior directives and were denied (id. at p. 3).

On June 27, 2018, the district filed a motion to dismiss the parent's due process complaint notice with prejudice (June 27, 2018 Dist. Mot. to Dismiss). The district argued that the parent's due process complaint should be dismissed with prejudice because the parent and her advocates failed to attend the two impartial hearing dates and that the parent did not have the right to dictate the location of the impartial hearing (id. at pp. 5-6).

On July 12, 2018, the parent filed a response to the district's motion to dismiss (July 12, 2018 Parent Response to Mot. to Dismiss). The parent argued that her due process complaint notice should not be dismissed based on her lack of attendance at the impartial hearing (id.). The parent further argued that her advocates submitted a lengthy email explaining her position for a change of location on May 9, 2018, but it was ignored (id. at p. 2). The parent requested that the IHO dismiss the district's motion to dismiss, reschedule hearing dates for this matter off school grounds, and direct the district to find a different location for the impartial hearing (id. at pp. 5-6). Alternatively, the parent proposed that the impartial hearing could proceed at the district building if the district could assure the parent that the district coordinator would not be in attendance at the impartial hearing except for his testimony, a different district representative could attend, and that the IHO would escort the parent and her advocates to and from the hearing room (id. at p.6). The parent and her advocates executed affidavits, which were submitted with the parent's response, along with one exhibit, in support of the parent's request for a new hearing location (July 12, 2018 Parent Response to Mot. to Dismiss Ex. 1 & Affidavits).

C. Impartial Hearing Officer Decision

By decision dated September 7, 2018, the IHO dismissed the parent's due process complaint notice without prejudice based on the parent's failure to appear at the impartial hearing scheduled for June 6, 2018 (IHO Decision at pp. 2-4). The IHO summarized his directive that the parent put her request for a change in location in writing via a motion and notes the parent's responses and/or lack thereof which followed and culminated in the parent's nonappearance at the impartial hearing on June 6, 2018 (id. at pp. 1-2). The IHO also recited that a party's failure to appear at a hearing date could result in dismissal and that parties are expected to comply with the reasonable directives of the IHO (id. at p. 2).

The IHO noted that the parent refused to appear at the impartial hearing based on a "perceived right to dictate the venue of the hearing," which the IHO distinguished from the requirements of State regulation for a location "'reasonably convenient to the parent'" (id. at pp. 2-3). Although the IHO recognized that the parent's allegations regarding the behavior of the district coordinator should be taken seriously if correct, the IHO asserted that finding that the school district was an "inconvenient" location because there were inappropriate actions by one of the district staff members would be a "stretch" (id. at pp. 2-3). Moreover, the IHO pointed out that the parent's argument related to the attendance of the district staff member at the impartial hearing and not the school district premises (id. at p. 3). The IHO noted that, even if the impartial hearing were held at a location preferred by the parent, the district coordinator could still be present and participate as the district's authorized representative (id.). The IHO concluded that the "parties

[wer]e at a stalemate with respect to the venue of the case" and that, even if the due process complaint notice were not dismissed, the matter would not move forward because the parent would not appear at the district's premises and the district would not appear at an alternative location or with an alternative representative (*id.* at pp. 3-4). In conclusion, the IHO dismissed the due process complaint notice without prejudice because the parent "appears to have a genuine dispute as far as her rights are concerned, and the Student's right to a FAPE should not be permanently compromised as a result" (*id.* at p. 4).

IV. Appeal for State-Level Review

The parent appeals the IHO's dismissal of her due process complaint notice. Initially, the parent alleges that the IHO committed several errors in conducting the impartial hearing, including failing to: provide a record close date, render a timely decision; provide a written copy of the IHO decision to the parent; document the reasons for extensions granted, ensure timely scheduling of hearing dates, or consider or document the parent's objections to extensions; and provide a summary of the March 20, 2018 prehearing conference. The parent also argues that the IHO failed to include an exhibit list with his decision. In addition, the parent asserts that the IHO should have deemed the district's response to the parent's due process complaint notice stricken for the district's failure to file it in a timely manner.

Next, the parent argues that the IHO erred in adjourning the two hearing dates of May 10, 2018 and June 6, 2018, without directing the district to present evidence and question witnesses, because the parent did not request an adjournment and expected the district to move forward with its case even if the parent was not in attendance.

Further, the parent argues that the IHO erred in finding that State regulations do not give the parent the right to dictate the venue of the hearing and that the location of the hearing at the school district is easily accessed by the parent. The parent argues that the IHO erred by failing to schedule the impartial hearing at a location that was reasonably convenient to the parent and the student as required by State regulation. If not a different location, the parent asserts that the IHO should have directed the district to pick a representative other than the district coordinator. Lastly, the parent argues that the IHO erred in ruling that there was an "obvious impasse" as to location of the impartial hearing and in refusing to make a ruling or directive to either party to appear.

As relief, the parent requests that the IHO's decision be reversed and that the claims in her due process complaint notice be heard and decided by an SRO or, alternatively, remanded to be heard by a different IHO at a place off school grounds at a location reasonably convenient to the parent and student. Finally, the parent asks for a finding that the IHO's conduct was not appropriate when he committed the procedural errors referenced above, in conducting the impartial hearing.

In an answer and cross-appeal, the district responds to the parent's request for review by generally denying the parent's allegations and asserting that the IHO properly dismissed the parent's due process complaint notice. Additionally, the district argues that the additional evidence attached to the parent's request for review should not be considered. In its cross-appeal, the district asserts that the IHO improperly dismissed the parent's due process complaint notice without prejudice. The district argues that the IHO should have dismissed the parent's due process complaint notice with prejudice because dismissing the parent's due process complaint notice

without prejudice allows the parent to "forum-shop" her claims raised in the due process complaint notice to be heard by a different IHO.⁶

V. Discussion

The above lengthy recitation of the events post-dating the parent's due process complaint notice sets the backdrop for a rather limited number of issues, all of a procedural nature, which shall be examined severally.

A. Additional Evidence

Initially, the district objects to the additional evidence attached to the parent's request for review. Generally, documentary evidence not presented at an impartial hearing is 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 (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of a Student with a Disability, Appeal No. 08-003; see also 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]).

Given the procedural posture of the matter and the issues presented for review, the evidence offered by the parent is necessary to the extent cited herein in order to review the parent's allegations about the conduct of the impartial hearing and whether the IHO properly dismissed the parent's due process complaint notice without prejudice. Accordingly, I will therefore accept the documents as additional evidence to the extent necessary to render a decision in this case and to the extent not otherwise duplicative of other documentation in the hearing record.

B. Conduct of the Impartial Hearing

The parent raises several allegations on appeal with respect to the IHO's conduct. State and local educational agencies are required "to ensure children with disabilities and their parents are guaranteed procedural safeguards with respect to the provision of a FAPE by such agencies," including, the rights of parents to participate in the development of an IEP and "to challenge in administrative and court proceedings a proposed IEP with which they disagree" (Burlington, 471 U.S. at 361; see 20 U.S.C. § 1415[a], [b], [f]). Additionally, the IDEA provides parents involved in a complaint the "opportunity for an impartial due process hearing" (20 U.S.C. § 1415[f]). State regulation sets 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]). These requirements are outlined below as they apply to each of the parent's specific allegations.

⁶ While not set forth in its answer, in the memorandum of law, the district also argues that the parent's request for review should be dismissed for failure to comply with the form requirements of the practice regulations governing appeals from an IHO decision (see 8 NYCRR 279.7); however, it has long been held that a memorandum of law is not a substitute for a pleading (see 8 NYCRR 279.4, 279.6; see, e.g., Application of the Bd. of Educ., Appeal No. 16-080; Application of a Student with a Disability, Appeal No. 12-233; Application of the Bd. of Educ., Appeal No. 05-031). Accordingly, the district's argument in this regard will not be further discussed.

Initially, the parent argues that the IHO improperly granted extensions to timelines for the impartial hearing and failed to provide a record close date, render a timely decision, and provide a written copy of the IHO decision to the parent. 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]). The 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]).

An IHO may grant extensions beyond these timeframes; however, such extensions may only be granted consistent with regulatory constraints and an 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 must issue a decision within 14 days of the date the IHO closes the hearing record (8 NYCRR 200.5[j][5]).

According 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]). While an IHO determines when the record is closed, guidance from the Office of Special Education explains that "[a] record is closed when all post-hearing submissions are received by the IHO. Once a record is closed, there may be no further extensions to the hearing timelines. . . . [and] the decision must be rendered and mailed no later than 14 days from the date the IHO closes the record ("Requirements Related to Special Education Impartial Hearings" Office of Special Educ. [Sept. 2017], available at <http://www.p12.nysed.gov/specialed/publications/2017-memos/documents/requirements-impartial-hearings-september-2017.pdf>; see 8 NYCRR 200.5[j][5][iii]).

Although the hearing record does not include the district's requests for extensions to the timelines, it reflects that the IHO issued five documented extensions to the 45-day timeline (see IHO Extension Orders at pp. 1-5). In each extension granted, the IHO indicated that the "district sought to extend the decisional timelines" (*id.*). For the first three extensions, the IHO indicated that the reason given for the request "was witness availability" (*id.* at pp. 1-3). For the last two extensions, the IHO stated that the reason "was [to] allow for briefing on the motion to dismiss" and to "allow for a decision on the motion to dismiss," respectively (*id.* at pp. 4-5). The IHO also indicated in each extension that he "reviewed the factors in 8 NYCRR Sect. 200.5(j)(5)(ii)" and, further, that there was no showing of "any impact on the child's educational interest or well-being in connection to this application or order," "any financial or other consequences to the parties," or "prejudice to the District" (*id.* at pp. 1-5). The district's requests for extensions to the timeline do not appear in the evidence in the hearing record and it is unclear whether or not the parent was notified of each extension as it was granted or when the IHO's orders on the extensions were

transmitted to the parties. The parent, through her advocates, generally objected to delays in the impartial hearing process and, specifically to an extension to the timeline, asserting that the student was "nearing aging out of his eligibility for special education services" (see June 27, 2018 Dist. Mot. to Dismiss Ex. 25 at p. 2; Request for Rev. Exs. 4 at p. 2; 5 at pp. 9-10). However, review of all of the correspondence between the IHO and the parties reveals that the IHO accommodated the parent's scheduling needs, as well as the district's (see, e.g., June 27, 2018 Dist. Mot. to Dismiss Exs. 11; 26 at p. 1), and that scheduled hearing dates did not go forward on May 10 and June 6, 2018 due to the parent and advocates refusing to appear at the district school, as summarized above. Accordingly, while there were nonconformities with the IHO's handling of extensions to the timelines, the delays in the hearing were attributable to both parties, as well as the IHO, and, on appeal, the parent has not alleged that she or the student suffered any prejudice as a result of the delays.

A review of the hearing record reveals that the last submission received from the IHO was the parent's response to the district's motion to dismiss dated July 12, 2018 (July 12, 2018 Parent Response to Dist. Mot. to Dismiss). Following the above guidance, the record close date should have been set as of the date the IHO received this final submission, making the decision due 14 days thereafter ("Requirements Related to Special Education Impartial Hearings," Office of Special Educ. [Sept. 2017]; 8 NYCRR 200.5[j][5]). However, a final extension was granted by the IHO after this submission, setting the decision due date as September 7, 2018 (IHO Extension Orders at p. 5). There is no indication that the IHO notified the parties of the ultimate date he deemed the record closed. Based on the foregoing, although the IHO rendered the decision as of the then-current due date, the decision was technically untimely. Even so, as with the improprieties in the scheduling of the impartial hearing, the parent has alleged no prejudice and has interposed no request for relief based on the untimeliness of the IHO decision.

Turning to the parent's other concerns with the conduct of the impartial hearing, with respect to the parent's argument that the IHO failed to include an exhibit list, no documentary or testimonial evidence was introduced in this matter. However, the motions and exhibits thereto are part of the hearing record (8 NYCRR 200.5[j][5][vi][b]) and best practice would likely dictate that the IHO admit those motions as exhibits and, therefore, include them in a list attached to the decision (see 8 NYCRR 200.5[j][5][v]).⁷ Nevertheless, the lack of an exhibit list does not amount to a procedural irregularity warranting any relief in this instance. Regarding the March 20, 2018 prehearing conference, which was not transcribed, although the IHO provided a summary of the March 20, 2018 prehearing conference to the parties in an email dated March 27, 2018, he did so with extreme brevity (June 27, 2018 Dist. Mot. to Dismiss Ex. 14). The IHO is reminded that, as a part of the impartial hearing, a copy of a transcript or adequate written summary of the prehearing

⁷ The parent also notes in her request for review that during the hearing proceedings, the IHO requested that counsel for the district "compile all emails in this case and put them into evidence as a Hearing Officer exhibit and [he would] admit that" (Tr. p. 7). While it does not appear that such an exhibit was compiled in this matter, the district included multiple emails as exhibits to its June 27, 2018 motion to dismiss, to which the parent had the opportunity to respond with additional or different exhibits. The parent has offered additional evidence on appeal, including some emails, many of which are duplicative of those included with the district's motion. Consideration of the parent's additional evidence is discussed below.

conference should be entered into the hearing record with consideration of the purposes set forth in State regulation (see 8 NYCRR 200.5 [j][3][v], [xi]).

The parent also argues that the IHO's decision was sent to her advocates by email rather than by mailing a copy of the decision to her directly. State regulation provides that an IHO shall "render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents" (8 NYCRR. 200.5[j][5]; see 34 CFR 300.512[a][5]; 300.515[a]). The hearing record does not reflect that the parent requested an electronic copy of the IHO's decision and, assuming the truth of the parent's allegation, the IHO did not render and mail his decision in compliance with State regulations. Despite this, there is little basis upon which relief may be had as there is no evidence to suggest that the parent or the student suffered any prejudice as a result of this failure. Notably, the parent was able to timely appeal from the IHO's decision. Nevertheless, the IHO is reminded that parties may be prejudiced by irregularities in decision issuance and that the IHO must comply with the applicable methods for rendering and transmitting a decision set forth in State regulation.

In summary, notwithstanding the procedural irregularities described above, there is no evidence to suggest that the parent or student suffered any prejudice as a result. Moreover, the parent has not alleged that the IHO's errors resulted in a denial of a FAPE to the student and has not requested any relief relating thereto.⁸

C. Dismissal of the Due Process Complaint Notice

The central issue in this case is whether the IHO erred in dismissing the parent's due process complaint notice without prejudice, based on the parent's failure to appear at the scheduled impartial hearing date. 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]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Child with a Disability, Appeal No. 05-

⁸ The parent also argues that the district's response to the due process complaint notice was untimely and, therefore, the IHO should have deemed the response stricken. State and federal regulation provides that if the school district has not sent a prior written notice to the parent regarding the subject matter of the parent's due process complaint notice, the district shall provide a response to the parent within 10 days of receiving the complaint (8 NYCRR 200.5[i][4][i] see 34 CFR § 300.508[e]). The hearing record reflects that the district responded to the parent's January 18, 2018 due process complaint notice on March 30, 2018 (Dist. June 27, 2018 Mot. to Dismiss Ex. 19). The district's response to the January 18, 2018 due process complaint notice does not comply with the 10-day timeline called for by the IDEA (20 USC 1415[c][2][B]; 34 CFR § 300.508[e]; 8 NYCRR 200.5[i][4][i]). However, given the disposition of this appeal, it is unnecessary to make a determination about the appropriate consequence, if any, of such untimeliness.

026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

In the instant case, the parent requested a change of location for the impartial hearing during a prehearing conference conducted on March 20, 2018 (June 27, 2018 Dist. Mot. to Dismiss Exs. 14; 29 at pp. 1-2). The IHO requested that motion papers regarding the change of location be submitted by March 27, 2018 (June 27, 2018 Dist. Mot. to Dismiss Exs. 14; 23 at p. 2; 29 at p. 2). In an email dated March 30, 2018, the IHO indicated that there were "no papers submitted" and that he assumed the hearing would take place at the district (June 27, 2018 Dist. Mot. to Dismiss Ex. 18 at p. 1). Subsequently, the advocates made a request about the location without elaboration in the parent's April 6, 2018 response to the district's partial motion to dismiss and provided some additional detail in an email dated April 10, 2018 (April 6, 2016 Parent Response to Partial Mot. to Dismiss at pp. 1-2; June 27, 2018 Dist. Mot. to Dismiss Ex. 23 at pp. 3-4). On April 11, 2018, the IHO sent an email to the parties indicating that he had previously requested that the parent provide correspondence regarding the change of location for the impartial hearing, but none was submitted, and indicated it was too late at that juncture to find another location (June 27, 2018 Dist. Mot. to Dismiss Ex. 24 at p. 1). During the May 10, 2018 conference call with the parent, the IHO again reminded the advocates of his request for motion papers to explain why the impartial hearing should be at a different location (May 10, 2018 Tr. p. 5). The IHO also explained to the advocates that if they wanted an alternate location, they needed to provide the IHO with "legal authority" for the request (*id.*). The advocates indicated that they did provide the IHO with an email (*id.*) However, the IHO indicated that he hadn't heard anything specific as to why the parent was unable to attend the high school location (May 10, 2018 Tr. pp. 10-11). On June 6, 2018, the district appeared for the scheduled impartial hearing date but the parent and the parent's advocates did not attend (*see* June 6, 2018 Tr. pp. 1-2). Subsequently the IHO dismissed the parent's due process complaint notice for failure to appear at the impartial hearing (IHO Decision at pp. 2-4).

A review of the evidence in the hearing record supports the conclusion that the IHO had a sufficient basis to dismiss the parent's due process complaint notice without prejudice. The IHO repeatedly attempted to obtain from the parent's advocates a formal motion pertaining to their request for a change in location of the impartial hearing. Although the parent's advocates later indicated to the IHO that they were unfamiliar with motion practice as they are not attorneys and that they sent a detailed email to the IHO on April 10, 2018 explaining the reason for a request in a change in location, the advocates did not provide the IHO with a response regarding a change in location prior to the March 27, 2018 deadline established by the IHO and, even then, the response was not in the form of a motion (June 27, 2018 Dist. Mot. to Dismiss Ex. 23 at pp. 3-4; Req. for Rev. Ex. 2 at p. 2).⁹

Formality in requests to the IHO regarding the conduct of the impartial hearing is a reasonable directive and, had the advocates complied with such a reasonable directive, the IHO likely would have issued a written decision and the parties could have proceeded with the impartial hearing with more certainty. Lack of formality can result in exactly the confusion that occurred

⁹ Further, there is no indication in the hearing record that the advocates requested guidance from the IHO about his expectations for submissions on the issue or informed the IHO about their lack of understanding of motion practice until well after the deadline set by the IHO and the June 6, 2018 hearing date at which they did not appear (*see* Request for Rev. Ex. 2 at p. 2).

here, in terms of the advocates' misunderstanding that hearing dates would occur at different locations or that the district would proceed with their case without the parent or the advocates present (see, e.g., June 27, 2018 Dist. Mot. to Dismiss Ex. 29 at p. 3; Request for Rev. Ex. 4 at p. 6).

On that point, with regard to the parent's argument that the IHO erred in adjourning the two hearing dates of May 10, 2018 and June 6, 2018 without directing the district to present its case notwithstanding the absence of the parent and her advocates, while not impermissible, the determination of whether or not to proceed in the parent's absence is a matter within the IHO's discretion (see Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]).¹⁰ The IHO specifically indicated in his email of May 9, 2018 that he did not want to go forward with the hearing without the parent or her advocates in attendance (Req. for Rev. Ex. 6 at p. 5). The IHO's preference and the manner in which he proceeded was not an abuse of his discretion.

In summary, the parent through her advocates should have cooperated with the reasonable directives of the IHO by filing a formal submission regarding the parent's request for a change in location and by attending the scheduled impartial hearing but she did not do so. It was within the IHO's discretion to schedule the impartial hearing at the district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice when the parent and her advocates did not appear (see Application of a Student with a Disability, Appeal No. 09-007 [finding that the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO]; Application of a Student with a Disability, Appeal No. 09-073 [finding that the IHO properly dismissed the parent's due process complaint notice for failing to comply with the IHO's reasonable directives and failing to attend the impartial hearing]).

Turning to the district's cross-appeal, the district argues that the IHO should have dismissed the parent's due process complaint notice with prejudice because dismissing the parent's due process complaint notice without prejudice allows the parent and her advocates to raise the same issues in front of a different IHO by "forum-shopping" her claims. A dismissal with prejudice should be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). Here, as the IHO found, the parent did not engage in egregious conduct warranting dismissal with prejudice and, in its cross-appeal, the district does not point to any conduct which would warrant reversal of the IHO's determination on this point.

Further, the evidence in the hearing record does not support the district's position that the parent is engaging in "forum-shopping" such that a dismissal of the due process complaint notice with prejudice is warranted. Here, even after the IHO dismissed the parent's due process complaint notice, the parent attempted on several occasions to proceed with the impartial hearing for the next scheduled impartial hearing date with the same IHO (Req. for Rev. Exs. 2 at p. 2; 4 at p. 6).

¹⁰ Unsurprisingly, challenges to a hearing process of this sort occur more commonly when an IHO proceeds without a party; in those instances, the courts have reviewed the IHO's conduct utilizing an abuse of discretion standard (see Davis v. Kanawha Cty. Bd. of Educ., 2009 WL 4730804, at *11-*14 [S.D.W.V. Dec. 4, 2009]; A.S. v. William Penn Sch. Dist., 2014 WL 1394964, at *6-*8 [E.D. Pa. Apr. 10, 2014]; see also Horen v. Bd. of Educ., 655 F. Supp. 2d 794, 806-07 [N.D. Ohio Sept. 8, 2009]).

Although the parent requested a remand to a different IHO on appeal, this does not on its own, support a finding of "forum-shopping".

With regard to the merits of the parent's request about the location of the hearing, this is not the appropriate forum or juncture for this issue. Initially, given the delay in presenting the issue formally for the IHO to consider, the district did not have a full opportunity to respond to the parent's request and, at that point, the dismissal of the parent's due process complaint notice was nothing but a formality. That is, the IHO had already indicated that the matter would be dismissed and that the only remaining issue was whether or not it would be with prejudice (June 6, 2018 Tr. p. 8). It was in response to the district's motion to dismiss with prejudice that the parent, through her advocates, did finally submit a more formal application with supporting affidavits regarding the request for a different location for the impartial hearing (July 12, 2018 Parent Response to Mot. to Dismiss). Since the parent submitted this request in the response to the district's motion, the district did not have an opportunity to respond. In his final decision, the IHO did opine about the merits of the parent's request but did make an ultimate determination about the location issue (see IHO Decision at pp. 2-4) and, given his determination on the record that the matter would be dismissed, such a finding would have been futile at that stage. IHOs retain broad discretion in scheduling the impartial hearing, as long as the time and place chosen is "reasonably convenient to the parent and student involved" (8 NYCRR 200.5[j][3][x]; see 34 CFR 300.515[d]). Further, State guidance indicates that it is the IHO who "ultimately determines whether the time and place for the hearing is reasonably convenient to the parent and student involved" ("Questions and Answers on Impartial Due Process Hearings for Students with Disabilities," at p. 11, Office of Special Educ. [Jan. 2018], available at <http://www.p12.nysed.gov/specialed/dueprocess/documents/impartial-hearing-guidance-jan-2018.pdf>). Accordingly, I decline to consider an issue regarding the hearing process when it is a matter best reserved for an IHO's consideration and discretion in the first instance.

VI. Conclusion

In summary, the evidence in the hearing record reflects that the IHO properly dismissed the parent's due process complaint notice without prejudice based on the parent's failure to appear at the scheduled impartial hearing date. The necessary inquiry is at an end. Should the parent decide to re-file a due process complaint notice in the future, consideration should be given by the IHO as to whether the location of the hearing assigned by the district is reasonably convenient to the parent and the student.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

**Dated: Albany, New York
November 8, 2018**

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**