The University of the State of New York

The State Education Department
State Review Officer
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No. 20-137

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:
Shebitz, Berman & Delforte, PC, attorneys for petitioner, by Benjamin E. Cain, Esq. and Matthew J. Delforte, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Hae Jin Liu, 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 with prejudice. The appeal must be sustained, and as explained more fully below, remanded to the IHO for further administrative proceedings.

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[a]). 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

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.[1] Briefly, at the time of the impartial hearing in the present matter, the student was eligible for special education as a student with multiple disabilities and attended Kulanu (Admin. Hr'g Ex. 1 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated September 5, 2018, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2017-18 school year, and asserted various procedural and substantive violations in support thereto (see generally Admin. Hr'g Ex. 1). As relief, the parent requested reimbursement for, or direct funding of, the costs of the student's tuition and related services (i.e., a "one to one ambulation para[professional]") at Kulanu for the 2017-18 school year (id. at p. 3). The parent also sought the provision of roundtrip, school bus transportation for the student while attending Kulanu (id.).

B. Impartial Hearing

On October 26, 2018, the parties proceeded to an impartial hearing; however, while the parent's advocate appeared on the parent's behalf (the parent did not attend), a district representative—without explanation—failed to appear for the impartial hearing (see Tr. pp. 1-3). At that time, the parent's advocate requested an extension of the compliance date, explaining that the student was "currently enrolled in school" and "receiving services" (Tr. p. 3). The IHO granted the extension request (see Tr. pp. 3-5). The impartial hearing resumed on January 14, 2019 (see Tr. p. 7). Without explanation, neither the parent, the parent's advocate, nor the district representative appeared (see Tr. pp. 7-9). The IHO noted that the matter would be scheduled for a "fact finding hearing on January 22nd, 2019 at 10 a.m." and if the parties failed to appear on that date, the "matter w[ould] be dismissed for failure to prosecute" (Tr. p. 8).

On January 22, 2019, the parent's advocate and a district representative appeared for the impartial hearing (see Tr. p. 10). The parent's advocate requested an extension of the compliance date due to the parent's unavailability (out of the country); the district representative joined in the request for an extension (see Tr. pp. 11-12). After granting the extension, the IHO scheduled the matter for a "fact finding hearing" on February 4, 2019 (see Tr. pp. 12-13).

At the impartial hearing held on February 4, 2019, the parent's advocate appeared on the parent's behalf (the parent did not attend); the district representative did not appear (without explanation) (see Tr. pp. 16-17). The IHO noted that he had received an email from the district representative prior to the impartial hearing date, which indicated that the matter had been referred for settlement (see Tr. pp. 17-18). However, after an off-the-record discussion with the parent's

[1] When the IHO dismissed the parent's due process complaint notice with prejudice, the IHO also ordered that the documentary and testimonial evidence entered by both the district and the parent at the impartial hearing be "stricken from the record" (see IHO Decision at p. 3; see also Tr. pp. 66-74, 76-142, 173, 175-88). As such, the district provided the following to the Office of State Review as the administrative record on appeal: the parent's due process complaint notice, the IHO's written decisions, and transcripts of the proceedings held with one or both of the parties and the IHO. For clarity, the parent's due process complaint notice will be cited to as "Admin. Hr'g Ex. 1." In addition, the parent attached additional documents to the request for review, which shall be considered on appeal to the extent discussed below.

advocate, the status of the matter became unclear, and the IHO granted the parent advocate's request to extend the compliance date to investigate the status of the case (see Tr. pp. 18-19).

According to the evidence, the parent's advocate and a district representative subsequently met for the impartial hearing on March 18, May 7, June 12, July 19, and August 15, 2019 without the parent in attendance (see Tr. pp. 22, 28, 34, 40, 46). At the March impartial hearing date, the parties advised the IHO that they were "optimistic that this matter c[ould be] resolve[d] through the settlement process" and jointly requested an adjournment and to reschedule the case for "another status hearing" to report on the "current status of settlement" (Tr. pp. 23-24).[2] Thereafter, the parent's advocate requested an extension to the compliance date, and the district representative joined in that request—which the IHO granted (see Tr. pp. 24-25). The impartial hearing dates in May, June, and July followed a similar pattern of appearances by the parent's advocate and a district representative (but not the parent), off-the-record discussions, adjournments for continued settlement discussions, rescheduling the matter for status conferences, and joint applications for extensions to the compliance date granted by the IHO (see Tr. pp. 28-31, 34-37, 40-43). However, at the August impartial hearing date, the IHO noted—after an off-the-record discussion—that the matter had "not yet resolved through the settlement process" and that the parties were "requesting that this matter be scheduled for a fact-finding hearing" to determine the case on the merits (Tr. pp. 47-48). The IHO granted the parties' joint application to extend the compliance date in order to prepare for the fact-finding portion of the impartial hearing (see Tr. p. 48-49).

On September 19, 2019, the parent, the parent's advocate, and a district representative appeared for the impartial hearing scheduled to conduct the fact finding (see Tr. pp. 52-54). According to the IHO, an off-the-record discussion between the parties revealed that a "number of emerging issues ha[d] existed, the first being that the representative who represented the [d]istrict ha[d] since retired, and a new representative ha[d] been assigned to the case" (Tr. p. 54). In addition, the IHO indicated that, based upon information from the parties, the "matter could be resolved through settlement" but that the "people before [him were] not necessarily aware of that information" (Tr. p. 54). The parties then jointly requested an extension to the compliance date, which the IHO granted (see Tr. pp. 55-56).

On the next impartial hearing date—November 1, 2019—the parent, the parent's advocate, and the district representative met and engaged in an off-the-record discussion with the IHO (see Tr. pp. 59-61). In summarizing that discussion, the IHO noted that the parties jointly sought to "adjourn this matter for the purposes of curing some issues with regards to their disclosure" (Tr. pp. 60-61). The IHO further noted, however, that while the "parent ha[d] appeared today as well as another day previously in this matter and [was] eager to have her matter resolved," "the issues, unfortunately, based on everyone's availability ha[d] precluded us from commencing the hearing, and certainly concluding the hearing today" (Tr. p. 61). As a result, the parties jointly requested an extension to the compliance date, with the parent's advocate indicating that "there would be no harm to [the student] because this [was] a case for the [2017-18] school year, and [the student was] currently placed for the [2019-20] school year" (Tr. pp. 61-62). The IHO granted the requested extension and scheduled the impartial hearing for December 11, 2019 (see Tr. pp. 62-63). In

[2] Throughout the impartial hearing, the IHO held "off-the-record" discussions with the parties, and then summarized these discussions as reflected in the transcripts (see, e.g., Tr. pp. 23-24, 47-48).

addition, the IHO indicated that the parties should "ensure that their witnesses [were] available" and if not, then the parties "should make applications to adjourn this hearing, sooner rather than later, as [he] would look more kindly on those applications should they be made in a timely manner from today as opposed to the day before our hearing [was] scheduled to commence" (Tr. p. 63). As a final point, the IHO indicated that it was his intention to "complete this hearing on or before December 11th" (Tr. pp. 63-64).

When the parties resumed the impartial hearing on December 11, 2019, the district representative presented two witnesses, via telephone, and entered approximately nine documents into the hearing record as evidence (see Tr. pp. 66, 68-69, 72). The parent's advocate—with the parent in attendance—entered approximately 14 documents into the hearing record as evidence (see Tr. pp. 66-68, 74). At the conclusion of the witnesses' testimony, both direct and cross-examination, the IHO noted that the parent had "indicated earlier that they would require an adjournment for the presentation of their case" (Tr. p. 143). Following an off-the-record discussion "regarding the availability of the parties, as well as the anniversary of the IHO in this matter," the IHO granted the parties joint application for an extension to the compliance date (Tr. pp. 143-45). The IHO reminded the parties that "should any issues come up, please communicate with one another so [they] c[ould] most efficiently use that time" and that it was his "hope and expectation" to conclude the matter at the next scheduled impartial hearing date (Tr. p. 145).

On January 9, 2020, the parent advocate and the district representative (via telephone) appeared for the impartial hearing before the IHO (see Tr. p. 148). Based upon an off-the-record discussion, the IHO explained that the parent had a "family emergency" and "could not appear" (Tr. p. 149). Although the matter was "originally scheduled for a fact finding," the IHO converted the impartial hearing date to a "status hearing" after receiving notice about the parent's unavailability from the parent advocate (Tr. pp. 149-50). Thereafter the parties made a joint application to extend the compliance date, which the IHO granted, and scheduled the next impartial hearing date for February 12, 2020 (see Tr. pp. 150-51). As further instruction, the IHO stated that the matter would "be marked final for the presentment of the [p]arent's case" and he would "not entertain any applications to adjourn except for exigent and emergency circumstances" (Tr. p. 151).

When the parent's advocate (via telephone), the district representative, and the IHO met for the February 12, 2020 impartial hearing, the parent was not in attendance (see Tr. pp. 154-55). The IHO stated that he received "notice" by email the previous day from the parent, which indicated that she was not available for the impartial hearing and requested an adjournment (Tr. pp. 155-56). The IHO noted that, "based on the circumstance of this case," he was "inclined to grant the adjournment" (Tr. p. 156). The district representative joined in the parent's request for an extension to the compliance date (see Tr. p. 156). In granting the request for an extension, the IHO scheduled the next impartial hearing date for March 26, 2020, and advised that the matter would be "marked final in that it [was] [the IHO's] expectation that this matter w[ould] conclude on March 26th for the presentment of the [p]arent's case" (Tr. pp. 156-57). In addition, the IHO instructed that if the parent was "unavailable on that date" and made an application "shortly between now and then," he would "entertain that application" (Tr. p. 157). The IHO further instructed, however, that if the "application to adjourn [was] made at the last minute, it [was the IHO's] expectation that the [p]arents w[ould] be able to present proof of exigent and emergency circumstances that would require such an adjournment" (Tr. p. 157).

On March 26, 2020, the parent advocate (via telephone), the district representative (via telephone), and the IHO met for the impartial hearing (see Tr. pp. 160-61). The parent was not in attendance (see Tr. pp. 160-61). In summarizing an off-the-record discussion, the IHO indicated that he had "convert[ed] this matter from a fact-finding hearing to a status hearing" in order to allow the parties "more time to get their bearings as to how to best proceed in this matter," and given that "circumstances . . . require[d] all of [them] to now work remotely" (Tr. pp. 161-62). According to the IHO, the parties had discussed the "case at length" and "agreed to an additional day for a fact-finding hearing" with the intention to conclude the case (Tr. p. 162). The IHO noted that the "matter ha[d] been pending before [him] for almost 600 days"—far longer than envisioned by the regulations (Tr. p. 162). After noting the current compliance date, the parties joined in a request to extend the compliance date, which the IHO granted (see Tr. pp. 162-63). As instructed previously, the IHO reminded the parties that the "matter [was] marked final and that unless there [was] exigent circumstances that exist[ed], [he would] not grant any adjournments of this date" (Tr. pp. 163-64). Finally, the IHO encouraged the parties to "consider and prepare an affidavit in lieu of direct examination in order to expedite and to efficiently create a record in this matter" (Tr. p. 164).

At the next impartial hearing date, April 28, 2020, the parent advocate (absent the parent) and the district representative—appearing via telephone—met with the IHO (see Tr. pp. 166-67). The IHO proceeded to summarize the off-the-record discussion between the parties, indicating that a "number of adjournments were provided because of the unavailability of the parties" and that the matter was "marked final for the commencement of [the] hearing" (Tr. pp. 167-68). In addition, the IHO stated that the parent was "prepared to proceed today," however, due to the "discussions" held, the "remote hearing posture," and to "ensure the most efficient use of the parties' time, as well as the technology that's available," the IHO "elected to adjourn this matter one last time to ensure" that the parties had a "full opportunity for a hearing on a future date" (Tr. p. 168). The IHO further indicated that the parties would "prepare affidavits of direct examination, or in lieu of direct examination, . . . in order to streamline and hopefully enhance [their] ability to hold the hearing remotely should it be necessary" (Tr. p. 168). After the IHO noted the current compliance date, the parties made a joint application to extend the compliance date, which the IHO granted (see Tr. pp. 168-69).

Resuming the impartial hearing on May 21, 2020, the parent advocate and the district representative appeared via telephone with the IHO, as well as a witness presented on the parent's behalf (see Tr. p. 173).[3] The parent advocate explained that the parent was "unable to participate" at the present moment, because she had a "therapist in the house" (Tr. p. 175). The advocate further explained that the parent would, however, attempt to "call in" and had "authorized" the parent advocate to "move forward" in her absence (Tr. p. 175). Thereafter, the district representative cross-examined the parent's witness (see Tr. pp. 175-88). At the completion of the witness's cross-examination, the parent advocate confirmed that the parent would be the "last witness" in her case (Tr. p. 188). Thus, the parties and the IHO consulted their calendars and scheduled the parent's appearance for June 23, 2020 (Tr. pp. 188-90). As a final point, the parties jointly requested an

[3] Consistent with the IHO's suggestion, the parent advocate entered an affidavit in lieu of the witness's direct examination into the hearing record as evidence (see Tr. pp. 177-78). While not described in the impartial hearing transcript, the parent's request for review indicates that the witness was the "Head of Schools for Kulanu Academy" (Req. for Rev. ¶ 19).

extension to the compliance date, which the IHO granted and which set the "new compliance date to August 10th, 2020" (see Tr. pp. 190-91).

On June 23, 2020, the district representative appeared for the impartial hearing via telephone with the IHO (see Tr. pp. 194-96).[4] Neither the parent advocate nor the parent was present (see Tr. p. 196). The IHO noted that while he had received an email "notifying [him] of their intent to request an adjournment" of the impartial hearing date, the email also indicated their intention to appear to "make that application on the record" (Tr. p. 197). The IHO commented that, "[f]or reasons better known, they ha[d] not yet done so" and approximately 26 minutes had elapsed since the impartial hearing was scheduled to proceed (Tr. pp. 196-97). While "inclined to grant the adjournment requested via email," the IHO specifically noted that "this matter ha[d] been pending before [him] for a total of 657 days" and then rescheduled the hearing for July 1, 2020 at 11:30 a.m. (Tr. p. 197). In addition, the IHO advised that if the parent was not able to proceed "on that date" and was similarly "unable to present a reason of exigent circumstances," he would "entertain any and all appropriate applications made by the [d]istrict with regard to the proceeding on this hearing" (Tr. p. 197). At that time, the district representative indicated an intention to request an extension of the compliance date, if necessary; the IHO responded that the current compliance date was August 10, 2020, thus, another application was not "required as of yet" (Tr. pp. 197-98).

On July 1, 2020, the district representative (via telephone) and the IHO appeared for the impartial hearing (see Tr. pp. 200-01). According to the IHO, the parent advocate sent an email indicating that the parent was not available on that day due to an "illness in the family" and "requesting an adjournment of these proceedings" (Tr. p. 201). The IHO explained that the matter had been "pending" for approximately "665 days" and approximately "16 individual hearing dates" (Tr. p. 202). In addition, the IHO noted that "while not every date was adjourned for the unavailability of the parent, a fair number of them, not the least of which was [the] last one, . . . , was adjourned, based on their request" (Tr. p. 202). At that time, the IHO indicated that, based upon his understanding, the district would be "making an application" that he would "certainly entertain" (Tr. p. 202). The district representative then requested that the IHO "dismiss the case with prejudice," noting further that the district "met its burden" to establish that it offered the student a FAPE, as testified to by its witnesses (Tr. p. 202). The district representative stated that the parent had "many, many opportunities to present their case even before the coronavirus outbreak and then during many other times, when the [p]arent requested adjournment due to illnesses, due to inability of the parents with him" and that the parent failed to do so (Tr. p. 202). Therefore, the district representative asked for the case to be dismissed with prejudice (see Tr. pp. 202-03).

Next, the IHO stated that upon receiving the email from the parent advocate's office, he "indicate[d] that somebody should appear today to make this application to adjourn in person" and no one appeared to do so, even though the matter was scheduled to begin at 11:30 a.m. (Tr. p.

[4] In addition to the district representative and the IHO, four other individuals attended the impartial hearing on June 23, 2020—all of whom were "IHOs . . . observing" the impartial hearing upon consent of both parties (Tr. pp. 194-96).

203).[5] Thereafter, the IHO considered the "flexibility [that] should be given to a parent in terms of adjournment," the preference for "determin[ing a case] on its merits rather than legal nuance in term of their failure to prosecute or the failure to litigate," and the timeframe within which to complete an impartial hearing as envisioned by the "SRO and the federal courts" following the resolution period (Tr. pp. 203-04). Given the length of the impartial hearing thus far, the IHO stated that he was "inclined to dismiss this matter with prejudice" because the parent had "failed to appear on multiple occasions" and "failed to present proof, when requested, of their illnesses and the mitigating factors that would be considered on this case" (Tr. p. 203).

However, the IHO also noted that he would "delay [the] issuance of the dismissal for a period of seven days," and if the parent could "furnish medical proof that they [were] unable to appear based on their son or some other person being unavailable due to illness," he "may not issue that order" (Tr. p. 204). In addition, the IHO stated that the "order to dismiss w[ould] be delayed ten days om the production of medical proof that the parent [was] unavailable" (Tr. p. 204). Absent such "proof within that time frame," the IHO stated his intention to dismiss the matter at that time (Tr. p. 204). As a result, the IHO scheduled the matter for a status hearing on July 10, 2020 at 10:00 a.m. (Tr. p. 204). Moreover, the IHO advised that if the parent failed to present "proof" by July 8, 2020 "that a medical necessity occurred"—the IHO would "not hold that status hearing and [he] w[ould] issue [the] order of dismissal" (Tr. pp. 204-05).

In summary, the IHO—"for the record"—"granted" the district's application to dismiss the matter, which the IHO indicated would be held in abeyance until July 8, 2020, "assuming medical proof"; absent such proof, the IHO would not hold the status hearing scheduled for July 10, 2020 and the matter would be dismissed (Tr. p. 205). The IHO further indicated that he would advise the parent of the same on that day (see Tr. p. 205). Finally, the district representative requested an extension to the compliance date, "if necessary, for the [IHO] to wait for the [p]arent's response" (Tr. p. 205). The IHO noted that the current compliance date was August 10, 2020, so he would "hold [the district's] application in abeyance until such time as may be necessary"—although the IHO "anticipate[d] this matter to resolve on or before July 10th" (Tr. pp. 205-06).

C. Impartial Hearing Officer Decision

In a decision dated July 9, 2020, the IHO dismissed the parent's due process complaint notice with prejudice based upon the parent and the parent advocate's failure to "litigate this matter" (IHO Decision at p. 3). In addition, the IHO ordered the "evidence collected in this matter [to be] stricken from the record as th[e] matter was not determined on its merits" (id.). In reaching these conclusions, the IHO initially acknowledged that while the matter had been "pending well beyond the original compliance timeline set forth by the Regulations," the IHO extended the compliance deadline—upon "application of the parties"—"to allow sufficient time for the parties to investigate the possibility of settlement and prepare for hearings" (id. at p. 1, citing 8 NYCRR 200.5[j][5][ii]).

In describing the impartial hearing, the IHO listed the 19 impartial hearing dates, and explained that the timeframe spanned by these dates was, in part, due to the parties' investigating

[5] The hearing transcript reflects that the "matter came on for hearing at 11:45 a.m." and ended at "11:52 a.m." (Tr. pp. 200, 207).

a settlement, as well as the retirement of the district representative prior to the "fact finding aspect" of the impartial hearing (IHO Decision at p. 2). Next, the IHO indicated that "[w]hile not every adjournment in this matter was on the request of the [p]arent," the parent had a "family emergency" on the impartial hearing scheduled for January 9, 2020; the parent was "unavailable" for the impartial hearing scheduled on February 12, 2020; and although the parent did not appear at the May 21, 2020 impartial hearing date, the parent advocate proceeded in her absence (id.). According to the IHO, neither the parent nor the parent's advocate appeared at the impartial hearings scheduled for June 23 and July 1, 2020—however, the IHO acknowledged receiving an email from the parent prior to the July 1, 2020 impartial hearing date, which indicated that the parent was "unavailable due to an illness in the family" (id.). The IHO noted that, at that time, he advised that the "advocate needed to appear to make an application," and then subsequently "granted the [d]istrict's motion to dismiss the action [on July 1, 2020] based in part on the failure of the [p]arent to appear and present their case" (id. at pp. 2-3). In granting the district's motion to dismiss, the IHO "held this order in abeyance until July 8, 2020 to afford the [p]arent and her advocate an opportunity to present documentation substantiating her unavailability" (id. at p. 3). The IHO further indicated that, as of the date of the decision—July 9, 2020—no such documentation had been presented (id.).

As further support in granting the district's motion to dismiss, the IHO noted that the parent had been "afforded and granted numerous courtesies in this matter; legal authority "clearly point[ed] to a substantial interest for matters to be determined on their merits rather than legal nuance and maneuvering"; and that this "substantial interest must also be balanced by the regulations" clear intent to have matters heard in a timely and expeditious way" (IHO Decision at p. 3). Thus, in "[b]alancing the due process rights" of both parties, the IHO concluded that the matter "should be dismissed [with prejudice] upon the failure of the [p]arent to appear and litigate this matter" (id.).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in dismissing the due process complaint notice with prejudice based upon the failure to prosecute, especially where, as here, the IHO did not provide the parent with an opportunity to be heard prior to issuing the dismissal with prejudice. The parent contends that the IHO failed to provide the parent with an opportunity to fully present evidence and present witnesses, thereby abusing his discretion in dismissing the parent's due process complaint notice and violating the parent's required procedural safeguards and rights. In addition, the parent argues that the IHO failed to offer her the ability to submit an affidavit in lieu of her direct testimony—as had been afforded to the parent's witness—in order to accommodate the student's "pressing medical needs." The parent asserts that she "remains ready and willing to litigate her complaint and testify," including through the submission of an affidavit in lieu of direct examination with her availability for cross-examination via telephone, if necessary. In addition, the parent argues that the IHO erred in failing to consider the factors set forth in State regulation in denying the parent's request for an adjournment of the July 1, 2020 impartial hearing date. As relief, the parent seeks an order reversing, vacating, and annulling the IHO's decision; reinstating the parent's due process complaint notice; and remanding the matter to allow the parent to testify and to complete the presentation of her case. The parent submitted additional documentary evidence with the request for review for consideration on appeal (see generally Req. for Rev. Exs. A-T).

In an answer, the district responds to the parent's allegations and initially argues that the IHO properly dismissed the parent's due process complaint notice with prejudice, as an IHO enjoys broad authority in conducting impartial hearings as long as the IHO affords each party a meaningful opportunity to exercise their rights during the impartial hearing. In addition, the district asserts that parties are generally required to comply with reasonable directives from the IHO regarding the conduct of the impartial hearing. According to the district, the parent was provided with an opportunity to exercise her rights and failed to appear at approximately seven scheduled impartial hearing dates. The district further argues that the parent "flouted" the IHO's request for proof of exigent circumstances and was provided with "ample notice and opportunity to be heard on the dismissal." In addition, the district contends that the parent "makes no assertion" that she requested an extension of the "one-week deadline to secure the required proof," noting that the IHO would "likely have granted it." The district argues that, contrary to the parent's contention, the IHO did not fail to consider the factors set forth in State regulation. As a result, the district seeks to uphold the IHO's decision in its entirety. Alternatively, the district alleges that if the SRO finds that the IHO erred in dismissing the parent's due process complaint notice with prejudice, then the matter should be remanded for a continued impartial hearing. The district also objects to the consideration of parent exhibit Q, as additional evidence, and submits additional documentary evidence with its answer for consideration on appeal (see Answer ¶ 26; see generally Answer Ex. 1).

In a reply to the district's answer, the parent argues her objections to the consideration of the additional evidence submitted with the district's answer. The parent also argues in further support of the consideration of parent exhibit Q, submitted as additional evidence with the request for review.

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]).

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. __, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[6]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

A. Preliminary Matters—Additional Evidence

As noted, both parties attached documents to their respective pleadings as additional evidence for consideration on appeal (see generally Req. for Rev. Exs. A-T; Answer Ex. 1). Other than objecting to the consideration of the exhibit Q offered by the parent, the district does not otherwise object to the remaining evidence submitted by the parent (see Answer ¶ 26). The parent objects to the consideration of exhibit 1 offered by the district (see Reply ¶¶ 1-11). 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—in particular, exhibits N and P, consisting of emails dated June 22, 2020 and July 1, 2020, as well as exhibit Q, a July 15, 2020 letter from a physician—are 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 with

[6] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

prejudice. Accordingly, I will therefore accept the documents as additional evidence to the extent necessary to render a decision in this case. However, to the extent that the parent's remaining evidence—exhibits A through M, O, and R through T—are otherwise duplicative of other documentation in the hearing record or are not now necessary to render a decision in this case, said documents will not be accepted as additional evidence. With respect to the evidence attached to the district's answer, the document was available at the time of the impartial hearing but was not offered at that time, and it is not now necessary to render a decision in this case. As a result, I will exercise my discretion and decline to accept the evidence submitted with the district's answer.

B. Dismissal of the Due Process Complaint Notice with Prejudice

The central issue in this case is whether the IHO erred in dismissing the parent's due process complaint notice with prejudice, based on the parent's failure to appear at scheduled impartial hearing dates and the related failure to comply with the reasonable directive to present proof justifying her absences within a set timeframe as ordered by the IHO. 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. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

A dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). Here, contrary to the IHO's findings and under the circumstances of this case, the parent's inability to attend impartial hearing dates and/or her failure to timely provide the IHO with medical proof for those absences, as directed by the IHO, do not constitute either a pattern of conduct or conduct so egregious warranting the maximum sanction of dismissal of the due process complaint notice with prejudice.

In the instant case, the evidence reflects that approximately 15 months elapsed between the date of the due process complaint notice—September 2018—and the presentation of the district's case-in-chief—December 19, 2019 (compare Admin. Hr'g Ex. 1 at p. 1, with Tr. pp. 66-143). The evidence further reflects that the parties and the IHO anticipated the parent to present her case-in-chief beginning at the next scheduled impartial hearing date, January 9, 2020 (see Tr. pp. 143-46, 148). However, due to a family emergency precluding the parent's appearance, the parent's advocate requested an adjournment of the proceeding, with the district joining in that request, and the matter was rescheduled to continue on February 12, 2020 (see Tr. pp. 149-51). In addition, the IHO marked the matter as "final for the presentment" of the parent's case and noted that he would not "entertain any applications to adjourn except for exigent and emergency circumstances" (Tr. p. 151). On February 12, 2020, the parent was, again, unavailable for the impartial hearing and, on the previous day, sent notice to the IHO seeking an adjournment of the proceeding (see Tr. pp. 154-56). Again, the district joined in the parent advocate's request for an adjournment and to

extend the compliance date (see Tr. p. 156). In addition, the IHO marked the matter as "final," noting his "expectation" to conclude the matter on the next scheduled impartial hearing date, March 26, 2020 (Tr. p. 157). Then, for the first time, the IHO indicated that if the parent made a "last minute" request to adjourn the next date of the proceeding, he expected the parent to "present proof of exigent and emergency circumstances" justifying the adjournment (Tr. p. 157).

By the time the next impartial hearing date occurred on March 26, 2020, the coronavirus pandemic had disrupted much, if not all of, daily life in the entire United States with New York City as its epicenter at the time. Thus, when the parties met with the IHO for the impartial hearing on that date, without the parent, it is not surprising that the parties needed "more time to get their bearings as to how to best proceed in this matter," and ultimately "agreed to an additional day for a fact-finding hearing . . . to present their case and hopefully conclude this matter" (Tr. pp. 160-62). At that time, the IHO noted his concern about the length of time the matter had been pending—"almost 600 days"—and reminded the parties that the matter had been "marked final" and no adjournments would be granted in the absence of "exigent circumstances" (Tr. pp. 162-64).

Notwithstanding what appeared to be the mounting pressure to conclude the impartial hearing in this case (which was understandable given the length of time since it had been filed), the IHO—at the next impartial hearing scheduled on April 28, 2020—"elected to adjourn this matter one last time" (Tr. pp. 166-68). Significantly, the parent was, as the IHO noted, "prepared to proceed" on that date (Tr. p. 168). According to the IHO, however, several factors weighed in favor of adjourning the matter, including off-the-record discussions, conducting the impartial hearing remotely, and ensuring the "most efficient use" of time and the technology available (Tr. p. 168). The IHO also noted that it was necessary to "ensure that [they] ha[d] a full opportunity for a hearing on a future date" (Tr. p. 168). The matter was adjourned until May 21, 2020 (see Tr. pp. 169-70, 173).

The evidence in the hearing record reflects that the impartial hearing continued on May 21, 2020, with the testimony of the parent's witness (see Tr. pp. 173, 177-88). The witness's direct testimony was completed through an affidavit, and the district representative conducted the witness's cross-examination via telephone (see Tr. pp. 174, 176-88). After concluding the parent witness's testimony, the parent's advocate confirmed that the parent would be the final witness in her case, and the impartial hearing was scheduled for June 23, 2020, for that purpose (see Tr. pp. 188-90).

In an email to the IHO dated June 22, 2020 at 6:43 p.m., the parent's advocate explained that the parent, who had just contacted her, had "another son who [was] severely to profoundly disabled" and who had "developed a serious hip infection" necessitating medical procedures and appointments on June 23, 2020 (Req. for Rev. Ex. N at p. 1). Acknowledging the late time of day, the parent's advocate requested an extension of the compliance date and to adjourn "tomorrow's scheduled hearing date" (id.). In addition, the parent's advocate noted the following: "[w]e can appear to put all of the information on the record" (id.).

On June 23, 2020, the impartial hearing resumed with the IHO and the district representative in attendance (see Tr. pp. 194-95). Referencing the email from the parent's advocate from the night prior, the IHO—while noting his inclination to grant the requested adjournment and extension to the compliance date—expressed concern about the length of time the matter had been

pending, as well as the parent advocate's failure to appear in order to request the adjournment in person (see Tr. pp. 196-97). At this juncture, the IHO noted, for the first time, his willingness to "entertain any and all appropriate applications" by the district on July 1, 2020—the date of the next impartial hearing—about how to proceed with the impartial hearing if the parent could not proceed and could not present a "reason of exigent circumstances" on July 1, 2020 (Tr. p. 197).

In an email to the IHO dated June 30, 2020, the parent's advocate inquired as to whether the impartial hearing scheduled on July 1, 2020 for this student was "going forward" (Req. for Rev. Ex. P at p. 4). The IHO responded in an email on the same day indicating that the "case [was] scheduled for fact finding and the presentment of the [p]arent's case" (id. at p. 3). At 10:36 a.m. on July 1, 2020, the parent's advocate emailed the IHO seeking an adjournment due to a "medical emergency" and the illness of the student's brother (id. at p. 2). The parent's advocate apologized for the inconvenience, and asked to "let [them] know when [the IHO] would like to re-schedule the [h]earing" (id.).

According to the evidence in the hearing record, the impartial hearing was scheduled for 11:30 a.m. on July 1, 2020, and the matter came to be heard at 11:45 a.m. (see Tr. pp. 197, 200). However, prior to appearing on the record, the IHO responded to the parent advocate's email seeking an adjournment at 11:23 a.m. on July 1, 2020, indicating that the matter had been marked "final so many times that someone need[ed] to appear to make this application on the record" (Req. for Rev. Ex. P at p. 2).

After the conclusion of the July 1, 2020 impartial hearing, the IHO emailed the parent's advocate at 11:55 a.m. (see Tr. p. 205; Req. for Rev. Ex. P at p. 1). The IHO advised the parent's advocate that, "[b]ased on the numerous adjournments already granted, I have dismissed the matter for the parent's failure to appear" (Req. for Rev. Ex. P at p. 1). In addition, the IHO explained that the order was "being held in abeyance until July 8," and if the parent provided "medical proof of necessity for not appearing today," the IHO would "rescind [the] order" (id. [emphasis in original]). The IHO further instructed that a status hearing had been scheduled for July 10, 2020 at 10:00 a.m., but "[o]nly if proof [was] provided" by the parent (id. [emphasis in original]).

The IHO issued the decision dismissing the parent's due process complaint notice with prejudice on July 9, 2020 (see IHO Decision at p. 3). The parent thereafter secured a letter from a doctor, dated July 15, 2020, as requested by the IHO (see Req. for Rev. Ex. Q).

Based upon the foregoing evidence, neither the parent nor the parent's advocate appeared at the impartial hearings scheduled for June 23, 2020, or July 1, 2020 (see Tr. pp. 194-95, 197). The parent's advocate had, however, on both occasions, notified the IHO by email of the parent's unavailability, albeit even if sent on very short notice (see Req. for Rev. Exs. N at p. 1; P at p. 2). Given that, since at least March 2020, the parties had been directed to conduct impartial hearings remotely, it is unclear why the IHO did not attempt to contact the parent's advocate on either June 23 or July 1 by telephone—or conversely, why the parent's advocate did not appear at the impartial hearings via telephone. This is especially true with respect to the July 1, 2020 impartial hearing date, when the IHO—having reached out to the parent's advocate via email and without receiving any response from the parent's advocate—concluded the matter within approximately 10 minutes without the parent having an opportunity to be heard on the district's request to dismiss the matter with prejudice.

Nevertheless, the evidence in the hearing record further establishes that the parent did not provide the IHO with medical proof explaining her absences, as directed by the IHO, prior to July 8, 2020 (see generally Tr. pp. 1-207). Instead, the parent appeared to secure that proof the following week, in a letter dated July 15, 2020, after the IHO had already dismissed the due process complaint notice with prejudice (see Req. for Rev. Ex. Q).

As a whole, the evidence in the hearing record does not support the conclusion that the IHO had a sufficient basis to impose the most drastic sanction possible—outright dismissal of the parent's due process complaint notice with prejudice. Here, even if the parent was remiss in failing to obtain and present the IHO with medical proof justifying her absences from the impartial hearing within the deadline set by the IHO—and even if the parent herself did not have the opportunity to testify at the impartial hearing as a result—both parties had already entered most of the documentary and testimonial evidence in the case and thus, the hearing record contained sufficient evidence, at that time, for the IHO to issue a decision as to whether the district offered the student a FAPE and, if not, could have at least considered the question of whether the parent had presented a sufficient quantum of proof that Kulanu was an appropriate unilateral placement for the student.[7] Instead, the IHO struck the evidence from the hearing record and dismissed the parent's due process complaint notice in its entirety.[8]

C. Remand

When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, because the IHO struck all of the evidence collected at the impartial hearing, the matter must be remanded to the IHO. The IHO's approach of issuing a conditional interim ruling warning the parent can be, generally speaking, a very appropriate, effective hearing management tool; however, the record should better reflect the IHO's reasoning for setting a one-week deadline for the submission of medical proof, especially given the circumstances of the pandemic in New York City and his statement that the compliance date was August 10, 2020. At this juncture, I hesitate to opine on the matter without a full record, but it

[7] This approach is still a sanction against the parent for the failure to appear or provide an excuse within the deadline, but would essentially be less draconian—it would be a limitation on the parent's ability to present her case rather than outright dismissal after nearly two years of effort in which a significant number of appearance failures occurred on the district's part as well.

[8] The IHO noted the strong preference for a determination on the merits, but nevertheless struck all of the evidence from the record (Tr. p. 203; IHO Decision at p. 3). This order was unnecessary and counter-productive, especially when it was quite foreseeable that the IHO's outright dismissal of a case seeking private school tuition costs would be challenged.

appears to be short time for the parent of not one but two disabled children to obtain proof, especially given the overall leniency that the IHO repeatedly displayed up until that point in time.

Accordingly, I find that the IHO should have an opportunity to revisit the adequacy of the medical proof submitted by the parent, as well as any reason(s) that the parent may have had for missing the IHO's July 8, 2020 deadline. Upon remand, the IHO is directed to consider the parent's letter, dated July 15, 2020, to determine whether this constitutes medical proof justifying the parent's absence at the impartial hearing and develop the record as described above if he continues to believe that the parent's testimony should be precluded. Regardless of this determination or whether the IHO reconsiders allowing the parent to present her testimony based on any excuse and or medical documentation, the dismissal of the proceeding without prejudice was an overbroad sanction in these circumstances and the IHO must reinstate all of the evidence previously entered into the hearing record and issue a substantive decision on the merits of the claims of a denial of a FAPE set forth in the parent's due process complaint notice and, if the FAPE denial claims are meritorious, whether the parent met her burden to show that Kulanu was appropriate and, if so, whether equitable considerations favor granting the parent tuition relief.

VII. Conclusion

Having determined that the IHO erred in dismissing the parent's due process complaint notice with prejudice and in striking the evidence from the hearing record, the matter must be remanded to the IHO for further proceedings and to issue a decision determining whether the district offered the student a FAPE for the 2017-18 school year, and thereafter, if necessary, whether Kulanu was an appropriate unilateral placement and whether equitable considerations weighed in favor of the parent's request for relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated July 9, 2020, is vacated; and,

IT IS FURTHER ORDERED that the matter is remanded to the same IHO who issued the July 9, 2020 decision to determine whether the district offered the student a FAPE for the 2017-18 school year based upon the issues raised in the parent's due process complaint notice, and what relief, if any, the parents may be entitled to; and,

IT IS FURTHER ORDERED that, if the IHO who issued the July 9, 2020 decision is not available to conduct a proceeding, another IHO shall be appointed in accordance with the district's rotational selection procedures and State regulations.

Dated: **Albany, New York**
September 18, 2020

JUSTYN P. BATES
STATE REVIEW OFFICER