



# The University of the State of New York

## The State Education Department

### State Review Officer

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**No. 21-087**

### **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:**

Judy Nathan, Interim Acting General Counsel, attorneys for respondent, by Brian J. Reimels, 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 challenging the special education and related services offered by respondent (the district) for her son during the 2019-20 school year. The appeal must be sustained.

### **II. Overview—Administrative Procedures**

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

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

### **III. Facts and Procedural History**

Due to the procedural posture of this appeal, the hearing record in this matter is very sparse. According to a July 20, 2020 due process complaint notice filed by the parent, the student in this appeal attended a nonapproved, nonpublic school (NPS) where he received special education and related services through the district (see Due Process Compl. Notice at p. 1). The student is the subject of a prior due process proceeding, which appears to have yet to be adjudicated (*id.* at p. 1). According to the parent, a privately-obtained neuropsychological evaluation of the student was conducted in 2017 in which the neuropsychologist offered the following diagnoses: attention deficit hyperactivity disorder – inattentive type with associated executive function challenges; learning disorder - reading disorder and disorder of written expression; generalized anxiety disorder; and developmental coordination disorder (*id.* at p. 3). The parent alleged that after requesting the continuation of special education services in May 2019, the CSE recommended integrated co-teaching services for all subjects, and related services of speech-language language

therapy, occupational therapy (OT) and physical therapy (PT), three times weekly for 30 minute sessions – each during the school day, testing accommodations, and a 30 minute counseling session weekly during the school day (*id.* at pp. 3-4). In her due process complaint notice, the parent asserted that the district failed to offer the student a free appropriate public education (FAPE) for the 2019-20 school year because, among other things, the CSE refused to incorporate the 2017 recommendations of the neuropsychologist and instead offered the same services recommendations in the IEP as in past school years (Due Process Compl. Notice at pp. 1, 2, 4). As relief, the parent asserted that the student requires, among other things, 30 hours per week of 1:1 instruction by a special education teacher, 5 hours of 1:1 instruction using Orton Gillingham or a similar literacy methodology, individual OT three times per week for 45 minutes, as well as continued speech language therapy and PT to address his needs (*id.* at pp. 6-13). The parent also requested funding for an independent neuropsychological evaluation, "[c]ompensatory education services for the total services recommended less those received through pendency" as well as "compensatory education services for all makeup hours for the pendency mandate not provided for the 19-20 school year" (*id.* at p. 13).

Between July 31, 2020 and October 1, 2020, the district and parent finalized an agreement regarding the student's pendency placement wherein based upon a September 2015 IEP the district agreed to provide the student with the following 12-month special education services, all in group sessions not to exceed two students: 15 hours per week of special education itinerant teacher services; three, 45-minute sessions each week of PT, OT, and speech-language therapy (see Pendency Agreement).

On January 12, 2021, an IHO was assigned by the district from the roster of IHOs to adjudicate the due process proceeding (IHO Decision at p. 2). No impartial hearing was conducted, and in a final decision dated March 6, 2021, the IHO indicated that he had e-mailed the student's family on three occasions during January and February 2021 and asked the district's case manager to "seek to reach the family as well" (*id.*). After receiving no response from the parent, the IHO dismissed the parent's due process complaint notice with prejudice (*id.*).

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

The parent appeals, asserting the IHO erred in dismissing the underlying due process hearing. The parent asserts, among other things, that she received several notification e-mails over the course of six months from the filing of the due process complaint notice from the district's impartial hearing office from a "do not reply" e-mail address, but that no hearing had been scheduled. Similarly, the parent alleges that a notification was sent from the district that the IHO had been assigned on January 12, 2021, as well as two further notifications from the district that her due process complaint had been received. The parent contends that she thereafter received a notice from the district on March 9, 2021 that the IHO had dismissed the parent's due process proceeding. According to the parent, she thereafter located e-mails dated January 14, 21, February 16 and March 6, 2021 from the IHO at what appeared to be a Hungarian e-mail address that had been blocked and segregated in a spam folder. The parent describes further communications from district personnel and the IHO thereafter, asserting that 1) the CSE agreed to the parents request for funding of an independent neuropsychological evaluation, 2) the IHO advised that changing the final order to "without prejudice" seemed "unlikely to impossible" without an appeal, and 3) the district could not resolve the parent's request for compensatory education in the absence of an

active due process proceeding. The parent requests that the undersigned either reverse the IHO's dismissal of the due process complaint notice with prejudice and remand the matter for an impartial hearing, or, in the alternative, modify the IHO's dismissal to one that is without prejudice so the parent can refile her claims.

In an answer, the district explains that the e-mails sent to the parties by the IHO were not made part of the administrative record and agrees with the parent that the IHO erred in dismissing the due process complaint notice with prejudice. The district indicates that the IHO only used e-mail to communicate with the parent despite the parent providing other means of communication on her due process complaint notice and that the IHO moved to quickly to dismiss the case with prejudice. The district requests that the IHO's decision be reversed and the matter be remanded for an impartial hearing on the merits.

## **V. Discussion**

### **A. Due Process Hearing Procedures and IHO Dismissal**

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 M.M. v. New York City Dep't of Educ., 2017 WL 1194685, at \*7-\*8 [S.D.N.Y. Mar. 30, 2017]; J.S. v. New York City Dep't of Educ., 2017 WL 744590, at \*5 [S.D.N.Y. Feb. 24, 2017]; 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]).

At first blush, the parent's failure to respond to the IHO's correspondence attempts over a two-month period appears problematic and could be viewed under some circumstances as a proper basis for dismissal of an impartial due process hearing due to the nonparticipation of the claimant. However, several particular facts are present in this proceeding that give me pause regarding the procedures used by the IHO to dismiss the impartial hearing, which appear to be undisputed by the parties. Due to several unusual factors, I am persuaded that the IHO erred in dismissing the parent's due process complaint notice with prejudice, based solely on the parent's failure to respond to the IHO's communications.

First, according to his decision, the IHO "reached out [to] the parties on January 14, 2021 and further e-mail correspondence was exchanged on several occasions without receiving any response from the family" (IHO Decision at p. 2). On January 21, 2021 the IHO notified the family via e-mail that the matter was at risk of dismissal and received no response (*id.*). On February 11, 2021 the IHO asked the district's impartial hearing "case manager" to seek to reach the family as

well after he had been unable to reach the family via the e-mail provided by them in the due process complaint notice (*id.*). After the IHO still had not received a response from the parent, he notified her on February 16, 2021 that he would dismiss the matter if he did not receive a response from her by February 23, 2021 (*id.*). The parent similarly alleges the IHO sent four e-mails, dated January 14, 21, February 16, and March 6, 2021 (see Req. for Rev. at p. 3). While the parent asserts that none of the e-mails from the IHO actually scheduled a prehearing conference or evidentiary hearing (*id.* at pp. 3-4), the contents of the IHO's e-mails and directives upon which the dismissal determination was based are not clear because, as the district points out, the IHO failed to include his directives to the parties in the administrative hearing record, and neither party produced the IHO's e-mails for this State-level review.<sup>1</sup> The failure to create an administrative record to support the IHO's determination weighs against upholding the IHO's dismissal of the due process complaint notice.

Another unusual factor in this case is the seeming reliance upon e-mail as the sole method of communication that was utilized by the IHO before resorting to outright dismissal of the due process complaint notice with prejudice. The parent's due process complaint notice contained two of her telephone numbers as well as her mailing address information as provided for in the due process complaint notice, but the IHO only used e-mail for communication (Due Process Compl. Notice at p. 1). While it may have been appropriate for the IHO to attempt communications via e-mail, and to further direct district personnel (i.e. the "case manager") to attempt to establish communications with the parent, there is no documentation in the administrative record indicating that the "case manager" complied with the IHO's request or, if she did make any attempt, what method of communication was used. Under these circumstances I find that the severe sanction of dismissal with prejudice was unwarranted when the parent had already provided multiple other means of contact and where no administrative record was created by the IHO to support the outcome.

Finally, the district's agreement with the parent's position that the IHO erred in dismissing the case and that the matter should be remanded for an impartial hearing weighs in favor of granting the parent's requested relief.

Before doing so, I also note this case presents a cautionary tale that highlights the ever changing nature and, at times, the unpredictability of e-mail communications. Both the use of e-mail communications and subsequent rise of new features such as spam or junk folders have become commonplace in this digital age, and the conveniences they afford to parties can hardly be overlooked. However, in my view the mere fact that e-mail communications were allegedly routed to a spam folder may not be a sufficient basis by itself to assert lack of notice, particularly when, as in this case, the e-mail address was affirmatively provided by the parent for the purpose of facilitating communications regarding the due process proceeding. In other words, reliance on e-mail communications provides a high level of convenience, but it is a cooperative endeavor and a party's mere allegation of accidental loss in a flooded inbox or the proverbial "it went in my spam

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<sup>1</sup> The decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and shall set forth the reasons and the factual basis for the determination (8 NYCRR 200.5[j][5][v]). Further, the hearing record should include "any other documentation deemed relevant and material", of which the e-mails he cites to in dismissing the parent's due process complaint clearly fall (8 NYCRR 200.5[j][5][vi][6]). The documents relied upon in an IHO decision must be made part of the hearing record.

folder" so to speak, may not win every argument (see Colon-Vazquez v. Dep't of Educ. of Puerto Rico, 46 F. Supp. 3d 132, 139-141 (D.P.R. 2014) [noting the difficulties with e-mail delivery of documents to the parent and declining to excuse the school district of its responsibilities]; Wong v. Bd. of Educ., 478 F. Supp. 3d 229, 259 [rejecting the parent's claim and finding that the school district's inadvertent blocking of the parents' e-mail as spam was insufficient basis to find that communication with the district had been impeded] [D. Conn. 2020]; Pettigrew v. Middletown Area Sch. Dist., 2006 WL 4032181, at \*4 [M.D. Pa. Sept. 26, 2006] [describing a dispute over the date of receipt of an e-mailed document and the legal consequences flowing from receipt]). In my view, incumbent with the decision to rely on e-mail, the participants in such communications have a responsibility to actively monitor the continuing effectiveness of e-mail communications and attempt to correct difficulties with reasonable diligence if their respective expectations have not been met.

In this case, it was the responsibility of the parent to periodically check the spam folder at the risk of the consequences for the failure to do so – at least more often than she did so in this case. At the same time, the alleged use of an e-mail address from overseas by the IHO may have inadvertently contributed to the likelihood that the messages would be blocked, and the repeated silence of the parent was a sign of a potential technical problem, especially when there was no evidence of the use of any other forms of communication. Once again, on this record, it is impossible to tell as neither the e-mails themselves, nor evidence of their treatment as spam were produced in the administrative record. Furthermore, as the district has acquiesced to the parents request in this matter and the administrative record does not support the IHO's determination, I will vacate the IHO's decision to dismiss the parent's due process complaint. The matter will be remanded to the IHO to conduct an impartial hearing on the merits and render a decision on the merits that is based upon an adequate hearing record.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated March 6, 2021 is vacated in its entirety; and,

**IT IS FURTHER ORDERED** that the matter is remanded to the IHO to convene an impartial hearing on the merits of the parties' dispute.

**Dated:**      **Albany, New York**  
**May 24, 2021**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**