



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 22-032

**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 Springville-Griffith Institute Central School District**

### **Appearances:**

Harris Beach PLLC, attorneys for respondent, by Jeffrey J. Weiss, Esq., and Andrew R. Mark, 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 complaint against respondent (the district) regarding the 2020-21, 2021-22, and 2022-23 school years with prejudice. The appeal must be sustained in part.

### **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**

Given the undeveloped state of the hearing record in the present matter, a full recitation of facts relating to the student's educational history is not possible; however, given the procedural posture of the impartial hearing and the limited nature of the appeal a detailed review of the student's educational history is not necessary and instead the focus is on a review of the procedural history in this matter.<sup>1</sup>

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<sup>1</sup> When the IHO dismissed the parent's consolidated due process complaint notices with prejudice, no evidence submitted by the parties had been admitted into the hearing record. After the IHO had resolved to dismiss the parent's consolidated due process complaint notices with prejudice, he admitted the parent's three due process

## A. Due Process Complaint Notice

The parent filed a February 11, 2021 due process complaint notice, which provides some background of the student's educational history leading up to this proceeding (IHO Ex. I at pp. 1-3). Briefly, according to the parent, the student moved to the district in October 2019, and prior to that time the student had been found eligible for special education and related services as a student with an other health impairment by a CSE in the student's prior school district (id. at pp. 1, 2). Reportedly, the student had attended a 6:1+1 special class and received the related services of occupational therapy (OT) and counseling, pursuant to an IEP (id. at p. 2). The February 2021 due process complaint notice also stated that the parent had the student evaluated by a private psychologist and in a report dated December 18, 2018, the psychologist "indicate[d] that [the student] me[t] the criteria for an autism spectrum disorder and A[ttention] D[eficit] H[yperactivity] D[isorder] . . . and has at least average or above average intellectual ability, an anxiety disorder and sensory and associated behavioral challenges" (id.). The parent also reported that the district did not conduct any evaluations when the student entered the district in October 2019 and that the district developed a behavior intervention plan (BIP) in December 2019 without conducting a functional behavioral assessment (FBA) or including the parent in the development (id.).

According to the parent, the district's CSE convened on May 19, 2020 to develop an IEP for the student for the 2020-21 school year and recommended that the student attend a third grade, out-of-district, Board of Cooperative Educational Services (BOCES) 6:3+1 special class for five hours per day and receive five 30-minute sessions per week of adapted physical education, three 30-minute sessions per week of individual occupational therapy (OT), five 15-minute sessions per week of individual counseling, and three 30-minute sessions per week of group counseling (id. at p. 1). The parent's initial due process complaint notice also reflected that the May 2020 CSE recommended that the student receive 12-month services consisting of the same program indicated above (id.). According to the initial due process complaint notice, the district updated the student's BIP in December 2020 without an FBA, parental involvement or a CSE review (id. at p. 2). The parent reported that the December 2020 BIP "and actions of staff" revealed that the student was "subject to physical holds without appropriate recommendations, MD recommendations and parental consent" (id.).

The February 2021 due process complaint notice further reflected that the CSE scheduled a meeting for January 8, 2021 to review the student's program "due to behavioral issues" and that the district's director of special education advised that the student "would be moved to a 'Behavioral School'" (IHO Ex. I at p. 2). The parent disagreed with the proposed action and retained two advocates to assist her with obtaining the student's educational records and preparing for the CSE meeting (id.). According to the parent, the district refused to allow the parent to review the student's educational records because she refused to sign the district's form (id.). As a result,

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complaint notices, correspondence between the parties and the IHO, and his consolidation orders and transcripts of the proceedings as evidence and entered all of the documents and transcripts as IHO exhibits. The transcripts were also provided separately with the certified record to the Office of State Review. However, the pages of the transcripts are not numbered consecutively. For the purpose of clarity, the transcripts will be cited to in this decision by the IHO exhibit number and corresponding page number.

the parent requested that the January 8, 2021 CSE meeting be postponed (id.). The parent reported that the meeting was postponed and as of that date had not been rescheduled (id.).

According to the February 2021 due process complaint notice, the parent received prior written notice dated January 13, 2021 indicating that the student was due for a triennial review (IHO Ex. I at p. 2). The parent reportedly withheld consent for the district to reevaluate the student because "[the private psychologist]'s evaluation was completed in Dec. 2018, less than 3 years ago and the Parent [wa]s in agreement with her findings and diagnoses" (id. at p. 3). On January 20, 2021, the district reportedly sent a second prior written notice requesting consent to reevaluate the student (id.).

Turning to the parent's procedural and substantive allegations identified in the February 2021 due process complaint notice, the parent asserted that the district failed to evaluate the student in all areas of suspected disability, including by failing to conduct a physical examination and medical/health review, including a review of ongoing health issues and medication side effects, an appropriate evaluation for OT with a sensory integration assessment, a neuropsychological evaluation with cognitive and achievement assessments, a developmental visual processing evaluation, an assistive technology evaluation, an FBA, and a comprehensive speech-language evaluation to include assessments of reading, reading comprehension and written language assessment, and auditory processing skills (IHO Ex. I at p. 3). The parent further asserted that the district failed to provide any special education, general education, or related services to the student from March 2020 through September 2020 (id.). With regard to the May 19, 2020 CSE meeting, the parent claimed that the district failed to provide prior written notice of the meeting, that the CSE was not properly composed, and that the parent was not permitted to participate in the development of the student's IEP (id.). The parent also contended that the CSE predetermined the recommendations set forth on the May 2020 IEP (id.). The parent next alleged that the May 2020 CSE failed to consider the student's regression and lack of progress, failed to recommend 12-month services, failed to consider or address the student's needs related to a diagnosis of autism or to consider and adopt the recommendations of a December 2018 privately-obtained neuropsychological evaluation (id. at p. 4). The parent next argued that the district failed to document the parent's concerns on the IEP and failed to include the parent when making changes to the IEP, the BIP, or the student's placement and program (id.).

The parent also asserted that the CSE incorrectly classified the student as having an other health impairment and failed to recommend a program and placement in the student's least restrictive environment (LRE) (IHO Ex. I at p. 4). Specifically, the parent argued that the student's placement should have been a general education class with consultant teacher services or a 12:1+1 special class with direct consultant teacher services, resource room, daily counseling, OT, and assistive technology (id.). The parent next alleged that the district failed to provide her with prior written notice of its recommendations (id.). The parent also claimed that the district improperly used physical restraint without a CSE recommendation, "a medical doctor's orders," or an FBA/BIP that included use of physical restraint (id. at p. 5). In addition, the parent contended that the CSE failed to develop a BIP for review at the CSE meeting and failed to consider the parent's concerns or allow parental input during the CSE meeting (id.). The parent also alleged that the CSE failed to recommend and provide assistive technology, failed to recommend "appropriate annual measurable goals," and failed to "review and measure" the student's lack of progress during the 2019-20 school year (id.). Lastly, the parent asserted that the CSE failed to recommend special

education and related services in the student's LRE, failed to recommend parent counseling and training, failed to recommend instructional services to address the student's language needs, failed to recommend a teacher with a background in teaching students with autism, and failed to provide transitional support services (id. at p. 5).

As a proposed resolution, the parent requested (1) immediate placement in a general education class with direct 1:1 consultant teacher services; or in a 12:1+1 special class for a full day program at the student's in-district elementary school with a 1:1 aide and up to one hour per day of resource room; (2) "[p]rovision of compensatory educational and related services to make up for the period of time that [the student] received none from March 2020-September 2020"; (3) a change in the student's classification to a student with autism and inclusion of relevant recommendations made by the private neuropsychologist in the IEP; (4) immediate provision of daily counseling for 30 minutes; (5) appropriate assistive technology at school and at home; (6) provision of daily OT for 30 minutes; (7) the development of measurable annual goals and the provision of progress reports to the parent; (8) independent educational evaluations (IEEs) in the areas of neuropsychology, developmental visual processing, OT with sensory integration, assistive technology, speech-language therapy, and central auditory processing; (9) completion of an FBA that includes parental participation and a BIP if warranted; (10) waiver of the requirement to complete school work or homework at home until the student was able to work independently; (11) provision of parent counseling and training for up to two, one hour sessions per month; (12) a recommendation for appropriate instruction and/or speech-language therapy for the student's language needs; (13) that the CSE recommend a teacher with a background in teaching students with autism; (14) that the CSE convene and develop an IEP consistent with the parent's demands; and (15) that the district admit "that it denied a FAPE to [the student] for the 2019-20 school year" (IHO Ex. I at pp. 6-8).

## **B. Subsequent Due Process Complaint Notices, Prehearing Conferences, and Correspondence**

On March 22, 2021, the parties convened remotely for a prehearing conference (IHO Ex. II at pp. 1-30). One of the advocates appeared on behalf of the parent and two attorneys appeared on behalf of the district (id. at pp. 2, 3).<sup>2</sup> The IHO discussed some of the claims raised in the February 2021 due process complaint notice with the parties (id. at pp. 3-18). In addition, scheduling matters were discussed as well as the parties working toward agreement on IEEs (id. at pp. 18-24). On April 6, 2021, the same advocate appeared on behalf of the parent and the district's attorney appeared for a second prehearing conference (IHO Ex. III at pp. 1, 2, 3). The parties conveyed that they were continuing to discuss IEEs (id. at pp. 3-4). The parent's advocate indicated that the district had agreed to some of the evaluations that the parent believed were necessary (id. at pp. 4-5). The parties further discussed scheduling the impartial hearing and were required by the IHO to explain why they may need more than one day each for the impartial hearing and to decide whether the hearing would be conducted remotely or in-person (id. at pp. 7-13, 18-25).

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<sup>2</sup> The district was represented by two attorneys at the prehearing conferences with the exception of the April 6, 2021 prehearing conference when one attorney appeared for the district (IHO Ex. III at pp. 2, 3). For simplicity, references to the district attorney in the decision are in the singular.

By letter dated April 6, 2021, the IHO confirmed the four dates in June selected for the impartial hearing and informed the parties of a new compliance date (IHO Ex. IV).

On April 13, 2021, the parent filed a second due process complaint notice indicating that a CSE met on March 19, 2021 and challenging the appropriateness of the recommendations made by the March 2021 CSE (IHO Ex. V at pp. 1, 2). The parent carried forward many of the claims from the February 2021 due process complaint notice, sought much of the same relief, and requested that the district admit "that it denied a FAPE to [the student] for the 2020-2021 and 2021-2022 school years" (*id.* at pp. 1-6). The parent also requested that the April 2021 due process complaint notice and the February 2021 due process complaint notice be consolidated into one proceeding (*id.* at p. 7).

In an email dated May 11, 2021, the district's attorney wrote to the IHO seeking a status clarification of the four dates reserved in June for the impartial hearing (IHO Ex. VI). The district's attorney also notified the IHO that the parties had reached agreement on the IEEs and that authorizations would be sent to the parent that week (*id.*). The district's attorney further reported that he did not know when the IEEs would be completed, and he thought that it seemed unlikely that they would be completed in June (*id.*). To that end, the district's attorney requested that a status update be obtained from the parent's advocates (*id.*). In addition, the district's attorney noted "a potential pendency issue for the summer going forward," which might require a pendency hearing and he proposed reserving one of the June hearing dates for that purpose (*id.*). In conclusion, the district's attorney also indicated that consolidation of the parent's two hearing requests "would be prudent" (*id.*).

By letter dated May 12, 2021 sent via email and first class mail, the IHO ordered consolidation of the parent's two due process complaint notices (IHO Exs. VII at pp. 1-2; VIII). The district's attorney replied to the IHO's email on May 12, 2021, acknowledging receipt of the consolidation order and reiterating his request for the status of the reserved impartial hearing dates in June (IHO Ex. VIII). By email dated May 13, 2021, the IHO requested that the parent's advocates respond to the district's attorney's email of May 11, 2021 (IHO Ex. IX). By email dated May 15, 2021, the parent's advocates responded to the IHO stating that the authorizations for the IEEs had been received by the parent on May 14, 2021, and that the parent would attempt to schedule the IEEs as soon as possible (IHO Ex. X). The parent's advocates indicated that the parent was willing to postpone the hearing dates scheduled for June but that the parties were not in agreement as to the student's pendency placement for summer 2021 and one of the June dates might still be required for a pendency hearing (*id.*).

In a letter dated May 21, 2021, the IHO confirmed that the parties were willing to postpone the June hearing dates while the IEEs were completed and further stated that both parties wished to "maintain some or all of the scheduled hearing dates . . . for a possible pendency hearing" (IHO Ex. XI at p. 1). The IHO also noted his confusion with regard to pendency as the parent had asserted in the February 2021 due process complaint notice that the May 2020 IEP failed to offer the student a FAPE, and the parent had later alleged in the April 2021 due process complaint notice that the May 2020 IEP constituted the student's pendency program and placement (*id.*). In addition, the IHO indicated that it was unclear to him where the parties' positions on pendency diverged, and he directed them to confer and determine if a pendency hearing was necessary (*id.* at pp. 1-2). By email dated May 24, 2021, the district's attorney requested that the parent's

advocates notify the IHO that the parties had reached an agreement on the student's summer 2021 pendency placement and he also set forth the district's position on the student's pendency placement for fall 2021 (IHO Ex. XII). By email dated May 25, 2021, the parent's advocates notified the IHO that the parties were in agreement regarding the student's summer 2021 pendency placement and that the hearing dates scheduled for June could be cancelled (id.). In a letter dated May 26, 2021, the IHO acknowledged that the parties had agreed to the student's pendency placement for summer 2021; he indicated that he had not made any pendency determinations for the summer or fall 2021 and advised that the current compliance date would not allow for completion of the IEEs (IHO Ex. XIII). By letters dated June 3, 2021 and August 23, 2021, the IHO granted the parent's and the district's respective requests for extensions to the hearing timelines (IHO Exs. XIV; XV).

By letter dated September 17, 2021, the IHO acknowledged receipt of a September 15, 2021 email from the parent's advocates, which notified him that the IEEs were completed and had been reviewed by the parties and further advised him of their available dates for the impartial hearing (IHO Ex. XVI at p. 1). The IHO informed the parties that all of the hearing dates were beyond the current compliance date and that he would tentatively schedule the hearing based on their availability but indicated that if an extension request was not received, he would dismiss the parent's due process complaint notices without prejudice (id.). The IHO scheduled two dates in October 2021 and reiterated his previous finding with regard to the length of the hearing and his requirements for disclosure (id. at pp. 1-2). By letter dated September 22, 2021 sent via email and first class mail, the IHO granted the parent's request for an extension to the hearing timelines (IHO Exs. XVII; XVIII). By email dated September 23, 2021, the district's attorney advised the IHO and the parent's advocates that he had a conflict with one of the October 2021 hearing dates (IHO Ex. XVIII). By letter dated September 29, 2021, the IHO advised the parties of new hearing dates, which included two dates in October 2021 and two dates in November 2021 (IHO Ex. XIX at pp. 1-2).

On October 20, 2021, the parent filed a third due process complaint notice, which indicated that a CSE convened on October 7, 2021 to review the completed IEEs and challenged the recommendations made by the October 2021 CSE (IHO Ex. XX at pp. 1, 3-6). The parent repeated many of the claims from the earlier due process complaint notices, sought much of the same relief, requested additional compensatory education, and requested that the district admit "that it denied a FAPE to [the student] for the 2020-2021, 2021-2022 & 2022-2021 [sic] school years" (id. at pp. 1-9). The parent also requested that the October 2021 due process complaint notice be consolidated with the prior due process complaint notices into one proceeding (id. at p. 11). By letter dated October 29, 2021, the IHO ordered that the due process complaint notices be consolidated (IHO Ex. XXI at pp. 1-3). By letter dated November 22, 2021, the IHO scheduled a prehearing conference for November 29, 2021, and granted the parent's request for an extension to the hearing timelines (IHO Ex. XXII).

A prehearing conference was held remotely on November 30, 2021 and attended by one of the parent's advocates and the district's attorney (IHO Ex. XXIII at pp. 1-3). The parent's advocate confirmed that the issues of the student's classification and the parent's request for IEEs had been resolved (id. at pp. 4-5). The IHO and the parties' representatives revisited the number of days each would require to present their respective cases, discussed whether the hearing would be in-person or held remotely, and whether or not the parent consented to a remote hearing (id. at pp. 5-

14). The parent's advocate stated that, since the requirement for parental consent was relatively new, she needed to speak with the parent (id. at pp. 14-15). The parent's advocate also noted that obtaining sufficient bandwidth for video conferencing continued to be an issue in the area (id. at p. 15). The district's attorney stated that, if the parent declined to consent to a remote hearing, "it needs to be clear the need to attend in person. This isn't simply a situation where the parent doesn't show" (id. at p. 16). Next, the district's attorney stated his preference that the hearing not be held on consecutive dates (id. at pp. 16-17, 20-21, 26-27). The parent's advocate indicated that the parent's second advocate could be called for jury duty and the parent's preference was to schedule hearing dates in January 2022 (id. at pp. 17-18). Although both parties' representatives stated a preference for the hearing dates to not be scheduled on consecutive days, the IHO requested that the parent's advocates and the district's attorney provide him with availability for two consecutive dates each for the impartial hearing (id. at pp. 27-38, 40).

In an email dated December 7, 2021, the parent's advocates notified the IHO and the district's attorney that the parent would consent to a remote hearing if "secure internet service" with "needed bandwidth" could be secured through the district (IHO Ex. XXV).

One of the parent's advocates and the district's attorney reconvened on December 7, 2021 for a continuation of the prehearing conference (IHO Ex. XXIV at pp. 1-3). Discussions were held about possible internet connectivity and bandwidth problems, as well as the IHO's and the parties' representatives' interpretation of the regulation providing each party up to one day to present their case during an impartial hearing (id. at pp. 7-17). Next, the discussion turned to scheduling, and the parties agreed to four hearing dates: January 11, 2022, January 13, 2022, February 1, 2022, and February 4, 2022 (id. at pp. 17-22). The IHO then reiterated his disclosure requirements for the impartial hearing (id. at pp. 27-44).

By email dated January 3, 2022, the parent's advocates requested an adjournment of the January 11, 2022 and January 13, 2022 hearing dates (IHO Ex. XXVI at pp. 1-2). The email was signed by the parent's advocate who had attended all of the prehearing conferences (Advocate 1) and was sent from the advocates' business email (id.).<sup>3</sup> The email indicated that the family of the parent's other advocate who had not attended the prehearing conferences (Advocate 2), had tested positive for COVID-19 and that Advocate 1 was ill and experiencing COVID-like symptoms herself and was awaiting test results (id. at p. 1). For these reasons, the email noted that the parent and the advocates could not be together in a room for the impartial hearing and requested that the January dates be adjourned (id. at p. 2).

By letter dated January 3, 2022, the IHO granted the parent's request for adjournment of the January 11, 2022 and January 13, 2022 hearing dates, as well as her request for an extension to the hearing timelines (IHO Ex. XXVII). The February 1, 2022 and February 4, 2022 hearing dates remained scheduled (id.). In an email dated January 4, 2022, the district's attorney wrote to the IHO requesting that additional hearing dates be scheduled to replace the adjourned dates

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<sup>3</sup> The business email address for the parent's advocates appears to display the name of the advocate who did not attend any of the prehearing conferences. Some of the email correspondence in the hearing record appeared to be jointly authored by the parent's advocates and other emails list only the name of the advocate who attended the prehearing conferences. As the parent's attendance at the impartial hearing is a primary issue in this matter, an effort to distinguish the participation of the two parent advocates without disclosing their names has been made.

stating, "[i]t is imperative that we move this matter towards conclusion. I respectfully request that the [p]arent provide[] dates of availability" (IHO Ex. XXVIII at p. 2). Having received no response, the district's attorney sent a second email on January 6, 2022, which reiterated the content of the January 4, 2022 email (id. at p. 1). By email dated January 6, 2022, the IHO wrote to the parent's advocates requesting that they respond to the email from the district's attorney (id.).

On January 28, 2022, the parent's advocates sent an email to the IHO and the district's attorney requesting that the February 1, 2022 and February 4, 2022 hearing dates be adjourned because a child of the parent (sibling of the student) had tested positive for COVID-19 (IHO Ex. XXIX at p. 2). The email also indicated that the student's entire family was quarantined, that the student could not attend school until "at least Feb. 3 based on his exposure to his sibling's COVID-19 positive status," and that the parent was "required to stay home as well because of COVID and to care for her children who [we]re not in school and at least one of them [wa]s COVID positive" (id.). In addition, the January 28, 2022 email disclosed that Advocate 2 had tested positive for COVID-19 as well (id.). The email further stated that "[a]s we had planned to attend the hearing virtually in the parent's home or one of ours together due to possible digital difficulties especially with multiple sites, this latest development precludes that plan. Therefore, with deep regret" the parent's advocates requested that the February 1, 2022 and February 4, 2022 hearing dates be cancelled and rescheduled (id.). The parent's advocates proposed six alternate dates between February 18, 2022 and April 1, 2022 (id.). In closing, the advocates wrote, "[p]lease let us know if this is granted. [I]f the timelines are running out . . . the [p]arent requests a 90[-day] extension to the hearing timeline due to COVID" (id.).

Approximately an hour and a half after the parent's advocates' email of January 28, 2022 was sent, the IHO replied stating that:

Decision on these requests is reserved, pending discussion on the record on February 1, 2022. The parent's advocates should make every possible effort to arrange for themselves and the parent to participate remotely or by telephone. The parent's advocates should advise the [d]istrict's attorneys of all appropriate contact information. I am concerned that the hearing issues have become more and more complex over time, especially with the prior consolidations, and that if the hearing process runs into the student's next annual review on account of further delay, they risk becoming unwieldy so. I am also concerned about the inherent uncertainty of when this hearing will be able to take place, and that the [d]istrict appears ready to proceed. The [d]istrict's proposed exhibits are expected to be delivered to my office today

(IHO Ex. XXIX at pp. 1-2).

Approximately two hours after the IHO's email of January 28, 2022, the district's attorney replied to inform the IHO and the parent's advocates that the district was ready to proceed with the hearing on February 1, 2022, that the district's exhibits would be delivered that day, and that there was no basis in the parent's advocates' email to adjourn both the February 1, 2022, and February 4, 2022 scheduled hearing dates (IHO Ex. XXIX at p. 1). The district's attorney opined that with

regard to the February 1, 2022 hearing date, the "record [wa]s unclear" and there was "no reason to cancel the February 4th hearing date" (id.). The district's attorney argued that there was no information provided by the parent's advocates "regarding when the positive test(s) took place" and without a specific date, it could not be determined whether anyone in the parent's household was required to quarantine through February 1, 2022 (id.). The district's attorney further stated that the district's director of special education would be present at the remote hearing on February 1, 2022 and would discuss the district's quarantining requirements (id.). The district's attorney also questioned why quarantine would affect the parent's ability to participate in a remote hearing (id.). The district's attorney stated that "[w]e expect that all of these issues will be thoroughly examined before this application is ruled upon" (id.). The district's attorney also wrote that the district shared the IHO's concern "regarding the amount of time this hearing has been pending" and stated that the parties needed "to proceed with urgency in order to bring this matter to closure" (id.). The district's attorney found the prospect of scheduling hearing dates in late March and April "deeply concerning" and stated a need for "a more thorough examination regarding availability" before granting the parent's request for an adjournment (id.). The district's attorney concluded stating that the district would be prepared to discuss all of the issues raised on February 1, 2021, and if the IHO denied the parent's request, the district was prepared to proceed with the hearing on February 1, 2021 (id.).

Approximately 45 minutes later, Advocate 1 responded by email dated January 28, 2022 (IHO Ex. XXX). The email indicated that the student had not tested positive, that the student's school-age sibling had, and that according to "BOCES, who is currently his provider, not [the district]," the student was not allowed to attend school until February 3, 2022 (id.). Advocate 1 further stated that the parent notified Advocate 2 of the situation "[l]ate, on Jan 24," and that "[t]he family [wa]s quarantined and even after quarantine because [the student] [wa]s not allowed in school, his mother must stay home to care for him. That means we cannot go to her house to have a hearing because of possible exposure to COVID" (id.). The parent's advocate stated that "[t]he family w[ould] be testing as well and if another member [wa]s positive the quarantine [wa]s on again" (id.). Next, Advocate 1 reiterated that the parent's other advocate, Advocate 2, had tested positive for COVID and reported that she "continue[d] to test positive to date" (id.). Advocate 1 further reported that she and her husband were at risk due to their ages and medical histories (id.). For those reasons, Advocate 1 asserted that, "[w]e cannot be together for the hearing and we have no way to manage 3 separate locations for a hearing as we told you before. That's why we've asked to adjourn those dates" (id.). Advocate 1 also stated that the parent's disclosure was submitted on January 25, 2022, as the parent "intended to move forward" with the hearing and Advocate 1 "was not privy to the COVID issue until after disclosure was made on Jan 25" (id.). Advocate 1 then stated "[w]e cannot participate in this hearing together and cannot manage it separately with one of the reps testing positive and the [p]arent at home with her children. Please adjourn Feb 1 and 4th dates as requested" (id.). In closing, Advocate 1 indicated that the parent's advocates were also concerned about the length of the hearing and the student's "inappropriate placement and program but COVID issues [we]re beyond our control" (id.).

In an email dated January 29, 2022, the IHO responded to the parties and informed them that he was "in possession of both parties' proposed exhibits" and that he had not opened either of the packages (IHO Ex. XXXI). Next, the IHO amended his earlier statement related to the parent and the parent's advocates making efforts to participate in the hearing remotely or by telephone to include "through whatever devices may be available to them . . . and that the [d]istrict . . . make

every possible effort to provide the parent and her advocates with any technical assistance, devices, and supportive hardware that may be warranted to enable the parent and her advocates to fully participate remotely" (id.). The IHO requested that the parties cooperate with each other and expressed his hope that "it c[ould] be accomplished before February 1, 2022" (id.). Lastly, the IHO stated that he was not "inclining either way as regards the parent's adjournment request," that he intended to permit the parties a full opportunity to be heard on the matter, and if the hearing was not adjourned, he wanted to begin the hearing promptly (id.).

In a reply dated January 29, 2022, Advocate 1 advised the IHO and the district's attorney that:

The parent reports today that both of her children are now COVID positive and symptomatic and quite ill. Both she and her husband are also COVID . . . positive now too. She and the representatives cannot participate in a hearing on Tuesday or Friday next week. [Advocate 2] continues to test positive for COVID as well. Again, we request to adjourn the dates and reschedule. Should you decide to move forward anyway, the parents and advocates will be unable to attend. Thanks for your consideration.

(IHO Ex. XXXII).

By email dated January 30, 2022, the IHO responded that "[d]ecision on the parent's request remains reserved" (IHO Ex. XXXIII). Advocate 1 replied by email dated January 31, 2022 and advised that the parent had emailed the advocates earlier that day and shared that, due to her health concerns related to COVID-19 as well as an earlier health issue, which ultimately could be "fatal," the hearing would have to be postponed to " either end of February if [she was] lucky, or March which [wa]s probably the safest bet" (IHO Ex. XXXIV at p. 1). The parent's advocate further reminded the IHO and the district's attorney that the student and his sibling were "quite ill with COVID-19" and the parent and her husband had both tested positive and were "caring for sick children and [the parent]'s medical issues" (id. at p. 2). The parent's advocate asserted that neither parent could attend the hearing on February 1, 2022 or February 4, 2022 and that the advocates were "not attorneys and only assist parents and c[ould] not proceed without them" (id.). Next Advocate 1 addressed the IHO's concerns stated in his email of January 28, 2022, opining that the issues would not become more complex over time as the student's current (challenged) IEP would not expire until October 19, 2022 and that the district had already ignored the recommendations of the evaluators who conducted the IEEs at the student's October 7, 2021 CSE meeting (id.). With regard to the IHO's directive to the district to provide technical assistance for the parent and the parent's advocates to participate remotely in the hearing, the parent's advocate replied that "[a]s we have already explained, the issue for connectivity of internet service [wa]s the problem with a virtual hearing, not the need for equipment or technical support" (id.). The parent's advocate continued:

[w]e have internet service and laptops, but the service in this area is unreliable and the more separate persons trying to log on a hearing makes the reliability worse and unpredictable. While we were willing to try this if we could secure a spot for all three of us . . . in

one location so as not to overload the internet services. We cannot even attempt that now as the . . . family is contagious and we cannot be close enough to the . . . family to assist with the hearing. . . . [t]he parents and representatives cannot participate in the hearing tomorrow or Friday. Again, please cancel the two dates and reschedule so we may participate

(id.).

The parent's advocate then stated that holding the hearing without the parent or her advocates would violate her due process rights, dismissal would cause further delay, and the parent's advocates withdrawing their assistance would cause further delay, and therefore it "[s]eem[ed] to [them] that the most prudent and expedient means to move this forward [wa]s to cancel these two dates and reschedule" (IHO Ex. XXXIV at p. 2).

By email dated January 31, 2022, the IHO replied,

[w]ith the language of 'a very high chance,' 'if I'm lucky,' and 'probably the safest bet,' do you understand the parent to be saying that participation in an impartial hearing before she and her family are free from COVID infection would be potentially fatal to her? Please advise yes or no. If the answer is yes, I cannot in good conscience rely on chance, luck, or bet.

(IHO Ex. XXXIV at p. 1).

The district's attorney also replied on January 31, 2022, stating that the district was prepared to discuss all of the recent correspondence on the record at the hearing scheduled for the following day (IHO Ex. XXXIV at p. 1). By email dated January 31, 2022, Advocate 1 replied that her understanding of the parent's email was that she was "indicating that she cannot participate in the hearing," and the advocate also noted that the parent had requested that she reschedule other CSE matters not related to the student (IHO Ex. XXXV). The parent's advocate concluded, "[s]o, 'yes' that is my understanding that she has a possible life threatening medical issue that impacts on her ability to attend the hearing, even on a virtual basis" (id.).

In an email dated January 31, 2022, the district's attorney notified the IHO and the parent's advocates that a web link had been previously provided for the impartial hearing and in an email dated February 1, 2022, the district's attorney sent a corrected web link for the hearing participants to access the impartial hearing remotely (IHO Exs. XXXVI; XXXVII at pp. 1-2).

On February 1, 2022, the district's two attorneys, the district's director of special education, and the IHO appeared to discuss the parent's request for an adjournment as directed by the IHO (IHO Ex. XXXVIII at pp. 1-3). After the participants who were present identified themselves, the IHO stated that he had left telephone messages at the telephone number listed on the parent's advocates' letterhead asking if they were having technical difficulties and further providing his telephone and cell phone numbers so that they could advise him if they were in fact having technical difficulties (id. at p. 3). The IHO also stated that he had not received any communication from the parent's advocates via email or telephone and had "also included the parent" to see if she

was having technical difficulties connecting to the hearing (id. at pp. 3-4). The IHO then stated that he had received no communication back from the parent's advocates and could only conclude that they would not be in attendance (id. at p. 4). The district's attorney stated that in correspondence over the last few days, the parent's advocates "clearly stated that they were not going to participate today" (id.). The IHO disagreed stating that the advocates had said they would not participate in a hearing but had not stated that they would not participate in a discussion of their request for an adjournment (id.). The IHO further noted that if the parent's advocates had appeared, he would have asked them why the parent was able to communicate with them via email over the last few days but was unable to "click on the link which was provided to join us for this discussion" (id. at pp. 4-5). The district's attorney noted that the district's director of special education was present and could respond to some of the claims regarding whether the student was able to attend school (id. at p. 6). The IHO provided an explanation regarding why he wanted to reserve his decision on the parent's request for an adjournment wherein he described two prior unrelated cases where a witness's illness and a parent's need to provide childcare while attending a hearing did not preclude their respective participation in remote hearings (id. at pp. 9-14). The IHO and the district's attorney discussed whether and how to move forward with the hearing (id. at pp. 14-27). The IHO stated his belief that the student was not currently attending school (id. at p. 27). The district's director of special education, although not sworn as a witness, provided additional information that, according to an email from the parent that the school received on January 31, 2022, the student would return to school on February 2, 2022, and she further stated that "it has not been reported to the school that he is COVID positive" (id. at pp. 27, 30). Next, the IHO reviewed the content of the parent's advocates' email dated January 29, 2022, wherein it was reported that the student and his sibling were "COVID positive and symptomatic and quite ill" (IHO Exs. XXXIII; XXXVIII at pp. 30-31). The district's director of special education stated that the student's sibling had been attending school (IHO Ex. XXXVIII at p. 31). The district's attorney and the IHO then discussed the difficulty of assessing the accuracy of the information provided by the parent to the advocates when the advocates failed to appear to discuss the request for an adjournment (id. at pp. 31-33). The district's attorney and the IHO next discussed how to proceed (id. at pp. 33-48). After the discussion, the IHO decided that within ten days after the parties had received the expedited transcript from the February 1, 2022 hearing date, the parent would be required to provide an explanation from a treating physician explaining why the parent could not attend an impartial hearing remotely or by telephone (id. at pp. 36-39). The IHO explicitly noted that the statement needed to "explain why the parent could not participate in an impartial hearing" (id. at p. 37). The IHO further stated that if the parent complied, he would dismiss the due process complaint notices without prejudice and if the parent did not comply or did not provide an adequate response, he would dismiss the due process complaint notices with prejudice (id. at pp. 38-39, 41).

By email dated February 1, 2022, the IHO notified the parent's advocates and the district's attorney that the parent's adjournment request had been denied, no appearances were required for the February 4, 2022 scheduled hearing date, no future hearing dates had been scheduled, and that they should all receive a copy of the transcript via email on February 2, 2022 (IHO Ex. XXXIX).

According to a February 7, 2022 note signed by a nurse practitioner, the student's parent was "under our care for a medical condition" and was "unable to participate in a hearing until after 3/1/2022" (IHO Ex. XL). The letter also indicated that the nurse practitioner could be contacted if further assistance was necessary (id.).

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

In a decision dated February 23, 2022, the IHO recounted the sequence of events and dismissed the parent's due process complaint notices with prejudice (IHO Decision at pp. 1-22). With regard to the February 1, 2022 scheduled hearing date, the IHO noted that, although the parent's advocate had repeatedly raised internet connectivity issues, she "had participated remotely in four prior video teleconferences with infrequent and transient connectivity issues" (*id.* at p. 17). The IHO further stated that, since neither the advocates nor the parent attempted to participate in the February 1, 2022 proceeding, there was no way to determine whether or not possible bandwidth or connectivity problems "would have proved to be an actual one" (*id.* at pp. 17-18). In addition, the IHO noted that "[n]othing that the advocates had shared concerning their respective issues with regard to COVID explained why either or both advocates could not have clicked the link that the [d]istrict's attorneys had provided" (*id.* at p. 18). The IHO further stated that nothing the advocates had shared "concerning the parent's issues with regard to COVID explained why the parent, who had communicated with the advocates concerning those issues by email as recently as the previous day, January 31, 2022, could not herself have clicked the link, which the advocates could have provided" (*id.*). The IHO also stated that he received the nurse practitioner's note via email from the parent's advocates on February 12, 2022 (*id.* at p. 22). The IHO found that the note was precisely "the kind of statement that [he] had said would result in a dismissal with prejudice" and that the second sentence in the note indicated that the nurse practitioner was willing to provide "the kind of statement that [he] had said would result in a dismissal without prejudice" (*id.*). For those reasons, the IHO dismissed the consolidated due process complaint notices with prejudice (*id.*).

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

The parent appeals, disagreeing with the IHO's decision to dismiss her due process complaint notices with prejudice because she was unable to attend the February 1, 2022 hearing date as a result of having contracted COVID-19, being very ill, as well as her children being very ill and being quarantined. The parent further disagrees with the IHO's dissatisfaction with her answer to whether or not her illness was life threatening and whether it constituted sufficient grounds to grant her request for an adjournment of the February 1, 2022 scheduled hearing date. The parent disagrees with the IHO's finding that she failed to appear for a discussion on February 1, 2022, as there was no scheduled prehearing conference for that date and the link that was provided by the district indicated that it was for a hearing and "not any other type of discussion or meeting." The parent disagrees with the IHO's determination that the nurse practitioner's note was not satisfactory, and indicates that the parent had no control over what the nurse practitioner wrote. Further the parent asserts that the IHO could have subpoenaed the nurse practitioner for testimony regarding the parent's ability to participate in the hearing. Lastly, the parent disagrees with the IHO's decision to adjourn the February 4, 2022 hearing date and not the February 1, 2022 hearing date arguing that it "was arbitrary and capricious and not based on any logical reason." As relief, the parent requests that the IHO's order be dismissed, and the matter be remanded to a different IHO "to complete the consolidated hearing as requested."

In an answer, the district responds to the parent's claims by first denying knowledge or information sufficient to form a belief as to whether the parent or her children were very ill. The district affirmatively asserts that, contrary to the parent's statements in the request for review, the

student's siblings "returned to school after isolating at home due to COVID-19 on January 28, 2022, and were in school on February 1, 2022." The district further asserts that, according to the hearing record, the parent advised the student's school that he would be returning to school on February 2, 2022, and, if the student had been sick as alleged in the request for review, he would not have been permitted to attend school on February 2, 2022. The district next argues that by failing to attend the February 1, 2022 hearing date, the parent failed to follow the reasonable directives of the IHO and failed to prosecute her case. With regard to the parent's additional claims, the district asserts that whatever the parent's subjective beliefs about what constituted grounds to adjourn, they did not supersede the IHO's broad discretionary authority to conduct the impartial hearing or relieve her of her obligation to comply with the reasonable directives of the IHO. The district alleges that the parent has failed to raise any basis to vacate the IHO's decision, failed to comply with the reasonable directives of the IHO, failed to provide a proper excuse for failing to appear, and further argues that the IHO acted within his discretion by dismissing the parent's due process complaint notices with prejudice. The district also contends that all of the parent's requested relief except the request for compensatory educational services for the period of March 2020 through June 2020 are now moot. The district requests that the parent's request for review be dismissed and the IHO's order be affirmed.

## **V. Discussion**

State regulations set 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]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). State regulation further provides that parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities, that an IHO may assist an unrepresented party by providing information relating only to the hearing process, and that nothing contained in the cited State regulation shall be construed to impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (see 8 NYCRR 200.5[j][3][vii]).

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]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

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 Student with a Disability, Appeal No. 09-073; 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). Under sufficiently egregious circumstances, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g. Application of a Student with a Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice without prejudice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]).

In this instance, the IHO granted the parent's first request for an adjournment of the January 11, 2022 and January 13, 2022 scheduled hearing dates; as the parent had requested, the February 1, 2022 and February 4, 2022 proposed hearing dates remained scheduled (IHO Exs. XXVI at p. 2; XXVII). On January 28, 2022, the parent requested that the February 1, 2022 and February 4, 2022 scheduled hearing dates be adjourned due to the student's sibling having contracted COVID-19 and further because one of the parent's advocates had also tested positive for COVID-19 (IHO Ex. XXIX at p. 2). The email exchanges that followed demonstrated that the IHO did not grant the requested adjournment, rather he directed that the parties appear either remotely or by telephone to argue the merits of the parent's request for an adjournment of the hearing (IHO Exs. XXIX at pp. 1-2; XXXI; XXXIII).

Having reviewed the facts leading up to the February 1, 2022 hearing date in detail above, I find that the IHO's requirement that the parties appear on February 1, 2022 to argue the merits of the parent's request for an adjournment to be a reasonable directive of the IHO, with which the parent's advocates and parent willfully failed to comply. In particular, the hearing record shows that there was a dispute as to the veracity of the parent's assertion that neither she nor the parent's advocates could attend the hearing remotely and the IHO reserved ruling on the parent's request for an adjournment until the parties had an opportunity to present their arguments on the February 1, 2022 hearing date (see IHO Exs. XXIX-XXXV). Having specifically directed the parent or her advocates to appear at the February 1, 2022 hearing, the IHO acted within his authority in imposing a sanction after the parent and her advocates failed to appear.

Nevertheless, 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]). In upholding a dismissal with prejudice, SROs have considered whether there was adequate notice to the party at risk for dismissal and whether the party engaged in a pattern of conduct or in conduct so egregious as to warrant the maximum sanction of dismissal of the due process complaint notice with prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 20-137;

Application of a Student with a Disability, Appeal No. 20-009; Application of a Student with a Disability, Appeal No. 20-008; Application of a Student with a Disability, Appeal No. 18-111).

In the judicial context, when reviewing whether a dismissal for failure to prosecute was an abuse of discretion, courts review five factors prescribed by the Second Circuit: "[1] the duration of the plaintiff's failures, [2] whether plaintiff had received notice that further delays would result in dismissal, [3] whether the defendant is likely to be prejudiced by further delay, [4] whether the . . . judge has take[n] care to strik[e] the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard . . . and [5] whether the judge has adequately assessed the efficacy of lesser sanctions" (LeSane v. Hall's Sec. Analyst, Inc., 239 F.3d 206, 209 (2d Cir. 2001); Harding v. Fed. Reserve Bank of New York, 707 F.2d 46, 50 [2d Cir. 1983]). Although the Second Circuit's factors are not directly applicable to hearings in this administrative setting, consideration of these principals to the matter herein is helpful in analyzing whether the IHO's dismissal with prejudice constituted an abuse of discretion. Applying the factors of notice to the party at risk of sanction and the consideration of a lesser sanction warrant further discussion.<sup>4</sup>

The hearing record reveals that prior to the February 1, 2020 scheduled hearing date, the IHO had only referenced a potential dismissal without prejudice in relation to the parties' failure to propose hearing dates before the expiration of the then-current compliance date (IHO Ex. XVI at p. 1). Discussion of dismissal of the due process complaint notices occurred on the record between the district's attorney and the IHO on February 1, 2022, without notice to and without the participation of the parent (IHO Ex. XXXVIII at pp. 8, 16, 17, 34, 36-39).

The IHO decided to dismiss the parent's due process complaint notices during the February 1, 2020 proceeding while on the record (IHO Ex. XXXVIII at pp. 36-39). The IHO further provided that the parent would have ten days after receiving a copy of the transcript to produce a note from a treating physician that stated she was unable to participate in the hearing either remotely or by phone (id. at pp. 36-37, 38-39). If the parent complied, the IHO indicated he would dismiss the due process complaint notices without prejudice (id. at 38-39). If the parent failed to comply or provided an inadequate explanation from a treating physician, he indicated he would dismiss the due process complaint notices with prejudice (id. at p. 41). In an email dated February 1, 2022, the IHO notified the parent's advocates and the district's attorney that the parent's adjournment request had been denied, that no appearances were required for the February 4, 2022 scheduled date, that no future hearing dates had been scheduled, and that they should all receive a copy of the transcript via email on February 2, 2022 (IHO Ex. XXXIX).

The IHO's notice to the parent via email and in the February 1, 2022 transcript provided an opportunity to the parent to effect the type of dismissal that would be ordered by the IHO, it did not provide advance notice to the parent of the risk of dismissal with prejudice or provide an opportunity to prevent dismissal with prejudice by appearing at the February 1, 2022 scheduled

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<sup>4</sup> Although the delay due to the parent and advocates' failure to appear for the February 1, 2022 hearing date does not appear to have been of an extensive duration, even in combination with the delay caused by the adjournment of the January hearing dates, courts have explained that the consideration of the duration of a delay is not relevant where the party has failed to comply with an order of the court or "otherwise demonstrated a lack of respect for the court" (Peart v. City of New York, 992 F.2d 458, 461 [2d Cir. 1993]).

hearing date. Accordingly, based on the above, the IHO's dismissal with prejudice in this matter lacked both proper notice to the parent and consideration of a lesser sanction.

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, 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 notices with prejudice—notwithstanding the parent and her advocates' refusal to comply with the IHO's reasonable directive.

I do not find that the IHO exceeded his authority in sanctioning the parent in this matter. However, because the IHO failed to provide advance notice of the potential for a dismissal with prejudice occurring due to the parent's failure to appear on the February 1, 2022 hearing date, a dismissal with prejudice was an unnecessarily harsh sanction. Therefore, the IHO's decision will be modified to dismiss the parent's consolidated due process complaint notices without prejudice.

## **VI. Conclusion**

Based on the foregoing, the IHO erred in dismissing the parent's consolidated due process complaint notices with prejudice. I have considered the parent's remaining contentions and find them to be without merit.

**THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.**

**IT IS ORDERED** that the IHO's decision dated February 24, 2022, is modified by changing the words "with prejudice" to "without prejudice" in the IHO's order dismissing the parent's consolidated due process complaint notices.

**Dated:**           **Albany, New York**  
                          **April 29, 2022**

\_\_\_\_\_  
**STEVEN KROLAK**  
**STATE REVIEW OFFICER**