



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-069

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Law Offices of Regina Skyer and Assoc., LLP, attorneys for petitioners, by Sonia Mendez-Castro, Esq. and Linda A. Goldman, Esq.

Liz Vladek, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Mary McDowell Friends School (Mary McDowell) for the 2021-22 school year. Respondent (the district) cross-appeals from the IHO's determination that it failed to prove that it had provided an appropriate educational program to the student for that year. The appeal must be sustained, and the matter remanded for further administrative proceedings. The cross-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

Given the limited nature of the appeal and the impartial hearing proceedings in the matter—namely that relief was denied after the hearing proceeded without the parties due to the nonappearance of both the parents and the district at the second impartial hearing date which was to be the hearing on the merits, with no record development including no testimony taken or exhibits entered into evidence by the parties—the educational history of the student will be limited

to a brief description of the due process complaint notice and the procedural history is similarly limited to a brief description of the impartial hearing and IHO's decision.

A. Due Process Complaint Notice

By due process complaint notice dated February 22, 2022, the parents alleged that the district denied the student a FAPE by failing to develop or provide an IEP or special education placement for the student for the 2021-22 school year, such that the student did not have a special education program and placement in effect at the start of the school year (IHO Ex. A at p. 2). The student was classified as a student with a learning disability and had a history of special education needs resulting from his social and emotional difficulties which interfered with his classroom functioning (id.). The parents asserted that the student required an educational setting that could address his social/emotional needs as well as his academic struggles (id.). As relief, the parents sought tuition funding for the cost of the student's placement at Mary McDowell for the 2021-22 school year, which they asserted was an appropriate placement that was able to address the student's academic and social/emotional needs and that there were no equitable considerations that barred funding (id.). The parents also sought transportation from the district (id. at p. 2).

B. Impartial Hearing Officer Decision

According to the IHO's decision, the IHO was assigned to preside over this matter on February 25, 2022 and a prehearing conference was held on March 28, 2022 (see IHO Decision; Tr. pp. 1-11). The IHO stated that, at the prehearing conference, the parties agreed to a hearing date and time of May 2, 2022, at 9:00 a.m. which was then scheduled via the impartial hearing office (IHO Decision at p. 1). The IHO further stated that upon that date, no one appeared, and since the parties had agreed on the hearing date, were "duly" notified of the hearing date, and had not requested any adjournments, the hearing proceeded "in absentia" of the parties (id. at pp. 1-2). At the May 2, 2022 hearing date, after introducing the case and stating the parties' names and the names of their representatives for the record, the IHO stated that, as nobody had joined the call, the IHO would pause for about 10 minutes "in case anybody [w]as running late" and "check in in ten minutes" (Tr. pp. 12-18). At 9:22 a.m., the IHO stated that:

Nobody else has joined this proceeding. But I'm going to proceed with the due process hearing. I have looked through the records and discerned that the parties were unambiguously informed of today's hearing. And the parties even jointly decided on this date and time. So I'm going to enter certain items into evidence. And I will either make a full decision or I will issue an order.

(Tr. p. 15).¹

¹ At this point in the impartial hearing, the IHO admitted into evidence the parents' February 22, 2022 due process complaint notice, the transcript of the March 28, 2022 prehearing conference, and an April 13, 2022 email scheduling notice for the May 2, 2022 impartial hearing (Tr. pp. 13, 15-16; IHO Ex. I-III).

The IHO also noted, on the record, his statement from the prehearing conference: "So 9 a.m., May 2nd will be the date of the full due process hearing. Both parties need to be ready on that date" (Tr. p. 16).

Thereafter, in a decision dated May 8, 2022, with respect to the provision of a FAPE to the student, the IHO found that the district did not present any evidence or argument against the parents' contention that the district failed to develop or provide an IEP for the 2021-22 school year, and thus failed to meet its statutory burden (IHO Decision at p. 4). The IHO also found that the parents had not established that the Mary McDowell program was an appropriate placement, as the parents presented no evidence showing that the program was designed to meet the unique needs of the student and, accordingly, found that the parents did not meet their statutory burden (*id.*). Thus, finding that the district had failed to prove it provided a FAPE to the student for the 2021-22 school year, and that the parents had failed to establish the student was unilaterally placed in an appropriate educational program for that school year, the IHO denied all relief requested by the parents (*id.* at p. 5).

IV. Appeal for State-Level Review

The parents appeal and assert that Monday, May 2, 2022 was a day that district schools were officially closed for the observance of a holiday² and that the district did not appear on this date, nor did parents' counsel join the meeting because of a computer error that inadvertently sent her to a separate proceeding for the student involving a different school year.³ The parents argue that the IHO abused his discretion by proceeding with the matter "in absentia" and in issuing a decision without a fully developed record or an opportunity for the parties to be heard. Specifically, the parents argue that the IHO's choice to proceed "in absentia" and render a decision denying the parents' requested relief "on default-based grounds" has the same effect and is "tantamount to a dismissal with prejudice for failure to prosecute" because the parents cannot reopen the matter or refile—the matter will become final and binding unless appealed—and that disposition in this manner was an "unnecessarily harsh sanction." The parents further argue that the IHO's decision to deny the parents' requested relief in a decision based upon a hearing held in absentia violates the parents' rights to due process given the absence of any history of delay and any advance notice of the "fatal" consequences the IHO intended to impose in the event of a potential, isolated non-appearance.⁴ Next, the parents assert that no record was developed by the

² Eid al-Fitr, marking the end of Ramadan.

³ The parents submit additional evidence with their request for review including the district's 2021-22 school year calendar and May 2022 emails advising that the case was in settlement (Req. for Rev. Exs. A-B). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (*see, e.g., Application of a Student with a Disability*, Appeal No. 08-030; *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]). The parents' proposed exhibits are not necessary in order to render a decision in this appeal.

⁴ The parents note that the IHO informed the parties of his rules for conducting impartial hearings at the prehearing conference, however, did not mention the possibility of proceeding in absentia as a consequence of failing to adhere to the IHO's specific rules about appearing or seeking an adjournment or extension.

IHO to establish that the parties' oversight in not appearing was "sufficiently egregious" to warrant the "drastic" action that he took, without permitting either side an opportunity to appear or explain, and there was no indication that he considered "any lesser, alternative approach." Further, the parents argue that the IHO did not adhere to "standard legal practice" in accordance with State regulations by failing to analyze and apply the criteria used by courts in deciding whether a dismissal for failure to prosecute was warranted. The parents assert that while parties are "understandably expected to comply with reasonable directives from an IHO, inadvertent oversights and unintentional errors invariably occur" and standard legal practice compels a judge or administrative tribunal to provide an opportunity for the parties to be heard, evaluate the reasonableness of the excuse for non-compliance, assess whether there has been prejudice to any particular party, and balance the rights of the parties, being mindful of the IDEA standard that an IHO decision should be made on substantive grounds as to whether the student received a FAPE. Finally, the parents contend that the IHO failed to allow for any additional opportunity for a settlement status update or for evidence to be presented to have a fully developed hearing record upon which to issue a decision on the merits. As relief, the parents request that the IHO's decision be reversed and the matter remanded to the IHO for further proceedings.

In an answer and cross-appeal, the district asserts that the IHO unjustifiably precluded the parties from presenting their cases—by concluding the impartial hearing without permitting the parties to present arguments with respect to whether the district proved it provided the student with a FAPE for the 2021-22 school year and whether the parents established that the student was unilaterally placed in an appropriate educational program⁵—and agrees that the IHO's decision should be vacated and the matter remanded to the IHO for a full hearing on the merits. The district also asserts that the IHO did not accord either party a meaningful opportunity to exercise their rights in the matter because he responded to the absence of both parties from a single hearing date by proceeding in absentia, and never sought an explanation for the parties' absence or gave either party the chance to present evidence. The district argues that this "unjust" result is "analogous" to circumstances in which decisions by IHOs who dismissed due process complaint notices when parents did not appear for only a small number of hearing dates were reversed by the SRO, noting that dismissal with prejudice should be "reserved for extreme cases," which this is not. Finally, the district contends that the IHO's decision was not in conformity with the IDEA and State regulations because the decision was based on a hearing that failed to allow the parties to present their cases and defend their claims including the opportunity to present evidence, was not made on substantive grounds, and was not based on record evidence setting forth the reasons and factual basis for the determination (*see* 8 NYCRR 200.5[j][3]-[5]). As relief, the district requests that its cross-appeal be sustained and the matter be remanded for additional proceedings before the IHO.

V. Discussion

A. Conduct of the Impartial Hearing

The parties agree that the IHO's disposition of the matter constituted an "unnecessarily harsh sanction," was "unjust" and should be reversed and remanded, as it violated the parents' rights to due process and did not afford either party a meaningful opportunity to exercise their

⁵ The district also notes that the IHO failed to address equitable considerations at all.

rights. Accordingly, it is useful to review the standards for due process and the scope of the IHO's authority over the impartial hearing process. 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]). 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).

The parties argue that the IHO's disposition of the matter here was analogous to a dismissal with prejudice. A dismissal with prejudice based on a party's failure to comply with the directive of an IHO should generally be reserved for extreme cases (see Edward S. v. W. Noble School Corp., 2014 WL 1319358, at *8, *12 [N.D. Ind. Mar. 31, 2014] ["Dismissal is a harsh sanction, especially when the issue is the fair and appropriate education of a child with disabilities"]; 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).⁶

⁶ In the judicial context, when reviewing whether a dismissal for failure to prosecute was an abuse of discretion,

Here the directive at issue was the IHO's scheduling of the impartial hearing on the merits for May 2, 2022 at 9:00 a.m. When neither party appeared at the start of the hearing, the IHO introduced the case and then acted reasonably in pausing the hearing for about 10 minutes "in case anybody [w]as running late" (Tr. pp. 14-15). However, at 9:22 a.m., the IHO stated his intention to proceed with the hearing in the parties' absence as they had been "unambiguously informed of today's hearing" and that he planned to "either make a full decision or . . . issue an order" (Tr. p. 15). From the transcript and the IHO's decision, it appears that no effort was made to contact the parents or the district via telephone to ascertain the reason they were not available on the phone at the time of the hearing or whether they had attempted to appear but were unable to do so or were running late. There is also no indication in the hearing record that the IHO gave the parties notice that their nonappearance at the scheduled hearing date could result in the maximum sanction of an order of dismissal with prejudice, or the issuance of a decision with the full and preclusive effect of a decision on the merits. There was also no indication that that any further opportunity was given to the parents or the district to explain their nonappearance or to be heard as to why the IHO should not issue an order to dismiss the due process complaint notice with prejudice or issue a "full" decision. Nor is there any indication that the IHO weighed or considered lesser sanctions. The district does not dispute the facts and agrees that the hearing held "in absentia" was error and the matter should be remanded for substantive proceedings. Generally, while the issue of limited resources and the dictates of fairness may support a dismissal with prejudice where a party has shown a pattern of dilatory conduct or disregard for an IHO's directives, a dismissal with prejudice at the first instance of noncompliance by a party, without ascertaining facts that may be relevant to the sanction of dismissal, is an abuse of discretion that deprives the parents of due process as contemplated by State regulations. Here, although the IHO issued a decision rather than an order of dismissal with prejudice, the practical effect on the parties was the same as it deprived the parents of due process and precluded both parties from presenting their cases—including evidence, witness testimony and cross-examination—and obtaining a decision on the merits.

B. 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]).

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 disposition of the matter constituted an abuse of discretion.

Here, the appropriate remedy is a remand to continue these proceedings (see 8 NYCRR 279.10[c] [a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]). Accordingly, the IHO's decision must be vacated and the matter remanded to the IHO for further proceedings relating to the parents' claims as set forth in the February 22, 2022 due process complaint notice and for the IHO to render a determination regarding whether the district offered the student a FAPE for the 2021-22 school year. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon.

VI. Conclusion

Having determined that the IHO erred by issuing a determination in this case without a full hearing on the merits, the case is remanded to address the parents' claims in their due process complaint notice to determine whether they are entitled to their requested relief and to allow both parties the opportunity to present their cases.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated May 8, 2022 is vacated in its entirety; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings in accordance with this decision.

Dated: **Albany, New York**
 July 28, 2022

CAROL H. HAUGE
STATE REVIEW OFFICER