



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-054

Application of a STUDENT WITH A DISABILITY, by her 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:

Shehebar Law, attorneys for petitioners, by Y. Allan Shehebar, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 dismissed their due process complaint notice against respondent (the district) regarding the 2021-22 school year with prejudice. The appeal must be sustained, and the matter remanded for further administrative proceedings.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law §3602-c). The task of creating an IESP is assigned to the same committee that designs educational programming for students with disabilities under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482), namely 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 related to IESPs, State law provides that "[r]eview of the recommendation of the

committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections of the IDEA and the analogous State law provisions 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 procedural posture of the matter—namely that it was dismissed with prejudice based on the nonappearance of the parents at the initial

impartial hearing date with no record development, including no testimony taken or exhibits entered into evidence—the educational history of the student will be limited to a brief description of the due process complaint notice below and the procedural history is similarly limited to the dismissal of the due process complaint with prejudice that occurred at the outset of the proceeding.

A. Due Process Complaint Notice

Briefly, by due process complaint notice dated September 14, 2021, the parents claimed that, although the student was entitled to four hours of special education teacher support services (SETSS) per week for the 2021-22 school year as provided for in an IESP dated May 27, 2020 as an appropriate service, they had not been able to find a provider at the district approved rate and instead had retained a private provider at an enhanced rate (Due Process Compl. Not. at pp. 1-2). Accordingly, the parents sought direct funding from the district for the four hours of weekly SETSS at the enhanced rate or, alternatively, reimbursement to the parents of any funds expended by them for the privately-obtained SETSS (*id.* at p. 3).¹

B. Impartial Hearing Officer Decision

According to the IHO's decision, the IHO was assigned to preside over this matter on February 17, 2022 (*see* IHO Decision). In the request for review, the parents assert that the matter was scheduled for an initial impartial hearing date on March 29, 2022, at 12:00 p.m. (Req. for Rev. ¶ 3). At 12:05 p.m., the IHO went on the record and stated she wanted "to memorialize that this hearing was scheduled in accordance with the [p]arent[s'] availability, and [they] ha[ve] not shown up" (Tr. p. 2). The IHO further stated that she and the district representative had sent independent emails to the parents "telling them that we're here, and we're available, and we're waiting. But there has been no response" (*id.*). The IHO noted that she was going to "assume" that she had not received a request for an adjournment or "any contact from them" and so would dismiss the matter because "they ha[d] been offered the due process that they requested in their due process complaint" and time had been "taken away from other cases" to give to the parents who hadn't "bothered to show up" (Tr. pp. 2-3). The district's representative stated on the record that the district had sent a proposed "resolution" to the parents on January 24, 2022, but he had not yet received any response from the parents (Tr. p. 3). The hearing ended at 12:07 p.m. (Tr. p. 4).

Thereafter, in a one-page decision dated March 29, 2022, the IHO dismissed the parents' due process complaint notice with prejudice (IHO Decision). The IHO stated that "[d]ue notice was sent to all parties of the scheduling" and the district appeared as scheduled on March 29, 2022 (*id.*). The IHO further stated that the parents failed to appear at the hearing and did not contact the IHO or the district regarding their nonappearance (*id.*). Accordingly, the IHO determined that "[a]s [p]arent[s] w[ere] offered the due process they requested in their [c]omplaint, and as they failed to avail themselves of that due process to prosecute their [c]omplaint, and further, as they failed to notify anyone else who had taken time on their behalf of their intention not to appear, the

¹ As set forth in a document signed by the district's representative on October 12, 2021, the parties agreed that the student's stay-put placement during the pendency of the proceedings consisted of the four hours per week of SETSS as set forth in the May 2020 IESP.

matter is dismissed with prejudice" (*id.*). The IHO indicated that she was dismissing the complaint with prejudice "[i]n accordance with 8 NYCRR § 200.5(j)(6)(ii)" (*id.*).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO's dismissal of the due process complaint notice with prejudice deprived them of their due process rights to be heard at the impartial hearing. Noting the IHO's citation of 8 NYCRR 200.5(j)(6)(ii), the parents allege that they never sought to withdraw the matter but rather appeared at the impartial hearing 11 minutes late after their counsel emailed the IHO apologizing for their tardiness and notifying the IHO that he was "calling into the hearing now." The parents contend that the hearing would have been scheduled for at least a 15 to 30-minute slot starting at 12:00 p.m. and the IHO and district representative had disconnected from the hearing already by the time the parents appeared at approximately 12:11 p.m. The parents assert that the IHO prematurely decided to dismiss the case without addressing the merits of the case and without permitting an adjournment for another hearing date despite that the hearing date in question was an initial appearance. The parents also disagree that due notice was given with respect to the guidelines of the hearing and argue that the IHO's decision violated regulations which require that a decision by an IHO should be made on substantive grounds. As a result, the parents seek findings granting them the relief sought in their due process complaint notice, as well as various findings regarding the conduct of the IHO.

In an answer, the district agrees with the parents that "the IHO's dismissal of the case after waiting only 5 minutes was premature." The district also notes that the parents' failure to timely appear at the hearing constituted "a single incidence" of noncompliance. The district further asserts that any substantive consideration of the parents' claims would be inappropriate on appeal and instead the matter should be remanded to an IHO for a full hearing on the merits. The district also argues that the parents' requests for directives to the IHO fall outside the authority of an SRO.

V. Discussion

While both parties agree that the dismissal with prejudice of the parents' claims constituted an unduly harsh sanction in this matter, it is perhaps useful to revisit 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).

However, 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).²

Here the directive at issue was the IHO's scheduling of the initial hearing date for the matter at 12:00 p.m. on March 29, 2022. While the parents did not appear immediately at 12:00 p.m., by 12:05 p.m. the IHO was already stating on the record her intention to dismiss the matter due to the parents' nonappearance. There is no indication in the hearing record that the IHO gave the parties notice that tardiness to the scheduled hearing date could result in the maximum sanction of dismissal with prejudice. Although the IHO references that she and the district's counsel sent emails "to the Parent[s]" to indicate they were waiting for them (see Tr. p. 2), such emails were not made a part of the hearing record, it is unclear if the emails were to the parents or to their counsel, and the parents (and/or their counsel) were given very little time to respond to the emails.

² 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.

From the transcript and the IHO's decision it appears that no effort was made to contact the parents or their counsel via telephone to ascertain the reason they were not available on the phone at the exact start time of the hearing or whether they had attempted to appear but were unable to do so or had appeared late. The parents assert that their counsel emailed the IHO at approximately 12:11 p.m. apprising her of the parents' tardiness and thereafter attempting to dial into the hearing only to find that the IHO and district representative were no longer available on the line. There is no indication that, after learning that the parents' counsel attempted to dial in to the hearing, albeit 11 minutes late, that any further opportunity was given to the parents or their counsel to explain their tardiness or to be heard as to why the IHO should not dismiss the due process complaint notice with prejudice.³ Nor is there any indication that the IHO weighed or considered lesser sanctions, such as allowing the district to proceed with the presentation of its evidence in the absence of the parents or dismissal without prejudice. The district does not dispute these facts and agrees that the dismissal of the matter with prejudice was premature and the matter should be remanded for substantive proceedings. 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 having ascertained facts that may be relevant to the sanction of dismissal, as happened here, is an abuse of discretion that deprived the parents the due process contemplated by the above regulations.

As to the parents' requests for a decision on the merits of their due process complaint notice, there is no factual record upon which to base such a finding, and an outright default judgment awarding any and all of the relief requested without question is a disfavored outcome (see Branham v. Govt. of the Dist. of Columbia, 427 F.3d 7, 11-12 [D.C. Cir. 2005] [rejecting "lump sum" grant of tutoring as a compensatory remedy for a multi-year denial of FAPE]). Authority specific to the issue of a parent's request for a default judgment due to a school district's failure to comply with provisions requiring a response to due process complaint notices tends to lean against entry of a default judgment in the absence of a substantive violation, and that the remedy is a due process hearing (G.M. v. Dry Creek Joint Elementary Sch. Dist., 595 Fed. App'x 698, 699 [9th Cir. 2014]; Jalloh v. Dist. of Columbia, 535 F. Supp. 2d 13, 19-20 [D.D.C. 2008]; Sykes v. Dist. of Columbia, 518 F. Supp. 2d 261, 267 [D.D.C. 2007]).⁴

³ Further, as the parents note, the IHO incorrectly cited 8 NYCRR 200.5(j)(6)(ii) as authority for her dismissal of the parents' due process complaint notice with prejudice. That provision of State regulations indicates that a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (8 NYCRR 200.5[j][6][ii]). Here, the parents did not withdraw their due process complaint notice and, even if they had, under the cited regulation, the IHO's decision would still have been erroneous insofar as the district did not request that the dismissal with prejudice and the parties were not given notice or an opportunity to be heard on the question of the dismissal being with prejudice.

⁴ As to the parents' requests for specific orders dictating the IHO's conduct in future matters, the jurisdiction of an SRO extends only to special education matters involving the particular student in the matter at hand. Accordingly, I will not further discuss these requests.

Here, the appropriate remedy for the IHO denying the parent her due process rights to a full and complete impartial hearing 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 order of dismissal must be vacated and the matter remanded for further proceedings.

VII. Conclusion

Having determined that the IHO erred by dismissing 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.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dismissing the due process complaint notice with prejudice dated March 29, 2022 is vacated; 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**
 June 22, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER