



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 23-175

**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 Lauren A Baum, P.C., attorney for petitioners, by Lauren A. Baum, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail Eckstein, 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 the parents' due process complaint notice with prejudice. The appeal must be sustained. The matter must be remanded for further administrative proceedings.

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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 description of the facts and educational history of the student in this matter is limited to the procedural history leading up to the parents' filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

Based on the information available, the parents originally filed a due process complaint notice on May 19, 2022 relating to the 2021-22 school year, which was assigned to an IHO (IHO

I) but was later withdrawn (Aug. 22, 2023 Aff. ¶ 1; see SRO Ex. A).<sup>1</sup> Then on March 16, 2023, the parents filed a second due process complaint notice relating to IEPs and CSE meetings for both the 2021-22 and 2022-23 school years and that matter was assigned to a different IHO (IHO II) (id. at ¶ 2; see SRO Ex. B).

On June 7, 2023, the parents' attorney submitted a request to amend the March 2023 due process complaint notice to IHO II to remove the claims related to the 2022-23 school year (SRO Ex. D at pp. 1, 3-10). The parents' attorney stated in an email to IHO II that the claims related to the 2022-23 school year "may be the subject of settlement negotiations and will therefore require a separate case number" (id.). IHO II responded the same day, indicating that he accepted the parents' amended due process complaint notice (SRO Ex. E at p. 1).

The parents' attorney then emailed the director of hearing administration and other staff at the district impartial hearing office asking why the March 2023 due process complaint notice had been assigned to IHO II rather than IHO I (Aug. 22, 2023 Aff. ¶ 3; see SRO Ex. C at p. 4). Correspondence then took place between counsel for the parent and the director of case management at the district impartial hearing office over June 7, 2023 and June 8, 2023, at which point the director responded that the March 2023 due process complaint notice included claims related to the 2021-22 and 2022-23 school year while the May 2022 due process complaint notice included claims related to the 2021-22 school year; the director reasoned that because the due process complaint notices sought funding or reimbursement for different school years, they were not considered to be "the same or substantially similar claims" (SRO Ex. C at pp. 1-3). The parents' attorney requested citations to authority to support the director's contention (id. at p. 1) and indicated that, based on the lack of a response to her final request, she assumed that the matter would remain with IHO II (Aug. 22, 2023 Aff. ¶ 4).

### **A. Due Process Complaint Notice**

On June 8, 2023, the parents filed a due process complaint notice for the 2022-23 school year that alleged the district failed to provide the student with a free appropriate public education (FAPE) raising allegations related to an April 27, 2022 CSE meeting and the resultant April 2022 IEP (Due Process Compl. Not. at p. 1), the which contained allegations regarding the same IEP and CSE meeting that that was the subject of the March 16, 2023 due process complaint notice and amended to withdraw the 2022-23 IEP one day prior as discussed (see SRO Ex. B). The district responded to the parents' due process complaint notice on June 14, 2023 and indicated that on April 27, 2022 the CSE met, found the student eligible for special education as a student with autism, and recommended a special class with related services (Dist. Response to Due Process Compl. Not. at pp. 1-2).

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<sup>1</sup> The parents submitted with their request for review twelve documents to support their appeal (see generally SRO Exs. A-L; Aug. 22, 2023 Aff.). Under the circumstances and due to the fact that no impartial hearing took place as part of this proceeding, I have determined that the additional documentary evidence is necessary to make a determination on appeal and will be considered.

## **B. Events Post Dating the Due Process Complaint Notice – Impartial Hearing Officer Decision**

IHO I was assigned to this matter on June 12, 2023 and, on June 29, 2023, IHO I emailed the parties inviting them to a settlement conference and pre-hearing conference on July 12, 2023 at 9:00 a.m. (SRO Ex. J at p. 3; see IHO Decision at p. 1). On June 30, 2023, a representative from the parents' attorney's law firm responded via e-mail stating "[t]hat time and date works for the parents. A resolution meeting was not held on this matter" (SRO Ex. J at p. 3; see Aug. 22, 2023 Aff. ¶ 9).<sup>2</sup>

On July 12, 2023 at 9:18 a.m., a pre-hearing conference was held and neither party appeared (Tr. pp. 1-5).<sup>3</sup> During the impartial hearing, IHO I attempted to call the parents' attorney but was unable to reach her and left a voicemail message on the record stating there was a settlement and pre-hearing conference involving the student taking place at that time and no appearance had been recorded (Tr. pp. 2-3). IHO I further stated that it was "highly unacceptable" given that the parents' attorney accepted the meeting and that she was inclined to treat this situation as a withdrawal, "absent an exigent circumstance" (Tr. p. 3). IHO I requested for the parents' attorney to either join the pre-hearing conference or get back to her (Tr. pp. 3-4). The pre-hearing conference ended four minutes later at 9:22 a.m. and, at 9:35 a.m., IHO I emailed both parties and summarized what took place during the settlement and pre-hearing conference (SRO Ex. J at p. 2). IHO I stated to the parties "[a]bsent extremely exigent and emergency situations I am inclined to dismiss the matter WITH PREJUDICE and issue an order of termination for failure to prosecute" (id.). IHO I further indicated that the parties had until 4 p.m. that day (July 12, 2023) to provide her with an explanation (id.).

Thereafter, in a two-page decision dated July 13, 2023, IHO I dismissed the parents' June 9, 2023 due process complaint notice with prejudice (IHO Decision). IHO I stated "[a]s I have not received any further communication on this matter from ether [sic] party, this Order of Dismissal follows. Based on the foregoing and the Parent[s'] failure to further pursue this matter I am issuing this Order of Dismissal, which is WITH PREJUDICE to any right to renew" (id. at p. 2).

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

The parents appeal and argue that IHO I's dismissal of the due process complaint notice with prejudice was not proportionate to the parents' attorneys' actions in this matter and that IHO I overstepped her discretion by issuing an order of dismissal with prejudice after one failed appearance. Noting IHO I's indication that she sent a conference invitation to the parties, the parents allege that the conference information was deleted from the parents' attorney's office calendar under the belief that the conference was scheduled by mistake since the attorney had another conference scheduled for the same student, with the same IHO, on the same day, July 12, 2023, but in the afternoon. Further, the parents allege that on July 12, 2023, unbeknownst to the

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<sup>2</sup> IHO I indicated in her decision that on July 3, 2023, she sent the parties a meeting invitation for the virtual conferences and on July 4, 2023, the parents' attorney accepted the invitation (IHO Decision at p. 1).

<sup>3</sup> IHO I indicated during the hearing that a "settlement officer" was on the line prior to the hearing being recorded and that both IHO I and the settlement officer attempted to reach both parties by email asking that they join the conference but that no one joined (Tr. p. 2).

parents' attorneys, their office email was not working, and no member of the law firm was able to send or receive outside emails which meant that the attempts made by IHO I to contact the attorneys on July 12, 2023 were not received. Additionally, the parents claim that the attorney IHO I called was out of the office and she had placed an out of office message on her email directing callers to an associate for assistance but that, due to the office email issues, the out of office message was not sent to IHO I. The parents also indicate their attorney set up her voicemail to also go to email, but the voicemails were not delivered due to the same email issue.<sup>4</sup> As a result, the parents seek an order reversing IHO I's order of dismissal with prejudice.

In an answer, the district agrees with the parents that IHO I prematurely dismissed the matter and that it would be appropriate to remand the matter to IHO I for the development of the record.

## V. Discussion

In this case, the parties agree that IHO I prematurely dismissed this matter after one failed appearance and the matter should be remanded. 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 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]).

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

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<sup>4</sup> Among the admitted exhibits on appeal is an invoice and service log from the parents' attorneys' IT company dated August 1, 2023, to support the parents' claims on appeal that the law firm's office email was nonfunctional on July 12, 2023 and July 13, 2023 (see SRO Ex. K). The log shows communications with the parents' attorney on the morning of July 12, 2023, the same individual who agreed to appear at the conference (Parent Exs. J at p. 3; K at p. 1-2). The efforts to rectify the issue were not successful until the IT company discovered that the law firm's domain name registration had expired because the account was past due and a June 1 charge related to the renewal had been disputed; consequently, the service technician advised to pay the overdue bill, after which the situation was resolved (Parent Ex. K at pp. 2-3). The evidence convinces me that the technology problem was known and attempts were being made to address it, but was self-inflicted because an overdue account related to one of the firm's domains, presumably due to the law firm's misunderstanding the intricacies of owning more than one domain. The case shows that much of the firm's communication abilities were tied to that single lynch pin and underscores the importance of a backup plan that includes other communication modalities in the event of a problem. In this case the firm principal resorted to a "Gmail" address the following business day to communicate the problem.

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]).

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 this instance, although neither party appeared for the July 12, 2023 hearing date, both parties agree that IHO I erred in dismissing the matter with prejudice. First, I note that IHO I's June 29, 2023 directives scheduling the matter contained numerous points with which the parties were to comply, but did not identify that there was a risk of sanctions for noncompliance or non-appearance, much less that the most severe type of sanction, dismissal with prejudice, could result due to a failure to appear or comply with other directives (Parent Ex. J at pp 3-4). Next, the hearing transcript indicates that IHO I left a message with the principal of the law firm but did not attempt to call the associate attorney who agreed to appear at the hearing (Tr. pp. 2-3; Parent Ex. J at p. 3). Furthermore, IHO I provided a response deadline of 4:00 PM the same day by e-mail only—a mere six- and one-half hours warning of the sanction of dismissal with prejudice, which was unreasonably short, especially when IHO I had not previously indicated to the parties that the risk of such serious sanctions was imminent. Accordingly, I find IHO I erred in acting too quickly in reaching an extreme sanction without adequate notice, and the dismissal cannot stand under these circumstances.

As set forth above, the parents provided reasons for their non-appearance within one business day and the district concedes that IHO I's dismissal of the proceeding with prejudice after the parties' failure to appeal for one hearing date was premature.<sup>5</sup> Here, as IHO I dismissed the case with prejudice without ruling on any of the parents' claims on the merits as set forth in the parents' due process complaint notice, 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]). 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]). Accordingly, IHO I's decision must be vacated, and the matter remanded to IHO I for further proceedings relating to the parents' claims as set forth in the June 8, 2023 due process complaint notice and for IHO I to render a determination regarding whether the district offered the student a FAPE for the 2022-23 school year. Upon remand, IHO I shall fully develop the hearing record on each issue that must be ruled upon.

## **VI. Conclusion**

Having determined that IHO I erred by dismissing the parents' June 8, 2023 due process complaint notice with prejudice, this matter must be remanded for further administrative proceedings.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the decision of IHO I, dated July 13, 2023 is vacated; and

**IT IS FURTHER ORDERED** that the matter is hereby remanded to IHO I to determine whether the district offered the student a FAPE for the 2022-23 school year based on the issues raised in the parents' June 8, 2023 due process complaint notice and, if necessary, a determination as to relief.

**Dated:**           **Albany, New York**  
                          **October 12, 2023**

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

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<sup>5</sup> Although apparently after the dismissal had already been issued, the parents' attorney indicated on July 13, 2023 that there was an appearance by the firm before IHO I in another matter between the same parties regarding the same student at 2:00 PM, two hours prior to the 4:00 PM deadline on July 12, 2023, but that IHO I said nothing regarding the earlier non-appearance at 9:00AM (Parent Ex. G at p. 1). If accurate, I am not of the view that IHO I should remain silent under those circumstances.