The University of the State of New York

The State Education Department
State Review Officer
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No. 24-007

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 the parent's due process complaint notice regarding her son's educational program for the 2023-24 school year with prejudice. The appeal must be sustained.

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 programing for students with disabilities under the 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, 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 on the ground that the parent failed to appear at the impartial hearing—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts and history of this matter is limited to the procedural history including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

In a due process complaint notice, dated September 7, 2023, the parent, through an attorney with Prime Advocacy, LLC (Prime Advocacy), alleged that the district "failed to develop" or implement "an appropriate program of services" for the student for the 2023-24 school year (see Due Process Compl. Not. at p. 1). According to the parent, the CSE last developed an IESP for

the student on April 27, 2018, which recommended five periods per week of group special education teacher support services (SETSS) (id. at pp. 1-2). The parent asserted that the district "impermissibly shifted its responsibility to provide the services to the Student," that the parent was "unable to procure a provider for the school year at the [district] rates," and that, therefore, the parent retained a private agency to deliver the services "at an enhanced rate" (id. at p. 2). The parent requested an order on pendency (id. at p. 3). For relief, the parent requested that the district fund the student's program of SETSS at an "enhanced rate," as well as compensatory education to make up for any services not provided by the district (id.).

The IHO scheduled a pendency hearing for October 27, 2023, a prehearing conference for October 31, 2023, and status conferences for November 1, 2023, November 6, 2023, and November 15, 2023, to which neither party appeared (Tr. pp. 1-17). At a November 17, 2023 status conference, the district appeared but the parent did not (Tr. pp. 18-22).

At the November 17, 2023 status conference, the district appeared and moved to dismiss the parent's due process complaint notice with prejudice for failure to prosecute (Tr. p. 20). The IHO indicated that she was granting the district's motion (id.).

Thereafter, in a written decision dated November 30, 2023, the IHO dismissed the parent's due complaint notice with prejudice based on the parent's "failure to proceed with and prosecute this matter" (IHO Decision).

IV. Appeal for State-Level Review

The parent appeals through a lay advocate from Prime Advocacy and argues that the IHO erred in dismissing the due process complaint notice with prejudice. According to the advocate, Prime Advocacy emailed a request to withdraw the due process complaint notice on October 25, 2023. The advocate alleges that no representative from Prime Advocacy "appear[ed] at the hearings because it had already notified its intent to withdraw the case" and that, therefore, a dismissal with prejudice was not warranted. Further, the advocate asserts that "there was no willful intent of failure to prosecute and/or comply with the reasonable directive issued during a proceeding," that no hearing dates devoted to the merits had commenced, and the district had also failed to appear.[1] Finally, the advocate argues that the dismissal with prejudice was an unduly harsh sanction as the conduct of Prime Advocacy was "neither negligent nor irresponsible." The parent requests that the IHO's order be modified to provide that the dismissal be without prejudice.

[1] The advocate also argues that the grounds for the district's motion to dismiss are not among those permitted by New York State's Civil Practice Laws and Rules (CPLR), Rule 3211. However, CPLR 3216 states that, under certain conditions, a court on its own initiative or upon motion, "with notice to the parties," may dismiss a party's pleading if that party "unreasonably neglects to proceed generally in an action or otherwise delays in the prosecution thereof" (CPLR 3216[a] [emphasis added]). There is no formal, explicit adoption of the CPLR procedures in administrative due process proceedings under IDEA, just as the technical rules of evidence do not formally apply. However, administrative hearing officers have at times found the elements and principles underlying the CPLR or the federal rules of civil procedure, if used cautiously and consistently with all IDEA-specific caselaw and regulations, to be a useful, familiar framework when filling in gaps to structure the administrative proceedings, especially when the IDEA hearing framework is silent and needs to be fleshed out in order to conduct the proceeding in a fair and reasonable manner.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld. In a reply, the parent's advocate offers as additional evidence a copy of an email, dated October 25, 2023, that, according to the advocate, constituted the parent's withdrawal of the due process complaint notice.

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 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 IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). 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.

Initially, with respect to the parent's advocate's claim that he withdrew the matter, the hearing record does not support this characterization. Pursuant to State regulation, 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]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]).[2] Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial

[2] If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to hear the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

hearing officer, in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding" (8 NYCRR 200.5[j][6][iv]).

Here, there was no written withdrawal from the parent or Prime Advocacy included in the hearing record, and upon written inquiry from the Office of State Review, the district confirmed that it received no such notice. The parent's advocate submits a copy of the purported written notice of withdrawal with the reply. However, while the greeting in the body of the email dated October 25, 2023, is directed to the IHO, the IHO's email address is not listed among the recipients of the message (Reply Ex. A). The email is addressed to recipients with the school district email domain but it is unclear from the hearing record what role the school district recipients have with respect to the proceeding, and the representative for the school district who submitted a notice of appearance for the impartial hearing is not among the school district recipients listed by Prime Advocacy (id.). Thus, it is likely that neither the IHO nor the district representative(s) during the impartial hearing process received Prime Advocacy's attempt to withdraw this matter. Having found that the parent, through her representatives, did not withdraw the matter, it remains to be addressed whether the IHO appropriately dismissed the matter with prejudice.

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).[3]

[3] 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

As summarized above, the IHO scheduled six separate appearances between October 27, 2023 and November 17, 2023, and neither the parent nor a representative from Prime Advocacy appeared at any of the dates; the district appeared at the last date (Tr. pp. 1-22). The hearing record does not indicate that the IHO issued a prehearing order of any sort. At each hearing date to which one or both of parties did not appear, the IHO noted on the record that "the matter was scheduled within the Impartial Hearing Reporting System" and that it was her "understanding that the Hearing Office provide[d] all parties who have matters scheduled within the Hearing System with notices, including the date and time of the matters scheduled before them"; as a result, she found "that the parties had notice" of the scheduled dates but did not appear (Tr. p. 2; see Tr. pp. 6, 9, 12, 15, 19). On November 1, 2023, the IHO indicated on record that, at the next appearance, she would "go forward without the parties" (Tr. p. 9). At the November 6, 2023 appearance, the IHO sent an email to the parties reminding them of the scheduled status conference but neither party responded (Tr. p. 12). On November 15, 2023, the IHO sent an email to the parties, to which the district's attorney responded that she was running late (Tr. p. 15).[4] On November 17, 2023, the final scheduled date, the hearing record does not reflect that the IHO reached out the parent or Prime Advocacy before dismissing the matter.

Based on the foregoing, it appears that the IHO's management of the impartial hearing process did not include any communication to the parties identifying 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 at conferences with the IHO. Further, while the IHO believed that notices were sent to the parties through the impartial hearing reporting system (see Tr. pp. 2, 6, 9, 12, 15, 19), the district included no such notices to the parties in the hearing record, and the fact that both parties failed to appear at five out of six scheduled appearances seriously calls into question whether the notices were in fact delivered to the parties. Although the IHO sent emails to the parties on the morning of two of the appearances (see Tr. pp. 12, 15), the emails included no indication that the IHO intended to dismiss the matter with prejudice, and there is no indication that the IHO attempted another means of communication such as a telephone call or a notice via mail before imposing the most severe sanction. Accordingly, I find the IHO erred in reaching an extreme sanction without adequate notice appearing in the administrative hearing record, and the dismissal cannot stand under these circumstances.

To be sure, the parent's advocate does not address whether Prime Advocacy received the hearing notices but instead alleges that a representative "did not appear at the hearings" on the

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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]).

[4] In response to an inquiry from the Office of State Review, the district submitted copies of the IHO's emails to the parties. Review of the emails shows that they were sent to Prime Advocacy and the representative for the district who had, at the time of the respective emails, most recently submitted a notice of appearance in the matter. The November 6, 2023 email was sent at 7:45 a.m. with the subject line "Call in at 8:35" followed by the student's name and the case number. The email did not include any message in the body. Similarly, the November 15, 2023 email was sent at 9:28 a.m. with the subject "Call in at 12:10" followed by the student's name and case number with no message in the body.

parent's behalf because it was believed that the matter was withdrawn (Req. for Rev. at pp. 2-3).[5] As discussed above, the evidence does not support the advocate's claim that withdrawal was effectively communicated. Further, it is entirely unclear why no attorney or advocate from Prime Advocacy followed-up after not receiving confirmation that the withdrawal was received or processed and, instead, clearly ignored messages from the IHO reminding the attorney and/or advocate of required appearances. Accordingly, when the district appeared on November 17, 2023, it may have been an appropriate exercise of the IHO's discretion to the dismiss the matter without prejudice at that point or to schedule the matter for an impartial hearing and allow the district to present evidence even if the parent or her representative again did not appear.[6] However, because the IHO did not provide advance notice of the potential for a dismissal with prejudice occurring due to the parent's failure to appear, a dismissal with prejudice was an unnecessarily harsh sanction. Therefore, the IHO's decision will be modified to dismiss the parent's due process complaint notices without prejudice.

VI. Conclusion

Based on the foregoing, the IHO erred by dismissing the parent's September 7, 2023 due process complaint notice with prejudice and the parent's request to change the terms of the IHO's order of dismissal will be granted.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of IHO, dated November 30, 2023, is modified to provide that the parent's September 7, 2023 due process complaint notice is dismissed without prejudice.

Dated: **Albany, New York**
March 4, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[5] The advocate states that Prime Advocacy tried to withdraw the matter because it was "experiencing staffing issues" (Req. for Rev. at pp. 2-3). I note that the attorney who signed the due process complaint notice, Gershon Kopel, Esq., was using a Prime Advocacy email address in his filing, and the same email address was purportedly used to send the withdrawal (see Due Process Compl. Not. at p. 3; Reply Ex. A). Suffice it to say, the attorney's business relationship with Prime Advocacy in this proceeding is far from clear.

[6] A determination of whether or not to proceed in the parent's absence is a matter within the IHO's discretion (see Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]). Unsurprisingly, challenges to a hearing process of this sort occur more commonly when an IHO proceeds without a party; in those instances, the courts have reviewed an IHO's conduct utilizing an abuse of discretion standard (see Davis v. Kanawha Cty. Bd. of Educ., 2009 WL 4730804, at *11-*14 [S.D.W.V. Dec. 4, 2009]; A.S. v. William Penn Sch. Dist., 2014 WL 1394964, at *6-*8 [E.D. Pa. Apr. 10, 2014]; see also Horen v. Bd. of Educ., 655 F. Supp. 2d 794, 806-07 [N.D. Ohio Sept. 8, 2009]).