The University of the State of New York

The State Education Department
State Review Officer
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No. 24-021

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:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, 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. 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 in part.

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 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, 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 educational history of the student in 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 3, 2023, the parent alleged that the district "failed to provide adequate special education and related services for the student for the 2023-2024" school year (see Due Process Compl. Not. at p. 1). According to the parent, a CSE last developed an IESP for the student,[1] with which she agreed, on February 17, 2022, which recommended five sessions per week of special education itinerant teacher (SEIT) services, as well as related services (id.). The parent asserted that she was "not able to locate providers to work with the Student at the [district's] standard rates for the 2023-2024 school year and the [district] did not provide any" (id.). However, the parent indicated that she located providers who were willing to deliver the services but "at rates higher than standard [district] rate[s]" (id.). The parent requested an order on pendency (id. at p. 2). For relief, the parent requested that the district be required to fund the student's program of special education teacher services at "an enhanced rate" and fund "all related services and aides on the IESP" via related services authorizations (RSAs) or direct funding (id.).[2]

In an undated and unsigned prehearing order, an IHO appointed by the Office of Administrative Trials and Hearings (OATH) indicated that she was assigned to this matter, as well as 20 additional cases filed by the same attorney, and that the group of cases were "slated for omnibus Settlement Conferences and hearings" (Pre-Hr'g Order at p. 1).[3] The order indicated that the settlement conferences would take place before a different IHO and that cases that did not settle would be scheduled for an impartial hearing (id.). The order indicated that prehearing conferences would not be held and that, if pendency hearings were needed, they would be conducted at the time of the impartial hearing (id.). The order set forth the same dates and times for settlement conferences (October 12, 2023), status conferences (October 31, 2023), and impartial hearings (November 6, 2023) for all of the cases to be heard together (id).[4]

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[1] The attorney for the parent confusingly referenced a 2022 individualized education services program in the September 3, 2023 due process complaint notice when the student may still have been under the auspices of the CPSE but then shortened that term to "IEP" throughout the rest of the document which is a different type of document developed by the CSE under Education Law Article 89. It's not clear what type of meeting the CSE held in 2022. After the student reached school-aged programming, the student was parentally placed in a religious school during the 2023-24 school year, so it appears that the parents were seeking dual enrollment services under an IESP (see Due Process Compl. Not. at p. 1).

[2] The district responded to the parent's due process complaint notice on September 21, 2023 (Dist. Response to Due Process Compl. Not.). The district asserted that a CSE convened for the student on March 22, 2022 and found the student eligible for special education as a student with an other health impairment (id.).

[3] With the request for review, the parent submits email correspondence between the IHO and the parties. It appears that on September 13, 2023, the IHO sent a prehearing order to the parties in the body of an email that is similar but not identical to the prehearing order included in the hearing record on appeal (compare Req. for Rev. Ex. F, with Pre-Hr'g Order).

[4] The order referenced an attached "Pre-Hearing Subjects to be Considered document" as well as an "attached Omnibus Interim Order" but the IHO did not make them part of the administrative record and such attachments are not included in the hearing record on appeal (Pre-Hr'g Order at pp. 2-3).

According to the IHO, the parties appeared at the settlement and status conferences for this matter (IHO Decision at p. 1). A district representative and an associate from the parent's attorney's law firm who was "currently pending admission" to the New York Bar (associate) appeared at a hearing date on November 6, 2023,[5] which the IHO indicated was related to "15 cases" (Tr. pp. 1-4).[6] Of the original 21 cases included in the "omnibus" group, the IHO noted that six cases were "IEP cases" as opposed to "straightforward implementation cases," and, therefore, were treated "like a subgroup" (IEP cases) and had been set for a status conference on December 4, 2023 (Tr. pp. 4-6). The IHO noted that for three of the remaining 15 cases, she had received "disclosures" and, therefore, those cases would go forward (Tr. pp. 2, 6). The associate representing the parent requested an adjournment of the other 12 cases but indicated that, if the IHO would not adjourn, he would "need to withdraw the cases without prejudice" (Tr. pp. 2-3). The IHO proposed that the 12 cases be adjourned to the same date as the IEP cases (Tr. p. 6). After discussion of the "compliance dates" for the cases and the lack of availability for an earlier date, the IHO stated her inclination to "dismiss the cases for failure to prosecute" but also noted that she would "entertain putting them over with an extension if that is what both parties [we]re requesting or a withdrawal" (Tr. p. 7). The parties agreed that the cases would be scheduled for a hearing on December 4, 2023 (Tr. pp. 7-8). The IHO suggested that the status conference for the "IEP cases" be moved to 9:00 a.m. and that the remaining 12 cases could be addressed thereafter until 4:00 p.m. with a break from 12:30 p.m. to 1:00 p.m. (Tr. pp. 8-9). The IHO indicated that she would issue extension orders for the 12 cases and that disclosures would be due November 27, 2023 (Tr. p. 9). For the remaining three cases that were ready to go forward, the IHO suggested that they "go into the web or the eScribers link for each individual case so that it's like a separate transcript and a separate record for each," at which point the IHO adjourned the proceedings so the parties could join the separate "link" (Tr. p. 9).

On December 4, 2023, the IHO opened the record at 9:45 a.m. (Tr. p. 12). A district representative appeared before the IHO but neither the parent nor a representative of the parent appeared (Tr. pp. 12-15). The IHO noted that she had not received disclosures from the parent (Tr. p. 13). In addition, the IHO indicated that she "sent several emails to the Parent's representative th[at] morning" but "ha[d] not received a response" (id.). Based on the failure of the parent's representatives to appear, the district made an application to dismiss the cases (Tr. p. 14). The IHO read 12 case numbers into the hearing record, including the case number for the present matter, and indicated that those cases were "dismissed with prejudice for failure to prosecute" (id.). The IHO closed the record three minutes later at 9:48 a.m. (id.).

In a written decision dated December 4, 2023, the IHO dismissed the parent's due process complaint notice with prejudice based on the parent's "failure to further pursue this matter " (IHO Decision at p. 2).

[5] In a State-level appeal involving one of the other students, Application of Student with a Disability, Appeal No. 24-022, the undersigned inadvertently listed this date as October 31, 2023.

[6] The transcripts submitted with the hearing record on appeal for this matter are captioned under a different student's name and a different IHO case number (Tr. pp. 1, 12).

IV. Appeal for State-Level Review

The parent appeals through her attorney and argues that the IHO erred in dismissing the due process complaint notice with prejudice.[7] The parent alleges that the IHO improperly dismissed this matter in a group of 12 cases and that the omnibus process utilized by the IHO is not consistent with State regulation that allows each party up to one day to present its case. The parent's attorney explains why he did not appear on the parent's behalf at the December 4, 2023 omnibus hearing date, pointing to issues with the hearing notice sent by the IHO, use by OATH of different platforms for remote hearings, and confusing communications by the IHO. In addition, the parent's attorney indicates that the 12 matters were scheduled for several hours that day and that he was actively communicating with the IHO and attempting to join the remote hearing when the IHO dismissed the matter. Given these circumstances, the parent asserts that the IHO should have rescheduled the hearing, proceeded with the hearing in the parent's absence and granted the relief sought, or, at worst, dismissed the matter without prejudice. The parent requests that the matter be remanded or that the dismissal be deemed without prejudice.

In addition, the parent asserts that the IHO erred in not holding a pendency hearing or ordering pendency and alleges that, although the district agreed to pendency, it did not implement the student's pendency services. Therefore, the parent requests an order requiring the district to fund the student's pendency services as delivered by providers of the parent's choosing.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld.

V. Discussion

Initially, I noted that because of how the impartial hearing in this matter was conducted, the record of the impartial hearing underlying this State-level appeal contains many of the same exact documents and transcripts considered by the undersigned in a matter involving a different student, thus there is a great deal of repetition between the two cases, but I have reviewed and considered each matter independently (see Application of a Student with a Disability, Appeal No. 24-022).

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

[7] The parent includes several documents with the request for review as additional evidence. Generally, documentary evidence not presented at an impartial hearing is 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; Application of a Student with a Disability, Appeal No. 08-003; 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]). Here, the additional evidence submitted with the request for review could not have been presented at the impartial hearing since the IHO dismissed the matter with prejudice based on the nonappearance of the parent at the impartial hearing with no record development, and it is necessary to consider it in order to render a decision about the IHO's dismissal of this matter (Req. for Rev. Exs. A-F).

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.

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).

The administrative hearing record and the process employed by the IHO suffered from significant flaws. First, I note that the IHO's prehearing order contained numerous points with which the parties were expected to comply but did not identify that there was any 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 (Pre-Hr'g Order).

Further, the additional evidence submitted by the parent with the request for review reflects that the IHO was in fact receiving active communications from the parent's attorney immediately before the IHO dismissed the matter with prejudice. The parent's attorney asserts that the hearing notice for the December 4, 2023 appearance was not sent to the attorney of record for the parent but instead went to the associate who appeared at the November 6, 2022 hearing date (see Req. for Rev. Ex. B at p. 2).[8] On December 4, 2023, the IHO sent the parent's attorney an email stating that she was waiting for an appearance at the status conference for the IEP cases on WebEx (Req. for Rev. Ex. C at p. 1). The attorney replied at 9:27 a.m. requesting permission to send an update by email in that matter (Req. for Rev. Exs. B at pp. 3-4; D at p. 1; E at p. 1). At 9:41 a.m., the IHO responded regarding the status conference for the IEP cases but also indicated at that time that there was an omnibus hearing on the merits taking place on the 12 cases for which she was waiting for an appearance on the eScribers platform (Req. for Rev. Exs. B at p. 3; E at p. 1). According to the parent's attorney, he attempted to join the hearing by following the link in the email chain with the IHO; however, that was the WebEx link for the status conference for the IEP cases (Req. for Rev. ¶ 11). The parent's attorney emailed the IHO at 9:48 a.m. and again at 9:52 a.m. indicating that he was "in the waiting room" on WebEx and "trying to log in" and that he would have to withdraw the matter without prejudice as he was not prepared to go forward (Req. for Rev. Exs. B at p. 3; E at p. 1). The IHO responded at 9:53 a.m. that, after waiting 10 minutes on the WebEx platform for the status conference for the IEP cases and then 15 minutes on the eScribers platform for the 12 cases scheduled for hearings, she was dismissing the 12 cases in the omnibus group "with prejudice for failure to prosecute" (Req. for Rev. Ex. B at p. 3). I am deeply troubled by the IHO's statements on the record that she had not received a response to her email from the parent's attorney, which is at best a mischaracterization of what was actually occurring. While it is possible that the IHO overlooked the attempts of the parent's attorney, the IHO also made no mention of the attempts at communication by the parent's attorney when later issuing the final decision dismissing the case with prejudice (see IHO Decision).

The IHO's communications with the parent's attorney on the day of the impartial hearing, again, did not state any warning of the IHO's intention to sanction the attorney by dismissing the matter along with the other 11 cases with prejudice for the attorney's nonappearance.

In addition to erroneously reaching an extreme sanction in this matter without adequate notice, I will address the parent's allegation that "[t]he case was assigned . . . [to OATH], which grouped the case together with 22 other cases as part of an 'omnibus' hearing" and that "[t]he Omnibus process was, and is, fraught with confusion and lack of consistency." The parent is

[8] It was not unreasonable for the IHO to notify the associate from the parent's attorney's firm who previously appeared in the matter and participated in choosing the date for the next scheduled appearance (see Tr. pp. 1-9); that associate's failure to share the notice with the parent's attorney is an oversight that is attributable to the associate, supervising attorney, and/or the law office's practices, not the IHO's case management.

correct. The IHO's inclusion of this matter with other cases for scheduling of what were described as "omnibus" conferences and hearings and her treatment of matters brought by the same counsel with presumably similar, but not identical factual and legal issues resulted in substantial confusion in the administrative record. The hearing process was functionally conducted as a merged, multiparty litigation or, in other words as a "group" proceeding and the hearing record at the prehearing state was a rambling discussion about 15 different proceedings that were not, for the most part, individually identified by their unique impartial hearing case numbers. While I acknowledge the wide leeway afforded to IHOs in their conduct of impartial hearings and also appreciate the value of judicial economy, in this instance, the use of the "omnibus" approach has made the individual hearing record in this matter problematic. As noted above, the transcripts for this proceeding were captioned under a different student's name and a case number in a different matter. In addition, the IHO's communications with the parent's attorney took place on an email chain for a different appearance. In ruling on the district's motion to simultaneously dismiss all 12 cases with prejudice, the IHO did not individually call each case to make clear rulings on a clear record.[9]

While the IHO erred in dismissing this matter with prejudice, the parent's attorney is not without fault for the failure to effectively manage his caseload or prepare for scheduled hearing dates. It is undisputed that, had the parent's attorney appeared at the December 4, 2023 hearing date, he had not submitted evidentiary disclosures to the district five days in advance and was not prepared to go forward with the hearing such that he stated that he would need to withdraw the matter (see Req. for Rev. Ex. E). He indicated only that "I don't have coverage to appear and I apologize if I did not mark this date in my calendar" (id.). Accordingly, the IHO would have been well within her right to dismiss the mater without prejudice even had the parent's attorney been permitted to enter from the waiting room. Accordingly, I decline to remand this matter but will modify the IHO's order to dismiss the matter without prejudice. With that said, in the event the parent re-files a due process complaint notice in this matter, it would be within the IHO's discretion to consider the conduct of the parent through her attorney in the present matter, and, if the IHO found a similar lack of preparedness on the part of the parent's attorney in such future matter, the IHO could determine that the parent through her attorney was engaging in a pattern of conduct that

[9] When faced with a large number of proceedings involving the same attorneys for both sides, it is a prudent exercise of the IHO's discretion in managing proceedings to schedule each matter in succession on the same day(s) for the sake of judicial economy. It may even be permissible to provide a window of time within which a certain number of proceedings is expected to be addressed rather than a specified time for each and every proceeding. However, the practices necessarily have limits. It is inconsistent with standard legal practice to then proceed to merge all the cases together into a blended hearing record (see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [referencing IHOs discretion in conducting hearings so long as they are conducted in accordance with standard legal practice]). Each parent is entitled to an unredacted, verbatim hearing record that applies to their own child (8 NYCRR 200.5[j][3][v]), and the parents, SROs, and reviewing courts must be provided with a clear record of each proceedings rather than be left sifting through a record that has been thoroughly polluted by an IHO's haphazard discussion of issues, evidence, and arguments from a litany of unrelated proceedings. Moreover, each parent is entitled to a confidential proceeding that is closed, unless the parent seeks an open proceeding (8 NYCRR 200.5[j][3][x]). Accordingly, if the IHO chooses to address multiple proceedings with the same attorneys on the same day, the IHO should open the record separately in each proceeding, place all motion papers, prehearing orders, scheduling information, e-mail communications from the parties to the IHO, and documentary evidence, if any, into each hearing record all bearing in mind that the parents in each proceeding are entitled to an unredacted verbatim record.

would then warrant a dismissal with prejudice.[10] Alternatively, if the IHO viewed the conduct of the parent through her attorney as an attempt to game the system, for example, to prolong the student's pendency entitlements by evading a hearing on the merits and refiling the case, the IHO could consider such conduct as an equitable consideration when crafting relief.

VI. Conclusion

Based on the foregoing, the IHO erred by dismissing the parent's September 3, 2023 due process complaint notice with prejudice.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 4, 2023, is modified to provide that the parent's September 3, 2023 due process complaint notice is dismissed without prejudice.

Dated: **Albany, New York**
February 26, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER

[10] If the IHO were to make such findings, it would be fitting for the IHO to include in the hearing record of such future matter documents supporting the pattern of conduct as, for example, IHO exhibits. Likewise, if the IHO issues any prehearing orders or directives that provide the parent's attorney warning of the likelihood of a dismissal with prejudice for nonappearance, the IHO should ensure that such notices are also included in the hearing record.