The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-066

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 petitioner, 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 a decision of an impartial hearing officer (IHO) which dismissed her due process complaint notice regarding her son's educational program for the 2023-24 school year with prejudice. Respondent (the district) cross-appeals from that portion of the IHO's decision that ordered the district to take certain actions going forward. The appeal must be dismissed. The cross-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 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),[1] 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 May 27, 2020, which recommended five periods per week of group special education teacher support services (SETSS) and two 30-minute sessions per week of 1:1 speech-language therapy (id. at pp. 1-2). The parent asserted that, in putting the burden on the parent to find providers, 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.). 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.).

After reaching out to the parties and receiving a response from a different attorney from Prime Advocacy and no response from the district, the IHO issued an interim decision on October 11, 2023, finding that the student's pendency placement consisted of the services set forth in a May 2020 IESP, as requested by the parent, and ordered the district to fund the costs of the services "at market rates" (Oct. 11, 2023 Interim IHO Decision at pp. 13, 15-16; see IHO Decision at p. 2).

Thereafter, a total of four hearing dates were scheduled in this matter; neither the parent nor a representative on the parent's behalf appeared at three out of four of the scheduled dates (see Tr. pp. 1-57). First, on October 19, 2023, an attorney for the district appeared and an advocate appeared on behalf of the parent (see Tr. pp. 1-3).[2]

At the next scheduled date, on November 14, 2023, neither the parent nor a representative from Prime Advocacy appeared (see Tr. pp. 10-11). During that appearance, the IHO noted that Prime Advocacy had also failed to appear at two other scheduled hearings that same morning involving other students, and the district's attorney noted that Prime Advocacy "ha[d] withdrawn, apparently, several thousand cases at the end of [the] last month" and that the district "had some concern with respect to making sure that Parents [we]re aware of where the[] cases [we]re procedurally and making sure that Parents know what's going on with their case" (Tr. pp. 11, 13). In an interim decision dated November 14, 2023, the IHO ordered that the parent appear at the next scheduled hearing date on December 15, 2023 or "run the risk of having the matter dismissed with prejudice" (Nov. 14, 2023 Interim IHO Decision at p. 2). According to the IHO, on December 14, 2023, he received an email directly from the parent requesting to withdraw the matter without prejudice and stating that she would not be able to attend the appearance scheduled for the next

[1] 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 (see Due Process Compl. Not. at p. 3). Suffice it to say, the attorney's current or former business relationship with Prime Advocacy in this proceeding is far from clear.

[2] According to a discussion had later in the proceedings between the IHO and a guardian ad litem appointed on behalf of the student, it was described that the advocate who appeared on October 19, 2023, was not from Prime Advocacy but, instead, had a title of director of support services and may have been from Luria Academy, which was the private agency delivering services to the student (see Tr. pp. 41-42).

day (Tr. p. 25; IHO Decision at pp. 2-3). The IHO did not adjourn the hearing date and informed the parent that the matter would proceed (see Dec. 18, 2023 Interim IHO Decision at pp. 2-3).

On December 15, 2023, neither the parent nor a representative from Prime Advocacy appeared (see Tr. pp. 22-23). The IHO expressed concern about the parent's attempt to withdraw the due process complaint notice being "an appropriate thing to do in the child's interest" (Tr. p. 26). Accordingly, the IHO stated his intent to appoint a guardian ad litem to "ascertain what the child's interests are" (Tr. pp. 26-29). In an interim decision dated December 18, 2023, the IHO appointed a guardian ad litem "for the limited purpose of determining whether it [wa]s in the student's interests to discontinue the proceeding at th[at] time" (Dec. 18, 2023 Interim IHO Decision at p. 3).

On January 16, 2024, neither the parent nor a representative from Prime Advocacy appeared; an attorney for the district and the guardian ad litem were in attendance (see Tr. pp. 36-37). The guardian ad litem reported that he had been unable to reach the parent but had spoken to an individual from Prime Advocacy about the agency's inability "to meet the demand" precipitated by a change in policy requiring matters filed requesting "enhanced rates" to go to hearing (Tr. pp. 38-39). Although the representative from Prime Advocacy reportedly assured the guardian ad litem that he would appear, he did not (Tr. pp. 39-41).

Thereafter, in a final decision dated January 17, 2024, the IHO dismissed the parent's due complaint notice with prejudice "as impossible to adjudicate on the facts available to the parties at this time" (IHO Decision at p. 4). The IHO opined that:

> Several serious questions are raised by this history. The question of whether those who sought to appear on behalf of the family and asserted that they were attorneys had acted in a manner consistent with their professional responsibility is one that each of us who have had contact with the matter must consider and determine whether in our view complaints should be filed against those practitioners. The question whether the family here is engaging in educational neglect and a referral should be made by the district or any other mandated reporter should be reviewed and addressed by those for whom it is relevant. The question whether the entire matter reflects possible fraudulent abuse of §3602-c of the Education Law is one that the district may wish to refer to the City's Commissioner of Investigation to investigate and pursue. All of these are outside the narrow scope of my jurisdiction, but all are important concerns that potentially endanger this child's welfare or seek to draw resources improperly from the district.

(id.). However, citing the district's child find obligation to the student under the IDEA, the IHO ordered the district to "immediately conduct a comprehensive evaluation of the student in all areas of suspected disability to ascertain whether the student is in need of special education services or programs at present and, if so, to offer the student a potential publi[]c school program unless the family expressly directs them not to do so" (id. at pp. 4-5). In addition, the IHO indicated that, if

the parent placed the student in a nonpublic school, she could "seek services for the student under § 3602-c as a student new to special education" (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals, but through a lay advocate from Prime Advocacy rather than the attorney from Prime Advocacy who signed the due process complaint notice, and argues that the IHO erred in dismissing the due process complaint notice with prejudice. The advocate argues that the IHO erred in finding a failure to prosecute, as "prime was experiencing staffing issues" for which the parent should "not have to suffer" and that, although the parent requested withdrawal, she was represented by an advocate who intended to move forward with the matter. 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." 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, through her advocate, requests that the IHO's order be modified to provide that the dismissal be without prejudice or, alternatively, that the matter be remanded to the IHO for further proceedings.

The district submits an answer with cross-appeal.[3] The district responds to the parent's allegations and argues that the portion of the IHO's decision dismissing the matter should be upheld. As an additional ground in support of the IHO's decision to dismiss the due process complaint notice with prejudice, the district asserts that, for the two prior school years, the parent had filed and later withdrawn due process complaint notices after receiving "full relief through the Student's pendency entitlements." The district offers additional evidence in support of this allegation.

As for its cross-appeal, the district alleges that the IHO erred in ordering the district to evaluate the student as the parent did not make a timely request for equitable services for the student for the 2023-24 school year under Educational Law § 3602-c. Further, the district argues that, to the extent the IHO's order could be read as permitting the parent "to seek services at a later date for the same school year," such a finding would be at odds with the order dismissing the matter with prejudice.

In an answer to the district's cross-appeal, the parent's advocate asserts that the guardian ad litem gave him the impression that his appearance on January 16, 2024 was not necessary. The parent offers additional evidence in support of this assertion, as well as to show that the parent

[3] The district argues that the parent's request for review should be rejected because the affidavit of verification was signed by the parent's advocate rather than by the parent (see 8 NYCRR 279.7[b]). However, the affidavit of verification filed with the Office of State Review was signed by the parent and notarized. According to the parent's answer to the district's cross-appeal, the appeal documents originally served on the district included a verification signed by the advocate rather than the parent but that the mistake was "corrected." Indeed, although proof of service filed with the parent's appeal reflects that the request for review and accompanying documents were served on the district on February 26, 2024, the affidavit of verification was notarized on February 27, 2024. While I decline to reject the parent's appeal based on this nonconformity, the parent's advocate is hereby warned that, if he finds it necessary to correct something related to the appeal documents, he should file all of the original documents as served upon the district and seek leave to serve and file the amended document less it appear that he is attempting to fraudulently obfuscate the original error.

requested equitable services from the district prior to June 1, 2023. In a reply to the answer to the cross-appeal, the district objects to the consideration of the parent's proffered additional evidence.[4]

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[5] "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or

[4] 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]). As I find that the IHO did not abuse his discretion in dismissing the parent's due process complaint notice based on the information before him, it is unnecessary to consider the additional evidence offered by the district to support alternative or additional grounds for the dismissal or offered by the parent to support the merits of her claim that the student was entitled to equitable services under Education Law § 3602-c, which the district failed to provide (see SRO Exs. B-C; 1-6). As for the email exchange between the parent's advocate and the guardian ad litem, it is considered briefly below to address the contention of the parent's advocate that, based on this communication, he was under the impression that he was not required to appear at the January 16, 2024 hearing date (see SRO Ex. A).

[5] State law provides that "services" includes "education for students with disabilities," which means "special educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

nonpublic schools located within the school district (id.).[6] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Dismissal with Prejudice

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.

[6] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

In addition, 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 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]).

As summarized above, the IHO scheduled four separate hearing dates between October 19, 2023 and January 16, 2024, yet neither the parent nor a representative for the parent appeared at three of those dates (Tr. pp. 1-57). The IHO issued an interim decision in which he explicitly notified the parent that she would be required to appear and stated the risk that, if she did not, the matter could be dismissed with prejudice (Nov. 14, 2023 Interim IHO Decision at p. 2).

On appeal, the parent's advocate does not allege that the IHO erred in failing to issue an order of termination after the parent requested to withdraw the matter, in declining to adjourn the matter, or in appointing a guardian ad litem (see Tr. pp. 25-29; IHO Decision at pp. 2-3; Dec. 18, 2023 Interim IHO Decision at pp. 2-3; see also 8 NYCRR 200.5[j][3][ix] [empowering an IHO to appoint a guardian ad litem under certain circumstances]; 200.5[j][6][ii] [providing that an IHO "shall issue an order of termination if a party seeks to withdraw a due process complaint notice"]).

To the contrary, in the request for review, the lay advocate disavows the parent's attempt to withdraw the matter and clarifies that it was the intent of Prime Advocacy to move forward with the parent's case.

In addition, the parent's advocate does not dispute that Prime Advocacy had notice of the scheduled appearance dates but asserts that it did not appear because the agency was "experiencing staffing issues." However, an attorney or advocate's heavy workload, without more, is generally not a justifiable excuse for a failure to prosecute a case (see Michaels v. Sunrise Bldg. & Remodeling, Inc., 65 A.D.3d 1021, 1023 [2009] [finding lack of reasonable excuse justifying failure to prosecute given lack of detailed explanation or evidence to substantiate claims of law office failure and attorney's health problems]; Cobos v. Adelphi Univ., 179 F.R.D. 381, 387 [E.D.N.Y. 1998] [finding that an attorney's mismanagement of a plaintiff's case did not constitute "excusable neglect"]).

The advocate also argues that his nonappearance on January 16, 2024 was due to the guardian ad litem's failure to notify him that his appearance was necessary. In the email correspondence offered by the parent as additional evidence, the parent's advocate messaged the guardian ad litem on January 3, 2024 suggesting that they discuss the case in a phone call and "see how [they] c[ould] prep for the Merits hearing" and they arranged for a phone call that day (SRO Ex. A at pp. 1-2). On January 12, 2024, the advocate messaged the guardian ad litem asking what he "want[ed] to do next at the conference on 1/16 at 8," and whether he wanted "to discuss then with the IHO if [he] should stay the guardian even though [the parent was] not going to withdraw?" (id. at p. 3). The guardian ad litem responded that day, noting that the IHO might relieve him as guardian ad litem once the IHO was informed that the matter was moving forward with the advocate providing representation (id.). The guardian ad litem then asked the advocate to provide a copy of the student's most recent IESP and evaluations and stated he would "appear on the 16th to confirm to the IHO that [they] ha[d] spoken" (id.). In the evening of January 15, 2024, the day before the scheduled appearance, the advocate emailed the guardian ad litem, asking that the guardian "let me know if you need my attendance at the meeting "(id. at p. 4).

Neither the statement by the guardian ad litem that he would appear on January 16, 2024 and inform the IHO about his discussions with the advocate nor the lack of a response by the guardian ad litem to the advocate's email the evening before the appearance divested the advocate of his or the parent's obligation to appear at the scheduled hearing date on January 16, 2024. Moreover, in light of the IHO's clear directives and the fact that the matter was scheduled for appearances, with significant discussion both on the record and in the IHO's interim decisions regarding concerns about the lack of appearances by either the parent or Prime Advocacy, there was no basis whatsoever for the advocate's view that an appearance both by the parent and Prime Advocacy would not be required (see Tr. pp. 11, 13, 26-29; Nov. 14, 2023 Interim IHO Decision at p. 2). It was not the guardian ad litem's role to notify the advocate about Prime Advocacy's obligations.

Regarding the advocate's position set forth in the answer to the district's cross-appeal that the appearance on January 16, 2024 was optional in light of the guardian's appointment, this understanding is belied by the advocate's own emails to the guardian ad litem stating the understanding that the guardian ad litem might not continue in the matter and, earlier, his understanding that both the advocate and the guardian ad litem would need to prepare for the

hearing (SRO Ex. A at pp. 1, 3). Further, any such view would represent a fundamental misunderstanding of the purpose of a guardian. According to State regulations, an impartial hearing officer is empowered to appoint a guardian ad litem to protect the interests of a student "[i]n the event the [IHO] determines that the interests of the parent are opposed to or are inconsistent with those of the student" (8 NYCRR 200.5[j][3][ix]). A guardian ad litem is defined as "a person familiar with the provisions of [8 NYCRR Part 200] who is appointed from the list of surrogate parents or who is a pro bono attorney appointed to represent the interests of a student in an impartial hearing . . . [who] shall have the right to fully participate in the impartial hearing" and, where appropriate, join in an appeal to the SRO initiated by the parent or district (8 NYCRR 200.1[s]). Although granted the right to participate in the impartial hearing, the guardian ad litem's authority is limited to the activities set forth in State regulation (8 NYCRR 200.1[s], see 8 NYCRR 200.5[j][3][xii]). Thus, the guardian ad litem was appointed, not to replace the parent's chosen representative, but to represent the student's interests in the event they were not consistent with the parent's.

Given the IHO's provision of notice of the possibility of a dismissal with prejudice for nonappearance and the multiple opportunities provided to the parent and Prime Advocacy to appear, I do not find that the IHO abused his discretion in dismissing the parent's due process complaint notice with prejudice.

B. Order for the District to Evaluate

Turning to the cross-appeal, I decline to disturb the IHO's order requiring the district to evaluate the student. Even if the parent did not request equitable services under Education Law § 3602-c as the district contends, the district would not be relieved of its obligations to the student under the IDEA.

In its Official Analysis to Comments in the Federal Register, the United States Department of Education noted that when a student is placed in a nonpublic school located outside of the district, a student's district of residence is responsible for providing FAPE, but further indicated that "[i]f the parent makes clear his or her intention to keep the child enrolled in the private elementary school or secondary school located in another LEA, the LEA where the child resides need not make FAPE available to the child" (71 Fed. Reg. 46,593 [Aug. 14, 2006]). The United States Department of Education has maintained this position, in relatively recent guidance answering the following question:

> If a parent makes clear his or her intention to keep the child with a disability enrolled in the private school, is the LEA where the child resides obligated to offer FAPE to the child and develop an individualized education program (IEP) for the following school year, and annually thereafter?
>
> Answer: No. Absent controlling case law in a jurisdiction, after the LEA where the child resides has made FAPE available to the child, and the parent makes clear his or her intention to not accept that offer and to keep the child in a private school, the LEA where the child resides is not obligated to contact the parent to develop an IEP

> for the child for the following year and annually thereafter. However, if the parent enrolls the child in public school in the LEA where the child resides, the LEA where the child resides must make FAPE available and be prepared to develop an IEP for the child.

("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

Courts have grappled with the effect of a parent's intention to place a student at a nonpublic school on the district's obligation to provide the student with an IEP. On the one hand, it is clear that a district violates the IDEA by refusing to convene an IEP meeting when the parent of a student who is parentally placed in a private school is making inquiries about potentially enrolling a student in a public school for special education programming and an outdated IEP in that instance is not a permissible placeholder (Bellflower Unified Sch. Dist. v. Lua, 832 Fed. App'x 493, 496 [9th Cir. Oct. 26, 2020]). In another instance, in E.T. v. Board of Education of Pine Bush Central School District, after concluding that the district retained an obligation to offer the student a FAPE, the court found that the "issue of the parents' intent [was] a question that inform[ed] the balancing of the equities rather than whether the district had an obligation to the child under the IDEA" (2012 WL 5936537, at *16 [S.D.N.Y. Nov. 26, 2012]). In contrast to the court's holding in E.T., at least two federal district courts have found that an objective manifestation of the parent's intention to place a student in a nonpublic school is a threshold issue regarding whether a district remained obligated to offer the student a FAPE (see Dist. of Columbia v. Vinyard, 971 F. Supp. 2d 103, 108-10 [D.D.C. 2013] [finding the court's explanation in E.T. "illogical"]; Shane T. v. Carbondale Area Sch. Dist., 2017 WL 4314555, at *15-*20 [M.D. Pa. Sept. 28, 2017]).[7]

However, here, the district's main defense at the impartial hearing was that the parent did not provide notice of her intention to place the student at a nonpublic school, and, therefore, it would appear that the district did not have reason to believe that the parent intended to parentally place the student for the 2023-24 school year at her own expense (see R.G. v. New York City Dep't of Educ., 585 F. Supp. 3d 524, 539 [S.D.N.Y. 2022] [noting that a notice of intent to parentally place represented an affirmative statement that the parent would pay for the student's placement "and sought only an IESP," whereas without such notice, the district "had no reason to believe that

[7] The Second Circuit has noted that "[a] local educational agency may not be required to offer an IEP if the parent's expressed intention is to enroll the child in a private school outside the district, without regard to any IEP" (Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 451 n.9 [2d Cir. 2015], citing Child Find for Parentally-Placed Private School Children with Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]; but see J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 665-66 [S.D.N.Y. 2001] [noting that the "district-of- residence's obligations do not simply end because a child has been privately placed elsewhere"]). The Court did not specifically address the situation presented here, where the nonpublic school the student attended was located within the district, and it appears that under that circumstance the district may not be relieved from the obligation to develop an IEP. The Court also did not reach the issue of whether or how the parent's actions might have impacted on equitable considerations.

the parents sought to parentally place [the student] at the parents' expense for that year" and, therefore, would be required to offer a FAPE]). Thus, the district continued to have an obligation under the IDEA to conduct a reevaluation the student and offer a FAPE, and the IHO did not err in ordering the district to evaluate the student and offer a public placement unless the parent "expressly directs [it] not to do so" (IHO Decision at p. 5).

With that said, to the extent the IHO's order could be read to allow the parent to request equitable services for the student for the remainder of the 2023-24 school year as "a student new to special education," such an order is not supported by the hearing record. Neither party asserts that at any time the student was found ineligible for special education as a student with a disability, and there is no indication that the student was declassified at any point. Moreover, at this juncture, even if the district conducted evaluations of the student and the parent requested equitable services for the student as an initial referral, such request would not, under State law, entitle the student to services for the remainder of the 2023-24 school year, as the statute provides that "[f]or students first identified after March first of the current school year, any such request for education for students with disabilities in the current school year that is submitted on or after April first of such current school year, shall be deemed a timely request for such services in the following school year" (Educ. Law § 3602-c[2]). As this portion of the IHO's decision is without support in the hearing record or the law, this aspect of the IHO's decision treating the student's case as one of initial eligibility must be reversed. Instead, the district should provide a notice to the parent that a reevaluation will be conducted by the district and unless, as the IHO indicated, the parent explicitly directs the CSE not to reevaluate the student, the CSE should proceed and comprehensively reevaluate the student as one who has already been found eligible for special education within the meaning of IDEA. The CSE should then reconvene to consider the comprehensive reevaluation of the student. Any directive by the parent to avoid or refuse a comprehensive reevaluation of the student by the CSE should be provided in writing by the parent to the CSE.

VII. Conclusion

There is no basis to disturb the IHO's decision that dismissed the parent's September 7, 2023 due process complaint notice with prejudice and ordered the district to reevaluate the student; however, that portion of the IHO's decision that provided that, if the parent were to request equitable services going forward, the student would be treated as "a student new to special education" must be reversed.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 17, 2024, is modified by reversing that portion which found the parent could seek services for the student under § 3602-c as a student initially found eligible for special education; and

IT IS FURTHER ORDERED that the district shall provide notice of a comprehensive reevaluation of the student to the parent within ten days and provide a mailing address and e-mail address to which the parent may submit a written objection to reevaluation within 10 days thereafter; and

IT IS FURTHER ORDERED that absent a written refusal by the parent to the district, the CSE shall comprehensively reevaluate the student and reconvene the CSE to consider the reevaluation within 60 days of the date of this decision consistent with the body of this decision.

Dated: **Albany, New York**
April 15, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER