The University of the State of New York

The State Education Department
State Review Officer
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No. 24-277

**Application of a STUDENT WITH A DISABILITY, by her 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:**
The Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 respondent's (the district's) provision of educational services to her daughter for the 2023-24 school year with prejudice. The appeal must be dismissed.

### 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, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the

parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections 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 procedural posture of this matter—namely that it was dismissed with prejudice prior to the introduction of evidence—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the

description of the student's educational history is limited and the facts center around the procedural history of this proceeding, including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

According to the parent, the student attended a nonpublic school at the parent's expense for the 2023-24 school year and CSE met on March 21, 2023 and on February 13, 2024 and developed IESPs that recommended the student receive five periods per week of group special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of individual speech-language therapy in Yiddish, one 30-minute session per week of group speech-language therapy in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in English, and one 30-minute session per week of group counseling in Yiddish (Amended Due Process Compl. at p. 2).

In an amended due process complaint notice dated April 22, 2024, the parent, through her attorney, alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Amended Due Process Compl. Not. at p. 3).[1] The parent alleged that she "ha[d] been unable to locate SETSS and related services providers" and that the district "failed to implement [its] own recommendations" (id.). The parent argued that, without support, the student's placement in a mainstream class was "untenable" (id.). As relief, the parent requested an order for the district to fund services delivered by "providers located by Parent for the 2023-24 school year at the provider's contracted rate" and an order for the district to "fund a bank of compensatory SETSS and related services for the entire 2023-24 school year - or the parts of which were not serviced" at the "prospective provider's contracted rate" (id. at pp. 3-4).

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on May 24, 2024 at 11:32 am (Tr. p. 1). At the hearing date, neither the parent nor her attorney appeared (id.). The district moved to dismiss the parent's April 22, 2024 amended due process complaint notice with prejudice "due to the multiple filings and Parent's failure to prosecute this case," which was causing "a waste of judicial resources" (Tr. p. 4). The IHO indicated that he would grant the district's motion to dismiss the matter but would reserve judgment and issue a written order regarding whether the dismissal would be with or without prejudice (id.). The matter was adjourned at 11:36 am (id.).

In a written order of dismissal dated May 24, 2024, the IHO dismissed the parent's amended due process complaint notice with prejudice (IHO Order at p. 2). The IHO indicated that the parent had originally filed a due process complaint notice involving the same matter on September 7, 2023, which had been withdrawn on November 3, 2023, the same date on which an impartial hearing was scheduled (id. at p. 1; see Tr. pp. 2-3). The IHO further summarized that an impartial hearing had been scheduled in the present matter for May 23, 2024 to hear the issues set forth in the parent's April 15, 2024 due process complaint notice, but that, when the parent filed the April 22, 2024 amended due process complaint notice, the matter was rescheduled to May 24, 2024 to allow for the resolution period to expire (IHO Order at p. 1; see Tr. p. 2). The IHO noted that he sent a "calendar invitation" for the May 24, 2024 hearing date on May 3, 2024 (IHO Order at p. 1). Following this, the IHO described emails between himself and the parties (id.). The IHO

[1] The original due process complaint notice was dated April 15, 2024 (Due Process Compl. Not.).

indicated that, in an email dated May 5, 2024, the parent informed the IHO that the matter would likely settle and the IHO responded by informing the parties that the matter would remain on the calendar pending "an update with respect to resolution" (id.). The IHO indicated that, on May 17, 2024, the parent requested that the May 24, 2024 hearing date "be canceled or converted to a status" conference, which the IHO denied as there was "no update with respect to resolution" (id.; see Tr. p. 3). The IHO further indicated he received no response to an email sent on May 23, 2024, inquiring how the parent intended to proceed, in which he also noted that no disclosures had yet been provided at that time (IHO Order at p. 1; see Tr. p. 3). The IHO indicated that, in an email sent on May 24, 2024, before the hearing convened, he reminded the parties of the hearing and that it would begin at 11:30 a.m. and warned them that "failure to appear may result in dismissal of the matter, with or without prejudice" (IHO Order at pp. 1-2; see Tr. p. 3).

Based on the foregoing, the IHO dismissed the matter with prejudice, citing the "history of this matter [and] Parent's failure to disclose exhibits, respond to [the IHO's] email inquiries, or participate in the [impartial hearing] process in any meaningful way," which raised "concerns with respect to Parent's intentions or willingness to pursue this matter" (IHO Order at p. 2).

## 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. The parent argues that she, through her attorney, only missed "a single appearance," the IHO knew that the parties were "engaged in efforts to resolve the matter," and "[t]here was no pattern of conduct that would warrant the maximum sanction." The parent asserts that the IHO did not give notice that the matter would be dismissed with prejudice. The parent also alleges that the district was not prejudiced by the delay in the proceedings given the subject matter of the due process complaint notice. Further, the parent asserts that the IHO abused his discretion in refusing to grant an adjournment. The parent contends that the IHO should have considered "lesser sanctions." The parent requests that the IHO's order be modified to provide that the dismissal be without prejudice.

In an answer, the district responds to the parent's allegations and argues that the IHO's order dismissing the matter with prejudice should be upheld.[2]

## V. Discussion

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

[2] The parent prepared, served, and filed a reply to the district's answer in this case. However, State regulation limits the scope of a reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parent's right to file a reply. Indeed, the reply largely restates the parent's arguments set forth in the request for review. As such, the parent's reply fails to comply with the practice regulations and will not be considered.

be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). 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]

Here, the IHO's articulation of the history of this matter, including his summary of communications between him and the parties (see Tr. pp. 2-4; IHO Order at pp. 1-2), is not disputed on appeal. That is, although the parent appeals the IHO's order of dismissal, she does not allege that the IHO misstated the history, nor does she present any additional evidence with her request for review to counter the IHO's statement of the procedural history or summary of communications between the IHO and the parties (see Tr. pp. 2-4; IHO Order at pp. 1-2).[4] In addition, the parent's attorney does not deny that he had notice of the scheduled impartial hearing

[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 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] The parent asserts that the IHO did not give notice that the matter would be dismissed with prejudice but does not allege that the IHO inaccurately summarized the emails exchanged, which, according to the IHO included such notice (IHO Order at pp. 1-2; see Tr. p. 3).

and gives no reason for his failure to appear on May 24, 2024 or to respond to the IHO's email. Instead, the parent's appeal is entirely devoted to arguing that the IHO's dismissal with prejudice was too harsh.

The parent alleges that the parties were "engaged in efforts to resolve the matter" and that the IHO should have granted the requested adjournment. However, while the parent states "there was clear evidence" of the parent's efforts to resolve the matter, the parent does not proffer such evidence on appeal. Moreover, if the parties were so intent on reaching a resolution of the matter without an impartial hearing, they could have agreed in writing to continue mediation at the end of the resolution period (8 NYCRR 200.5[j][3][iii][b][4]). As for the requested adjournment, an IHO may grant an extension to the timelines set forth in State regulation, including the timeline for commencing the hearing after considering the cumulative impact of several factors in State regulation, and an extension may be granted "for settlement discussions between the parties" but only upon "a finding of good cause based on the likelihood that a settlement may be reached" (8 NYCRR 200.5[j][5][i]-[iii]; see 8 NYCRR 200.5[j][3][iii]). Here, however, according to the IHO, in the parent's May 17, 2024 request for an adjournment, the parent offered no update on the status of negotiations in the request for an adjournment, despite the IHO having previously indicated that the matter would remain on the calendar until the IHO was provided with an update as to resolution (see IHO Order at p. 1; see also Tr. p. 3). Therefore, there is no basis for a finding that the IHO abused his discretion in denying the parent's requested adjournment.[5]

While the parent's attorney undoubtedly would have preferred an adjournment of the matter, when the IHO denied his request, there is no explanation offered regarding why the parent's attorney did not appear at the May 24, 2024 impartial hearing date. If the parent's attorney was not prepared to proceed at that juncture, the parent's attorney could have appeared on May 24, 2024 and renewed the request for an adjournment with more information to support the request or the parent's attorney could have withdrawn the matter prior to the hearing as had been done previously (see 8 NYCRR 200.5[j][6]). Instead, the parent's attorney just did not appear in disregard of the IHO's directive that the hearing date would proceed and did not respond to the IHO's attempts to ascertain the parent's intentions.

Given the IHO's representation regarding the provision of notice to the parties that nonappearance could result in a dismissal with prejudice and absent any explanation for the parent's or the parent's attorney's failure to appear, I do not find that the IHO erred in dismissing the parent's amended due process complaint notice with prejudice (see Application of a Student with a Disability, Appeal No. 24-066).

[5] The parent indicates that, on April 17, 2024, the district expressed to the parent's attorney a shared sense of "urgency to resolve wherever possible without litigation" (Req. for Rev. at p. 2); however, this broad statement of the district's feelings towards resolutions in general would not, even if presented to the IHO, demonstrate a likelihood of settlement in this matter. In contrast, the parent also asserts that she attempted to schedule a resolution meeting with the district but that the district was not responsive. This tends to undermine the parent's claim that the district was as keen as the parent to pursue settlement. Most significantly however, there is no indication in the parent's request for review that the parent communicated any of this to the IHO.

## VI. Conclusion

There is insufficient basis presented on appeal to disturb the IHO's order dismissing the parent's April 22, 2024 amended due process complaint notice with prejudice.

**THE APPEAL IS DISMISSED.**

**Dated:** **Albany, New York**
**August 29, 2024**

**STEVEN KROLAK**
**STATE REVIEW OFFICER**