



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-305

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

### **Appearances:**

Liz Vladeck, General Counsel, attorneys for respondent, by Nate Munk, 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 terminated the parent's due process complaint notice 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 programming 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[a]). 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 issues to be resolved in this appeal, a full recitation of the student's educational history is not necessary. Briefly, a CSE convened on January 27, 2022, and developed an IESP for the student with a projected implementation date of February 11, 2022 and a projected

annual review date of January 27, 2023 (January 2022 IESP) (see Parent Ex. B at p. 1).<sup>1</sup> Finding that the student remained eligible to receive special education as a student with an orthopedic impairment, the January 2022 CSE recommended that the student receive eight periods per week of SETSS delivered in a group setting (Yiddish), two 30-minutes per week of individual speech-language therapy services (Yiddish), two 30-minute sessions per week of individual counseling services (Yiddish), two 30-minute sessions per week of individual occupational therapy (OT) services (English), and two 30-minute sessions per week of individual physical therapy (PT) (English) (id. at pp. 1, 14-15).<sup>2</sup> In addition, the January 2022 CSE developed annual goals with corresponding short-term objectives targeting the student's needs in the areas of fine motor skills, gross motor skills, ocular motor control skills, sensory processing skills, expressive and receptive language skills, academic skills (reading, writing, mathematics), and social/emotional functioning (id. at pp. 7-14).<sup>3</sup>

In a letter to the district dated May 30, 2023, the parent's attorney—on behalf of the parent—informed the district that the student had been parentally placed in a religious, nonpublic school and, as a student entitled to a special education program, the parent requested that the district provide those services to the student for the 2023-24 school year (see Parent Ex. D at p. 2).

On August 1, 2023, the parent executed a contract with "Upgrade Resources, LLC," (Upgrade or agency), which reflected that the agency would "make reasonable efforts to implement the above referenced Program with suitable qualified providers" (Parent Ex. E at pp. 1-2). Within the contract, the agency listed the "fee structure" for the following services: SETSS at \$195.00 per hour, speech-language therapy at \$300.00 per hour, OT at \$300.00 per hour, PT at \$300.00. per hour, counseling services at \$300.00 per hour, and paraprofessional services at \$85.00 per hour (id. at p. 2). The contract did not specify the services to be delivered to the student for the 2023-24 school year or otherwise identify a specific IESP that would be implemented (id. at pp. 1-2).

In a letter dated August 27, 2023, the parent's attorney—on behalf of the parent—notified the district of the parent's intention to unilaterally obtain the SETSS and related services recommended in the student's January 2022 IESP (see Parent Ex. C at p. 2). The parent indicated that she consented to "all services on this IESP being implemented by the [district]" (id.). The parent indicated that she had been unable to locate providers to deliver these services at the district's standard rates, and therefore, she had "no choice but to implement the IESP on [her] own and seek reimbursement or direct payment" of these services by the district (id.).

On December 15, 2023, a CSE convened and developed an IESP for the student with a projected implementation date of December 15, 2023 and a projected annual review date of

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<sup>1</sup> Based on the student's age when the January 2022 CSE developed the student's IESP, it appears that the student would have been considered, chronologically, as a second grade student during the 2021-22 school year (see Parent Exs. A at p. 1; B at p. 1; F at p. 1; Dist. Ex. 2 at p. 1).

<sup>2</sup> The student's eligibility for special education as a student with an orthopedic impairment is not in dispute (see 34 CFR 300.8[c][8]; 8 NYCRR 200.1[zz][9]).

<sup>3</sup> According to the attendance page of the January 2022 IESP, the parent attended the CSE meeting via telephone (see Parent Ex. B at p. 18).

December 15, 2024 (December 2023 IESP) (see Dist. Ex. 2 at p. 1).<sup>4,5</sup> As reflected in the December 2023 IESP, the evaluative information before the CSE included the following: a November 2023 SETSS report, a November 2023 counseling report, a November 2023 speech report, and a November 2023 OT report (id.). The IESP also noted that there was no PT report available because there was "no provider" (id.). Finding that the student remained eligible to receive special education as a student with an orthopedic impairment, the December 2023 CSE recommended that the student receive 10 periods per week of SETSS delivered in a group setting (Yiddish), two 30-minutes per week of individual speech-language therapy services (Yiddish), two 30-minute sessions per week of individual counseling services (Yiddish), one 30-minute session per week of counseling in a group (Yiddish), two 30-minute sessions per week of individual OT services (English), and two 30-minute sessions per week of individual PT (English) (id. at pp. 1, 11-12). In addition, the December 2023 CSE developed annual goals targeting the student's needs in the areas of sensory processing skills, visual-perceptual and visual-motor skills, gross motor skills, ocular motor control skills, expressive language skills, academic skills (phonics and word analysis, reading fluency and reading comprehension, writing, mathematics), social/emotional functioning, receptive language skills, developing compensatory strategies for auditory processing, and varying sentence structure (id. at pp. 3-10).<sup>6</sup>

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

By due process complaint notice dated May 2, 2024, the parent, through his attorney, alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year because the district had "delay[ed] in convening a new IEP meeting for the 2023-24 school year" and therefore, the student's January 2022 IESP was "outdated and expired" (see Parent Ex. A at pp. 1-2). In addition, due process complaint notice indicated that the parent had "not received any subsequent IEP or IESP documents and [wa]s uncertain whether there [wa]s a more recent program" (id. at p. 2). As part of the due process complaint notice, the parent sought pendency services for the student consistent with the special education program recommended in the January 2022 IESP, which constituted the last-agreed upon program for the student and consisted of the following: eight periods per week of SETSS delivered in a group setting (Yiddish), two 30-minutes per week of individual speech-language therapy services (Yiddish), two 30-minute sessions per week of individual counseling services (Yiddish), two 30-minute sessions per week of individual OT services (English), and two 30-minute sessions per week of individual PT (English) (id. at p. 2). In addition, the due process complaint notice indicated that the parent had been unable to locate any providers to implement the "services

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<sup>4</sup> According to the December 2023 IESP, the student was attending fourth grade at his religious, nonpublic school (see Dist. Ex. 2 at p. 1). Based on the evaluative information listed in the December 2023 IESP, as well as the information reported in the present levels of performance, it appears that the student was receiving SETSS (eight periods per week), counseling (two sessions per week), speech-language therapy (two 30-minute sessions per week), and OT services (two 30-minute sessions per week), but not PT (id. at pp. 1-4).

<sup>5</sup> The hearing record is devoid of evidence concerning any CSE meetings that may have taken place between the January 2022 CSE meeting and the December 2023 CSE meeting (see generally Tr. pp. 1-49; Parent Exs. A-K; Dist. Ex. 2; IHO Exs. I-II).

<sup>6</sup> According to the attendance page of the December 2023 IESP, the parent attended the CSE meeting via telephone (see Dist. Ex. 2 at p. 15).

recommended" on the [January 2022] IESP" for the 2023-24 school year, and since the student's "parental mainstream placement [wa]s untenable" without such services, the parent had located "appropriate services providers independently for the 2023-24 school year" (id.).

As relief for the alleged violations and as relevant to this appeal, the parent initially reserved the right to seek compensatory educational services in the form of SETSS and related services "for any periods not provided during the 2023-24 school year" (Parent Ex. A at p. 2). The parent also sought an order directing the district to fund the following: the "program outlined in the [January 2022] IESP for the 2023-24 school year at the agency's contracted rate" and a bank of compensatory educational services "for all services" the student was entitled to receive under pendency "for the entire 2023-24 school year—or the parts of which were not serviced" (id. at p. 3).

## **B. Impartial Hearing**

On June 6, 2024, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. pp. 1-48). Initially, the IHO reminded the parties that, on May 8, 2024, an "interim order" had been provided to them, which "set forth in great detail the rules and procedures of this case, as well as the conduct expected by the parties during th[e] due process hearing" (Tr. p. 5; see generally IHO Ex. I). The IHO explained additional instructions for the conduct of the impartial hearing, and both parties acknowledged on the record that they understood these instructions (see Tr. pp. 5-6). The IHO and the parties then turned their attention to the entering of the parties' respective documentary evidence into the hearing record and addressed any objections or concerns raised (see Tr. pp. 6-25). The IHO entered 11 documents into evidence for the parent, as well as entering 1 document into evidence for the district (see Tr. pp. 15-19, 25; Parent Exs. A-K; Dist. Ex. 2).

Having received the documentary evidence, the IHO next turned to clarifying the issues to be resolved (see Tr. p. 25). Specifically, the IHO stated that the parent had alleged that the district failed to implement the student's program for the 2023-24 school year, and the parent sought an order allowing her to implement the student's IESP, dated January 27, 2022, which had been entered into evidence as parent exhibit "B," as relief (Tr. p. 25; see generally Parent Exs. A-B). After describing the recommended program in the January 2022 IESP, the district, upon inquiry by the IHO, confirmed that it was not contesting the services set forth in the IESP with respect to the "2023 school year" (Tr. pp. 25-26). The IHO noted that, since neither party had requested to make opening statements, she was moving on to whether the parties wished to present any additional evidence at that time, and the district rested its case-in-chief (see Tr. p. 26).

After dealing with some issues concerning whether the parent's attorney was situated in a "secure location" for the impartial hearing, the IHO confirmed that the district's attorney did not wish to conduct any cross-examination of the parent's witness, who had provided direct testimony by affidavit (see Tr. pp. 26-29; see generally Parent Ex. K). The parent's attorney then rested the parent's case-in-chief at that time (see Tr. p. 29). The IHO then provided both parties with an opportunity to present closing statements on the record (see Tr. pp. 29-30). The district's attorney went first, and as part of her closing statement, referenced district exhibit "2," which was an IESP, dated December 15, 2023, and the special education program recommendations set forth therein (Tr. pp. 30-34; see Dist. Ex. 2 at pp. 1, 11-12).

When the district's attorney completed her closing statement, the IHO turned the proceeding over to the parent's attorney for a closing statement (see Tr. p. 34). In response, the parent's attorney asked to "withdraw" the present matter "so that [the parent] c[ould] amend the complaint" and asked whether it was "possible at this late stage" of the proceeding (id.). The IHO stated that the parent's attorney could "make whatever application [he] want[ed] to make" and then asked if the parent's attorney was waiving his closing statement (Tr. pp. 34-35). The parent's attorney made an application to withdraw the case, but added that if the IHO did not grant his application to withdraw, he would proceed with a closing statement (see Tr. p. 35). The IHO explained that a "conditional request to withdraw" did not exist, and reposed her question regarding whether the parent was making an application to withdraw (id.). The parent's attorney responded, "[y]es," and "[w]ithout prejudice" (id.). The IHO instructed the parent's attorney to put his application on the record, which the parent's attorney did, noting that the "application to withdraw without prejudice [wa]s to refile and amend the [due process] complaint and include the more recent IESP that was cited by the [d]istrict in their previous statement" (id.).

The IHO gave the district's attorney an opportunity to respond to the parent attorney's application to withdraw the matter without prejudice (see Tr. pp. 35-36). The district's attorney objected to the parent's application, stating that if "there were any withdrawals, that it should be with prejudice as it relate[d] to any portion of the claims in the 2022 school year" (Tr. p. 36).

In response to the district's position, the parent's attorney stated that the parent would "request a bank of hours" because the student was "already entitled to the services laid out in the 2022 IESP"; however, the parent's attorney also stated that they would "request the greater services that [we]re specified in the 2023 IESP as a bank to be used throughout the school year by the student" (Tr. p. 36).

The IHO indicated her confusion with the statements just made by the parent's attorney, and thereafter provided the parent's attorney with another opportunity to directly address the district's position that the matter be withdrawn with prejudice (see Tr. p. 36). The parent's attorney indicated that he had "case law to support that dismissals with prejudice [we]re never appropriate unless a parent's conduct [wa]s egregious," and pointed to a decision issued by an SRO (Tr. pp. 36-37, citing Application of a Student with a Disability, Appeal No. 21-087).

The IHO paused the proceeding for a moment to explain to the parent's attorney that she did not "want general statements of law just put on the record," and noted that they were "now concluding the due process hearing" with the "only thing left on the record to happen [wa]s for the [p]arent to make a closing statement" (Tr. p. 37). The IHO indicated that "[a]ll the evidence ha[d] been submitted" and thus, the presentation of evidence had "concluded" (id.). As further noted by the IHO, the parent's attorney was now making a motion to withdraw the matter "after we have completed the submission of evidence," so the specific issue presented to her was the parent attorney's request to withdraw the matter after the submission of evidence, after both parties had rested their cases, and with the parent attorney's closing statement as the only thing left to complete; however, the IHO then gave the parent's attorney time off the record to prepare a response to the district's request that, if withdrawn, that the matter be withdrawn with prejudice (Tr. pp. 37-38).

Following a short recess, the parent's attorney indicated that, having spoken with colleagues, it had been "determined that the best approach would be simply to proceed with the case" (Tr. pp. 38-39). The IHO stated that the parent's attorney could not do that because he had made a motion, the district had responded to the motion, and the IHO needed to now decide the motion (see Tr. p. 39). The IHO asked if the parent's attorney was now seeking to withdraw the motion after the IHO had already received the district's argument on it; however, before receiving a response from the parent's attorney, the IHO readdressed whether the parent's attorney was in a "secure location" for the impartial hearing and recessed, for a second time, to allow the parent's attorney to situate himself in a secure location for the impartial hearing (see Tr. pp. 39-40).

When the impartial hearing resumed, the IHO asked for the district's position with respect to the parent's attorney's request to withdraw the motion to withdraw the due process complaint notice (see Tr. p. 41). The district's attorney stated that, because the impartial hearing had "already started," the matter "should be withdrawn with prejudice, without order of termination" (Tr. pp. 42-43). Thereafter, the IHO set forth her understanding of the motion proceedings thus far, and noted that she did not believe that it was "proper" for the parent's attorney to now seek to withdraw the motion to withdraw the due process complaint notice (Tr. p. 43). In light of this belief, the IHO indicated that the issue before her was "whether or not the withdrawal w[ould] be with or without prejudice" and the IHO gave the parent's attorney an opportunity to address the district's position that the matter be withdrawn with prejudice (Tr. pp. 43-44). The parent's attorney asserted that, contrary to the district's position, the matter should be withdrawn without prejudice because "withdrawals with prejudice should 'usually be reserved for extreme cases,'" and the parent's request to "withdraw because there [wa]s a more recent IESP that should have been included in [the parent's] due process complaint" notice was not so extreme, as it was simply an "amendment that c[ould] be easily made, and there would be no harm to the student" and "no prejudice against other parties" (Tr. pp. 44-45, citing Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]).

The IHO then gave the district's attorney one more opportunity to respond to the parent's legal argument, which the district's attorney used to indicate that the parent attorney's reliance on Massachusetts law was misplaced (see Tr. p. 47). The district's attorney noted that, within New York, "prior to the commencement of a hearing, a voluntary dismissal by a party requesting the hearing must be deemed by the IHO to be without prejudice, unless parties otherwise agree"; and in this matter, the district did not agree (id.). In addition, the district's attorney argued that "commencement" referred to the "first date of the hearing . . . after the initial hearing conference," and at that juncture, the impartial hearing was concluded because closing statements had occurred (id.). The district's attorney further argued that the IHO should issue an order of termination, "not a withdrawal without prejudice" (Tr. pp. 47-48).

At that point, the IHO did not allow the parent's attorney to make any further arguments and concluded the impartial hearing (see Tr. p. 48).

### **C. Impartial Hearing Officer Decision**

In a termination order dated June 6, 2024, the IHO dismissed the parent's May 2024 due process complaint notice with prejudice (see IHO Decision at pp. 1, 3). Initially, the IHO indicated that the instant proceeding was a "case refiled" by the parent wherein she had "made the same

claims and sought the same relief" (*id.* at p. 1). According to the IHO, the parent's previous matter was "filed on September 7, 2023 and [was] scheduled for a hearing on November 8, 2023"; however, on "November 6, 2023, the parent withdrew the prior case without prejudice" (*id.*). The IHO indicated that although the district had "submitted disclosures for the prior case," the parent "did not submit disclosures" (*id.*).<sup>7</sup>

Next, the IHO noted that in an email dated May 8, 2024, the parties received the IHO's "Omnibus Interim Order," which delineated the "rules and procedures for this case" (IHO Decision at p. 1; see generally IHO Ex. I). In addition, the IHO indicated that the "parties exchanged disclosures for this matter" on May 30, 2024 (IHO Decision at p. 1). The IHO noted that on June 5, 2024, both parties met for the impartial hearing, both parties entered evidence into the hearing record, and only the district made a closing statement (*id.*). In its closing statement, the district argued that, contrary to the parent's assertion in the due process complaint notice, a CSE developed a December 2023 IESP for the student, which included recommendations for "more services than what was [recommended] in the January 2022 IESP" (*id.*). According to the IHO, the parent, although provided with an opportunity to present a closing statement, "declined" to do so and "instead, requested to withdraw the case without prejudice" (*id.*). The IHO indicated that the district "requested that the case be terminated with prejudice" and the parent argued, in opposition, that her request to withdraw the due process complaint notice was "not egregious conduct warranting a dismissal with prejudice" (*id.* at pp. 1-2).

The IHO then recited the State regulations applicable to the issuance of termination orders (see IHO Decision at p. 2, citing 8 NYCRR 200.5[j][6][i]-[ii]). Based on the regulations, the IHO found that a "termination order [wa]s necessary" and indicated that both parties had an opportunity to be heard with respect to whether "this case should terminate with or without prejudice" (*id.*).

Initially, the IHO found the timing of the parent's request to be "concerning," as well as the parent's stated "grounds" for the withdrawal (IHO Decision at p. 2). Because the parties presented evidence, made legal arguments, and rested their respective cases, the IHO indicated that the parties "had a fair opportunity to litigate this case and to participate in the hearing process," which included the parent having had the opportunity to hear the district's arguments (*id.*). Thus, as noted by the IHO, the parent's "belated request to withdraw this case without prejudice would [have] allow[ed] the parent the opportunity to relitigate the claims raised in the [due process complaint notice]" (*id.*).

Next, the IHO found it "troubling" that the parent had alleged in the due process complaint notice that the January 2022 IESP was "'outdated and expired,'" that she had not "'received any subsequent IEP or IESP documents,'" she was "'uncertain whether there [wa]s a more recent program,'" and that the "'delay in convening an IEP meeting and recommending [a] proper placement and services [wa]s a denial of a FAPE for the 2023-24 school year'" (*id.*, citing Parent Ex. A at p. 2). According to the IHO, "parent's counsel was on notice of the December 2023 IESP" no later than May 29, 2024, when the district made its disclosures in this matter, and "at no time prior to or during the hearing, did the parent seek to amend the [due process complaint notice],

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<sup>7</sup> Notwithstanding the IHO's recitation of the procedural history of this matter, the hearing record is devoid of any evidence to support these findings (see generally Tr. pp. 1-49; Parent Exs. A-K; Dist. Ex. 2; IHO Exs. I-II).



withdraw the case, or clarify the statements in the [due process complaint notice]" (IHO Decision at p. 2). The IHO found this "especially concerning" because, upon review of the December 2023 IESP, it appeared that the parent participated at the December 2023 CSE meeting (*id.* at pp. 2-3, citing Dist. Ex. 2 at p. 15). As noted by the IHO, the parent's counsel "allowed the hearing to go forward to conclusion" (IHO Decision at p. 3).

In addition to these concerns, the IHO indicated that the parent's counsel had "several opportunities to correct the [hearing] record or request to withdraw the case prior to the admission of evidence into the [hearing] record" (IHO Decision at p. 3). The IHO further indicated that, at the impartial hearing, the parent's counsel had the opportunity to review the December 2023 IESP and to object to its admission into evidence; however, the parent's counsel did not state any objections thereto or "mention the services set forth in this IESP" (*id.*). The IHO opined that the parent's counsel did not appear to understand that a subsequent IESP existed until the district presented its closing statement, or that the IESP had "additional services" (*id.*). Additionally, the IHO indicated that, "although this issue was raised by the [district], parent's counsel made no attempt to correct the statements made in the [due process complaint notice] or clarify the record with respect to the December 2023 IESP" (*id.*). As a final point, the IHO indicated that "any assertion by the parent that the December 2023 [IESP], [wa]s an appropriate program for the student, [wa]s contradicted by the parent's evidence" (*id.*, citing Parent Ex. K).

In light of the foregoing findings, the IHO terminated the parent's due process complaint notice with prejudice (*see* IHO Decision at p. 3).

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

The parent appeals, arguing that the IHO erred by issuing the order of termination with prejudice.<sup>8</sup> The parent asserts that, although she attended the December 2023 CSE meeting via telephone, she was unaware that an IESP had been finalized and she had not received a copy of the IESP. In addition, the parent contends that, had the district filed a response to her due process complaint notice, "this confusion could have been avoided." The parent also contends that she was "forced to either proceed and risk losing . . . or attempt to withdraw without prejudice." According to the parent, there was "nothing dilatory about [her] actions" and she has "no incentive to re-file other than to seek funding for the services the [district] should have provided in the first instance." In support of this assertion, the parent argues that "an IHO's concerns of undue delay [we]re unwarranted when the only issue in a case [wa]s the failure to implement" (Req. for Rev. at p. 3, citing Application of a Student with a Disability, Appeal No. 24-166 n.3). The parent further argues that a termination "with prejudice should usually be reserved for extreme cases" (Req. for Rev. at p. 3, citing Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). In addition, the parent argues that SROs have considered the IHO's conduct and "refusal[s] to consider an adjournment and insistence that the case be heard was improper and unduly harsh" when determining whether a termination with prejudice was appropriate.

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<sup>8</sup> The parent's request for review is not consecutively paginated; for the purposes of this decision, when cited the citation will be by reference to consecutive pagination with the first page (Notice of Request for Review) as page one (*see* Req. for Rev. at pp. 1-7).

In this matter, the parent contends that there was "no indication of a pattern or course of conduct that would warrant the most extreme action of a dismissal with prejudice" and notes that the district shares blame by having failed to respond to the due process complaint notice. The parent asserts that, if "with prejudice" is not removed from the IHO's decision, she "will have no chance to have [her] case heard on the merits." Moreover, the parent notes that, "although the [impartial] hearing had commenced, there [wa]s no indication that the [district] would be prejudiced in any way." As relief, the parent seeks that "the termination be deemed without prejudice."

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's termination of the due process complaint notice with prejudice. Initially, the district asserts that the parent failed to timely amend the due process complaint notice after "failing to come prepared to litigate h[er] claims on a prior hearing date and after ignoring numerous reminders from the IHO to make the proposed amendments or risk dismissal of the [due process complaint notice]" (Answer ¶ 9). The district also asserts that, in considering whether to terminate a proceeding with prejudice, the "parties' expenditure of resources [wa]s a relevant consideration" (*id.* ¶10, citing Application of a Student with a Disability, Appeal No. 18-143). Next, the district asserts that IHOs may, under appropriate circumstances, dismiss a parent's due process complaint notice with prejudice for the failure to prosecute claims or for failure to comply with reasonable directives of the IHO, noting further that a party risks a dismissal with prejudice for "engaging in a pattern of conduct or in conduct so egregious as to warrant the maximum sanction." Moreover, the district argues that filing multiple due process complaint notices on the same issues undermines judicial economy and is inconsistent with the tenets of the IDEA's due process provisions. More specific to the facts of this matter, the district indicates that, given the disclosures made on May 30, 2024, the parent had "adequate time to review the December 2023 IESP" and when entering evidence into the hearing record, the parent made no objections and she "should have been aware of its existence at least by that time." The district also indicates that the parties had an opportunity to be heard at the impartial hearing with respect to whether the parent's request to withdraw should be ordered either with or without prejudice. In addressing the parent's arguments, the district notes that, because the December 2023 IESP was entered into the hearing record as evidence, the IHO "may have ordered the [district] to fund or implement the services recommended" therein, and thus, the parent's concern that there was no other way to proceed or to have her day in court absent the request to withdraw is without merit.

## **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]).<sup>9</sup> "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 nonpublic schools located within the school district (*id.*).<sup>10</sup> 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. v. New York City Dep't of Educ.*, 694 F.3d 167, 184-85 [2d Cir. 2012]).

## **VI. Discussion**

### **A. Preliminary Matters—Withdrawal with Prejudice**

Pursuant to State regulation, a due process complaint notice may be withdrawn by the party requesting a hearing (see 8 NYCRR 200.5[j][6]). Except in cases where a party withdraws the due

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<sup>9</sup> 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]).

<sup>10</sup> 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at <https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students>). 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.*). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

process complaint notice prior to the first date of an impartial hearing, a party seeking to withdraw a due process complaint notice must immediately notify the IHO and the other party, and the IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). In addition, a withdrawal "shall be presumed to be without prejudice except that the [IHO] may, at the request of the other party and upon notice and an opportunity for the parties to be heard, issue a written decision that the withdrawal shall be with prejudice" (*id.*). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (*id.*). Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an [IHO], in his or her discretion, from issuing a decision in the form of a consent order that resolves matters in dispute in the proceeding" (8 NYCRR 200.5[j][6][iv]).

Consistent with State regulations, the IHO in this matter properly issued a written termination order or final decision. Here, the transcript of the June 6, 2024 impartial hearing indicates that, just prior to concluding the proceeding, the parent—rather than presenting a closing argument—made a request to withdraw the due process complaint notice in order to amend her claims concerning the 2023-24 school year to include the services recommended in the December 2023 IESP, which had been entered into the hearing record as evidence by the district. After hearing from both parties regarding whether the matter should be terminated with or without prejudice, the IHO issued a written decision terminating the parent's due process complaint notice with prejudice.

When dismissing a matter with prejudice, and 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]).

As noted by the parent, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti, 893 F. Supp. 2d at 293-94). 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).<sup>11</sup>

Nevertheless, the above factors apply to a dismissal with prejudice for failure to prosecute or failure to follow directives of the IHO. In this instance, the IHO issued an order of termination following the parent's request to withdraw. Under this circumstance, while there is a presumption that dismissal shall be without prejudice, the IHO was permitted to consider the factors raised by the district in its request that the withdrawal result in an order of termination with prejudice.

As discussed above the district requested that the withdrawal be with prejudice as the hearing had already begun (Tr. pp. 36, 42-43). The parent's response to this, both during the hearing and on appeal, has been that the parent was asking for a withdrawal without prejudice because there was a more recent IESP that should have been included in the parent's due process complaint notice and that there was no prejudice to the other side (Tr. pp. 44-45).

Initially, the IHO appears to have considered information that was not contained within the hearing record in making this determination, which was improper. For example, the IHO indicated that the parent had previously filed a due process complaint notice dated September 7, 2023, which the parent withdrew without prejudice prior to November 8, 2023, when the impartial hearing had been scheduled to commence (see IHO Decision at p. 1). However, the hearing record does not include any evidence of the September 7, 2023 due process complaint notice or the parent's previous withdrawal without prejudice (see generally Tr. pp. 1-49; Parent Exs. A-K; Dist. Ex. 2; IHO Exs. I-II).

Review of the IHO decision shows that the IHO also considered permissible factors related to the impact of the timing of the parent's request for withdrawal being made only after the hearing had been completed (IHO Decision at p. 2). For example, the IHO noted that "[t]he parent had a fair opportunity to litigate this case and to participate in the hearing process including hearing the [district's] arguments" (*id.*). The IHO also reviewed the basis for the parent's request for having the matter terminated without prejudice and found that the parent should have known of the December 2023 IEP as of the time of the filing of the May 2024 due process complaint notice because the parent participated in the December 2023 CSE meeting (*id.* at pp. 2-3).

On appeal, the parent asserts that, although she participated in the December 2023 CSE meeting via telephone, she never saw the December 2023 IEP.<sup>12</sup> The parent then blamed the

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<sup>11</sup> 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]).

<sup>12</sup> It is worth noting that while the parent appeals seeking that the withdrawal be deemed without prejudice, the parent did not address the IHO's denial of parent's counsel's attempt to withdraw his motion for a withdrawal (Tr. pp. 39, 43-44). As that issue was not raised by the parent, I will not address it on appeal.

district for any failure to address the December 2023 IEP earlier, asserting that any confusion over the IEP could have been avoided if the district had "submitted a substantive response to [her] complaint indicating there was a more recent IEP document." Yet, the district had done just that, as, contrary to the parent's assertion, the administrative hearing record on appeal includes a copy of the district's response to the parent's due process complaint notice, dated May 20, 2024, which references a meeting held on December 15, 2023 and notes that the CSE recommended "SETTS, [speech-language therapy], OT, Counseling Services, [and] PT" for the student (Due Process Response at pp. 1-3).

Overall, while I am aware that dismissing the parent's due process complaint notice with prejudice "operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation' of them" (N.S. v. Dist. of Columbia, 272 F. Supp. 3d 192, 200 [D.C. Cir. 2017], citing Belizan v. Hershon, 434 F.3d 579, 583 [D.C. Cir. 2006]), under the circumstances presented there is not a sufficient justification for finding that the IHO abused her discretion in issuing an order of termination with prejudice. The parent and her counsel are charged with the responsibility of being personally aware of the due process proceedings they have brought and requesting a withdrawal of a due process complaint notice without prejudice after completion of a hearing may result in an IHO rejecting the request for a withdrawal without prejudice after considering relevant factors (see Application of a Student with a Disability, Appeal No. 23-074; Application of a Student with a Disability, Appeal No. 18-143).

## **VII. Conclusion**

Based on the foregoing, the IHO's decision terminating the parent's May 2, 2024 due process complaint notice with prejudice is upheld and the appeal is dismissed.

I have considered the parties' remaining contentions and find that they are without merit.

**THE APPEAL IS DISMISSED.**

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

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