



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-607

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:

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 against respondent (the district) with prejudice. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational 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). 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 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 facts and history of this matter is limited to the procedural history, including the parent's due process complaint notice, the exhibits entered into the record by the IHO, and the IHO's dismissal of the due process complaint notice with prejudice.

According to the parent, a committee on preschool special education (CPSE) convened in March 2023, found the student eligible for special education services as a preschool student with a disability, and developed an individualized education program (IEP) that recommended the student receive five 60-minute sessions per week of special education itinerant teacher (SEIT) services, three 30-minute sessions per week of speech-language therapy, and two 30-minute sessions per week of occupational therapy (OT) (Due Process Compl. Not. at pp. 1-2).

In a due process complaint notice dated July 15, 2024, the parent, through her attorney, alleged that the district had not developed an appropriate IEP for the student for the 2023-24 school year, and that the then "current" IEP was a preschool IEP (id. at p. 2). The parent contended that the district's failure to develop an appropriate program for the 2023-24 school year constituted a denial of a free appropriate public education (FAPE) and that she was forced to continue to unilaterally provide the services recommended in the March 2023 CPSE IEP (id.). The parent sought a finding that the district denied the student a FAPE for the 2023-24 school year, an order that the recommended services from the March 2023 CPSE IEP be funded for the 2023-24 school year at the provider's contracted for rate, and an order that the district fund a bank a compensatory education services for recommended services that were not provided to the student for the 2023-24 school year (id. at p. 3).

The parties appeared before an IHO appointed by the Office of Administrative Trials and Hearings (OATH) on September 13, 2024 for a prehearing conference (see Sept. 13, 2024 Tr. pp. 1-9).^{1, 2} The parties and IHO mutually agreed to hold the impartial hearing on November 6, 2024 (Sept. 13, 2024 Tr. pp. 4-5).

On September 14, 2024, the IHO sent the parties, via email, a prehearing conference summary and order (IHO Ex. II). The interim order noted the mutually agreed upon date and time of the impartial hearing on November 6, 2024 at 1:30 p.m. (id. at p. 3). The prehearing conference summary and order also had the following two provisions:

¹ The transcripts are non-consecutively paginated, thus when the transcript is referred to throughout this decision, for clarity, the date of the hearing will be cited to in addition to the page number.

² The prehearing conference began with a discussion on, and ultimate denial (issued orally on the record) of, a motion to dismiss for lack of subject matter jurisdiction filed by the district (Sept. 13, 2024 Tr. pp. 2-3). Copies of the motion papers have not been included with the hearing record on appeal as required by State regulation (see 8 NYCRR 200.5[j][5][d][vi]; see 279.9[a]). The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). Here, as no party is contesting the IHO's denial of the district's motion to dismiss, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]).

11. Adjournments: If any party becomes unavailable to appear or unable to proceed on the scheduled date/time, the party must request an adjournment as soon they become aware of the unavailability or inability to proceed. If they fail to do so or fail to appear, this Hearing Officer may hold the hearing in their absence and may dismiss the case for failure to prosecute, may draw negative inferences, or may limit affirmative defenses. Declining a video conference invitation is not considered an adjournment request . . .

12. Failure to Appear: Nonappearance by a party, without contacting the IHO and copying the other party, may result in dismissal of the DPC (with or without prejudice), an explicit finding that the party has failed to meet their burden, or other results as due process requires.

(IHO Ex. II at p. 4).

The IHO sent an additional email on September 14, 2024 to the parties, confirming that the due process hearing was scheduled for November 6, 2024 at 1:30 p.m. (IHO Ex. IV at pp. 1-2).

On November 6, 2024, the district appeared before the IHO for the scheduled impartial hearing (Nov. 6, 2024 Tr. pp. 1-5). Neither the parent nor the parent's representative appeared on November 6, 2024 (Nov. 6, 2024 Tr. p. 3). The IHO noted, on the record, that it was 15 minutes past the scheduled start time of the hearing, and that the IHO had emailed the parent's representative after two minutes had elapsed past the scheduled time, asking them to join the impartial hearing (see id.; see also IHO Ex. IV at p. 1). The district orally made a motion to dismiss the matter with prejudice for failure to prosecute and due to a waste of judicial resources (Nov. 6, 2024 Tr. p. 3). The district alleged that this matter was initiated due to the parent refile a prior matter, related to the same school year, which was previously withdrawn (id.). The IHO granted the district's motion to dismiss the matter with prejudice (Nov. 6, 2024 Tr. p. 4).

The IHO subsequently issued a written order of dismissal dated November 6, 2024 (IHO Decision). The IHO noted the prehearing conference summary and order that was sent to the parties, specifically referring to paragraph 12 of the interim order that discussed circumstances where a party fails to appear without notice to the IHO, and that the due process complaint notice could be subject to dismissal with or without prejudice should that occur (id. at p.1; see IHO Ex. II at p. 4). The IHO also noted that she sent the parties a hearing invitation on September 14, 2024, and that she resent the hearing invitation on November 4, 2024 (IHO Decision at p. 1; see IHO Exs. III, IV at pp. 1-2).³ The IHO noted the parent's nonappearance, and the email the IHO sent after the scheduled commencement time of the hearing asking the parent or her representative to join the hearing (IHO Decision at p. 1; see IHO Ex. IV at p. 1). The IHO indicated that, after waiting 15 minutes and not receiving any communication from the parent or her representative,

³ The IHO cites to IHO exhibit III to support the proposition that she resent the hearing invitation to the parties on November 4, 2024, but I note that the email in IHO exhibit III is undated (see IHO Ex. III).

the IHO granted the district's motion to dismiss the matter with prejudice (IHO Decision at pp. 1-2).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her due process complaint notice with prejudice. The parent indicates that, due to a program change in the platform that hosted impartial hearings, the parent's representative's office did not calendar the impartial hearing. The parent specifically contends that, among other things, there is evidence in the record that the parent intended to litigate this matter, there was no egregious conduct warranting a dismissal with prejudice, and there was no clear indication the matter would be dismissed with prejudice for a failure to appear. The parent asks that this matter be remanded to the IHO or, in the alternative, that the dismissal with prejudice be changed to a dismissal without prejudice.

In an answer, the district contends that the IHO's dismissal with prejudice should be affirmed. Specifically, the district contends, among other things, that the IHO acted reasonably and within her discretion, the parent was told on four separate occasions the date and time of the impartial hearing, and the parent received notice that a dismissal with prejudice could occur if she or the parent's representative failed to appear.

V. Discussion - Dismissal with Prejudice

As a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061). Under sufficiently egregious circumstances, SROs have found that an IHO has properly dismissed a parent's due process complaint notice for his or her failure to comply with an IHO's reasonable directives by not attending an impartial hearing either in person or by an attorney or advocate (see, e.g., Application of a Student with a Disability, Appeal No. 18-111 [finding that it was within the IHO's discretion to schedule the impartial hearing at a district location when the parent did not submit a formal request for a different location and to dismiss the due process complaint notice without prejudice when the parent and her advocates did not appear]; Application of a Student with a Disability, Appeal No. 09-073 [finding that an IHO had a sufficient basis to dismiss a matter with prejudice after the district had rested its case, parent's counsel had been directed by the IHO to produce the parent for questioning by the district at a following hearing date, and neither the parent nor counsel for the parent appeared at the subsequent hearing date]).

Nevertheless, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). In upholding a dismissal with prejudice, SROs have considered whether there was adequate notice to the party at risk for dismissal and whether the party engaged in a pattern of conduct or in conduct so egregious as to warrant the maximum sanction of dismissal of the due process complaint notice with prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 20-137;

Application of a Student with a Disability, Appeal No. 20-009; Application of a Student with a Disability, Appeal No. 20-008; Application of a Student with a Disability, Appeal No. 18-111).⁴

Here, despite the parent's contentions otherwise, there was adequate notice that the due process complaint notice could be dismissed with prejudice for failing to appear before the IHO during a scheduled appearance. As discussed above, the IHO's prehearing conference summary and order warned the parties that a party's failure to appear without contacting the IHO, and copying the other party, may result in a dismissal of the due process complaint notice with or without prejudice (IHO Ex. II at p. 4). Merely because the interim order did not specify that a dismissal would definitely occur, or that dismissal would undoubtedly be with prejudice, does not render the notice to be inadequate (see Application of a Student with a Disability, Appeal No. 24-353; Application of a Student with a Disability, Appeal No. 24-274). There is no explicit requirement that the IHO specify what type of dismissal may be forthcoming when the IHO is providing notice of such dismissal (see id.). The parent received notice of a potential dismissal, and the parent bore the risk of what type of dismissal or consequence that could be.

While the parent had adequate notice of a potential dismissal with prejudice, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti, 893 F. Supp. 2d at 293-94). Here, as the parent notes, despite not appearing for the impartial hearing on November 6, 2024 or communicating with the IHO and district, there is no indication that the parent and her representative were otherwise negligent in pursuing this matter, or in communicating with the IHO and the district. The parent's representative attended the prehearing conference on September 13, 2024 (see Sept. 13, 2024 Tr. pp. 1-9). While the parent's representative's reasoning behind missing the November 6, 2024 hearing due to a mistake in the representative's calendaring system is not a compelling reason to excuse a failure to appear, I nonetheless find that a dismissal with prejudice for a single nonappearance of fifteen minutes, without more, is neither a pattern of conduct (as it is a single instance), nor conduct so egregious, to warrant the extreme sanction of a dismissal with prejudice (see Application of a Student with a Disability, Appeal No. 24-014; see also Application of a Student with a Disability, Appeal No. 20-137; cf. Application of a Student with a Disability, Appeal No. 24-353).

However, the IHO would have been well within her right to dismiss the matter without prejudice (see Application of a Student with a Disability, Appeal No. 24-014). Thus, I decline to remand this matter, but I will modify the IHO's order to dismiss the due process complaint notice without prejudice. With that said, in the event the parent re-files a due process complaint notice in this matter, it would be within the IHO's discretion to consider the conduct of the parent through her representative in the present matter, and, if the parent or her representative engages in similar

⁴ 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]).

conduct in the future, the IHO could determine that the parent through her attorney was engaging in a pattern of conduct that would then warrant a dismissal with prejudice.⁵

While I find that the IHO erred in dismissing the due process complaint notice with prejudice under the current circumstances, I do note that this office has upheld such dismissals under similar circumstances where an attorney has repeatedly failed to appear due to alleged calendaring errors (see, e.g., Application of a Student with a Disability, Appeal No. 24-353). Additionally, a brief review of decisions issued by the Office of State Review shows that in at least one other matter, the parent's attorney failed to appear at a scheduled hearing resulting in a dismissal with prejudice (see Application of a Student with a Disability, Appeal No. 24-277). However, the circumstances in that matter appear to have been more egregious than the current matter as, in that matter, the attorney failed to appear for a scheduled hearing after having a request for an adjournment of that hearing denied and without any explanation for the failure to appear being provided, and, in this matter, accepting the parent's attorney's explanation for the failure to appear, his conduct appears to be attributable more to negligence than something that could be seen as intentional.

Nevertheless, although the IHO's decision in this matter will be modified to reflect a dismissal without prejudice, I note that an attorney has the responsibility to diligently calendar all relevant dates in a case, including hearing dates, and ensure attendance at all scheduled hearing dates or risk significant legal consequences for their clients, including potential dismissal of the case or other sanctions. Hearing officers are not provided the resources to chase down absent attorneys and, when setting clear, reasonable rules in prehearing orders regarding appearances and notification of absences, a hearing officer should expect the rules to be followed. If the rules are not followed, the parties, or their attorneys, should expect increasing consequences over time until corrective measures are taken, including dismissals with prejudice. I remind the parent's attorney of his duty to diligently calendar all relevant dates in a matter, and caution him, as well as those in his office, from engaging in similar practices in the future, which could result in significant consequences for his clients.

VI. Conclusion

Based on the foregoing, the IHO erred by dismissing the parent's July 15, 2024 due process complaint notice with prejudice.

I have considered the parties' remaining contentions and find that the necessary inquiry is at an end.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

⁵ If the IHO were to make such findings, it would be fitting for the IHO to include in the hearing record of such future matter documents supporting the pattern of conduct as, for example, IHO exhibits. Likewise, if the IHO issues any prehearing orders or directives that provide the parent's attorney warning of the likelihood of a dismissal with prejudice for nonappearance, the IHO should ensure that such notices are also included in the hearing record, as she did in this matter.

IT IS ORDERED that the IHO's decision, dated November 6, 2024, is modified to provide that the parent's July 15, 2024 due process complaint notice is dismissed without prejudice.

Dated: **Albany, New York**
 March 28, 2025

STEVEN KROLAK
STATE REVIEW OFFICER