The University of the State of New York

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

No. 25-511

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 Thomas W. MacLeod, 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 denied the parent's request for withdrawal of the due process complaint notice and denied, in part, the parent's request for relief. Respondent (the district) cross-appeals from that portion of the IHO's decision which awarded compensatory education services. The appeal must be sustained. The cross-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 underdeveloped state of the hearing record in the present matter, a full recitation of the facts relating to the student's educational history is not possible. However, given the limited scope of the issues raised on appeal, a detailed review of the student's educational history is not necessary, and this decision will instead primarily focus on a review of the procedural history in this matter.

A. Due Process Complaint Notice

In a due process complaint notice dated December 17, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (IHO Ex. I at pp. 3, 5).[1] The parent requested that the student receive the services set forth in an unappealed November 27, 2024 IHO decision as pendency (id. at p. 2). The parent further asserted that the district failed to recommend an appropriate program for the student because a May 20, 2020 CSE reduced the recommended services from 10 hours of special education itinerant teacher (SEIT) services per week to five periods of special education teacher support services (SETSS) per week (id. at pp. 2, 3).[2] The parent contended that "SETSS [wa]s a more limited service that d[id] not address the broader organizational, executive functioning, [and] social skills" that were needed to meet the student's needs (id.). The parent further asserted that because the district did not recommend "a proper placement," the parent was "left with no choice but to implement the SEIT program independently and seek reimbursement" (id.).

The parent requested an order finding that the district's failure to convene a timely CSE meeting for the 2024-25 school year and the recommendation for continuation of the student's SEIT program was a denial of a FAPE and further requested an order directing the district to fund the recommendations contained in the student's January 28, 2020 IEP, for the 2024-25 school year, at the providers' contracted rates (IHO Ex. I at p. 4). The parent also requested an order directing the district to "fund a bank of compensatory education equivalent to the missed services" at the providers' contract rates for any services that the student missed during the pendency of the proceeding (id.).

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[1] The parent's due process complaint notice is not paginated. For purposes of this decision, the pages will be cited by reference to their consecutive pagination with the first page as page one.

[2] State law defines SEIT services (or, as referenced in State regulation, "Special Education Itinerant Services" [SEIS]) as "an approved program provided by a certified special education teacher . . . , at a site . . . , including but not limited to an approved or licensed prekindergarten or head start program; the child's home; . . . or a child care location" (Educ. Law § 4410[1][k]; 8 NYCRR 200.16[i][3][ii]; see "[SEIS] for Preschool Children with Disabilities," Office of Special Educ. Field Advisory [Oct. 2015], available at https://www.nysed.gov/special-education/special-education-itinerant-services-preschool-children-disabilities). A list of New York State approved special education programs, including SEIS programs, can be accessed at https://www.nysed.gov/special-education/approved-preschool-special-education-programs. SEIT services are "for the purpose of providing specialized individual or group instruction and/or indirect services to preschool students with disabilities" (8 NYCRR 200.16[i][3][ii]; see Educ. Law § 4410[1][k]). SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

On January 16, 2025, the district filed a due process response, generally denying each allegation contained in the parent's due process complaint notice and asserting its intention to challenge the evidence presented by the parent and the appropriateness of the relief sought by the parent, and its intention to pursue all applicable defenses during the proceedings (Dist. Ex. 3 at pp. 2-3).

B. Events Post-Dating the Due Process Complaint Notice

On January 30, 2025, the parties were notified by email that an IHO from the Office of Administrative Trials and Hearings (OATH) had been appointed to hear the matter, and that an impartial hearing was scheduled for May 29, 2025 (IHO Ex. II at p. 3).[3] The January 30, 2025 email correspondence further indicated that additional hearing instructions and orders had been attached to the email and directed the parties to "carefully read the attached [o]rder" as the parties would be "strictly held to its provisions" (id. at p. 5).

On May 14, 2025, the district filed a motion to dismiss the parent's due process complaint notice for lack of subject matter jurisdiction (IHO Ex. VI).

On May 20, 2025, the parties were notified by email from OATH that another IHO (the IHO) had been appointed to hear the omnibus docket, to which this matter had been assigned (IHO Ex. II at p. 1). The May 20, 2025 OATH email correspondence further stated that the impartial hearing would be held on May 29, 2025 (id.).

By email dated May 21, 2025, parent's counsel requested an adjournment of the May 29, 2025 impartial hearing date (IHO Ex. IV at p. 1). Parent's counsel indicated that the parent's witness was not available "to call in for the hearing" (id.). In a response, dated May 22, 2025, the IHO denied the request for an adjournment and directed the parties to review the "attached Omnibus Part rules, item #1, stating no adjournments w[ould] be considered except in 'extraordinary circumstances'" (id.). The IHO "further directed the parties to review the requirements for requesting an adjournment and stated that the impartial hearing would proceed on May 29, 2025 (id.).

C. Impartial Hearing Officer Decision

The parties convened on May 29, 2025 for an impartial hearing, which "concluded on the same day (Tr. pp. 1-15). During the hearing, the IHO indicated that the parties held "a brief off the record discussion" indicating that "the parent had a request" (Tr. p. 4). Counsel for the parent then requested that pendency be handled "before the hearing proper begins" and further requested an adjournment of the matter (id.). Counsel for the parent continued expressing that if the adjournment is denied, the parent requested "to withdraw without prejudice" (Tr. p. 5). In response, the district requested to "move forward today with the hearing" (Tr. p. 6). The IHO then indicated that "to avoid any issues with respect to withdrawal with or without prejudice . . . [he] would like to just go on the record today and do the hearing" (Tr. p. 7). The parent then renewed the request "to withdraw without prejudice, before we officially start the hearing today" (Tr. p. 8).

[3] IHO Exhibits II and IV are not paginated. For purposes of this decision, the pages of the exhibits will be cited by reference to their consecutive pagination with the first page as page one.

The IHO denied that request, indicating that the parent "could have disclosed even if you had sought to withdraw, but I did not receive any documents, so we're going to move forward" (id.).

In a decision dated July 8, 2025, the IHO denied the district's motion to dismiss for lack of subject matter jurisdiction (IHO Decision at pp. 3-4). The IHO found that previous SRO decisions had repeatedly concluded that students authorized to receive dual enrollment special education services in private placements under Education Law § 3602-c are entitled to the same protections and due process procedures as students in full-time public school as set forth in Education Law § 4404 (id.).

The IHO then turned to the parent's counsel's May 21, 2025 request to adjourn the impartial hearing to a later date (IHO Decision at p. 4). The IHO noted that a January 30, 2025 email correspondence from OATH advised the parties that hearing instructions and orders had been attached to that email, that the parties were to carefully read "the attached [o]rder," and that the parties would be "strictly held to its provisions" (id.). The IHO surmised that the hearing instructions and orders referenced in the email from OATH was the Omnibus Part Standing Order (id.)." The IHO further reiterated that he denied the parent's counsel's request for an adjournment due to the parent's counsel's failure to provide any information relating to why the parent's witness was not available, failure to describe any extraordinary circumstances in the adjournment request, and failure to provide an affidavit of unavailability, "as [was] required by the Omnibus Part Standing Order" (id.). The IHO also noted that the parent did not disclose any documentary evidence prior to or during the impartial hearing (id.).

The IHO discussed the sufficiency of the parent's due process complaint notice and stated that although it generally lacked clarity and failed to allege that the district did not implement the services recommended in a January 2020 IEP and a May 2020 IESP, it sufficiently described the parent's difficulties in locating providers to implement the May 2020 IESP (id. at pp. 5-6). The IHO also noted that the due process complaint notice challenged the appropriateness of the recommendations set forth in the May 2020 IESP (id. at p. 6). Notwithstanding the lack of clarity, the IHO found that the district "appeared to understand [the p]arent's position as one arguing that [the d]istrict failed to implement [the s]tudent's May 2020 IESP" (id.). Next, the IHO noted that the district offered a due process response and May 2020 IESP into evidence and that neither document "effectively refute[d the p]arent's assertion" that the district failed to implement the May 2020 IESP (id.). For those reasons, the IHO found that the district failed to meet its burden and failed to "provide" the student with a FAPE on an equitable basis for the 2024-25 school year (id.). Next, the IHO determined that the CSE failed to convene and recommend a program for the 2024-25 school year, the IHO further found that the district did not contest the parent's allegation that the CSE had not convened since 2020 and as a result, the IHO found that the student was denied a FAPE on that ground as well (id. at p. 7).

Turning to the parent's requested relief, "the IHO again noted that the parent's due process complaint notice was unclear (IHO Decision at p. 7). The IHO observed that the parent's due process complaint notice made several references to a service provider without identifying a specific provider, did not detail what specific services the student missed, and did not specify a desired hourly rate for compensatory services (id.). The IHO also found that the parent did not clarify the requested relief at the hearing, and only requested a bank of compensatory services for services that were not delivered (id.). The IHO interpreted the parent's claim to mean that the

student did not receive services during the 2024-25 school year, and was requesting funding of the services recommended in the January 2020 IEP or the unappealed November 27, 2024 IHO Decision (id.).

Having considered the above, the IHO noted that IHO's hold broad discretion in ordering equitable relief and, in an exercise of that discretion, attempted to craft an appropriate equitable remedy (IHO Decision at pp. 7-8). The IHO found that the May 2020 IESP was the more appropriate basis for an award, rather than the January 2020 IEP (id.). The IHO asserted that the parent had provided no evidence to establish why the more recent May 8, 2020 IESP, which called for SETSS instead of group SEIT services should not govern (id.). The IHO was "not persuaded" by the parent's position that SETSS were a more limited service than a SEIT program, and found no basis to find that SETSS would be unable to address the student's needs if designed appropriately (id.). Instead, the IHO found that the May 8, 2020 IESP was created more recently, was based on more recent information, and was, therefore, more likely to contain appropriate educational service recommendations for the student than the January 2020 IEP (id.).[4]

The IHO then found that the student's entitlement to services began on September 5, 2024, based on the first day of the district's 10-month school year (IHO Decision at p. 9). The IHO found that a compensatory award of the services recommended in the May 2020 IESP at a "reasonable market rate" was appropriate, and that an expiration date of three years was appropriate for that award (id.).[5] Based on the foregoing, the IHO ordered the district to fund a compensatory bank of up to five hours per week of SETSS services, one hour per week of speech-language therapy services, and one hour per week of physical therapy (PT) services, to cover the services missed from September 5, 2024 through the end of the 10-month 2024-25 school year (id. at p. 10). The IHO ordered that these services be provided by a qualified provider chosen by the parent, reimbursed at a reasonable rate consistent with the rates paid by the district in the then-past six months, to be fully used by the student by June 30, 2028, with payment to be made within 35 days of the parent's submission to the district of the provider's invoices for those services (id.).

Lastly, the IHO addressed the conduct of the hearing as an equitable consideration, expressing "grave concern" regarding the conduct of the parent's counsel and the law firm, noting that the parent's counsel did not follow OATH's Omnibus Part Rules regarding adjournments (IHO Decision at p. 9). The IHO also faulted the parent's counsel for failing to comply with the requirement to disclose the parent's proposed exhibits, written opening statement, and witness list five days before the scheduled impartial hearing date (id. at pp. 9-10). The IHO specifically noted the parent's counsel's failure to disclose any documents, followed by a second request for "an adjournment on the record again, even after [the] IHO had already denied the request via email" and a subsequent request "to withdraw the case without prejudice, which was also denied" (id. at p. 9). The IHO stated that "[w]hile the reasons for [the p]arent's actions [we]re unclear, [he was] concerned that [the p]arent counsel's firm may have chosen intentionally not to disclose documents

[4] The IHO additionally noted that neither the district nor the parent disclosed a copy of the January 2020 IEP into the record, so the hearing record lacked the additional information and context from that IEP, which the IHO noted would have been relevant to determining if those services remained appropriate (IHO Decision at p. 8).

[5] The IHO was not persuaded by the district's arguments seeking a reduction in rate, noting that they did not provide a specific alternative amount (IHO Decision at p. 9).

and to use this intentional non-disclosure as a basis for requested adjournment, after the initial request had been denied" (id.). Although the IHO characterized the parent's counsel's actions as "regrettable," he declined to reduce the parent's award on those grounds (id. at p. 10).

IV. Appeal for State-Level Review

The parent appeals and alleges that the IHO erred in preventing her from withdrawing her due process complaint notice without prejudice before the start of the hearing.[6] The parent argues that pursuant to State regulation, an IHO has no discretion to deny a timely prehearing request to withdraw a due process complaint without prejudice. Accordingly, the parent asserts that the IHO's denial of the parent's request to withdraw was legal error, and that her due process complaint notice should have been dismissed without prejudice. As relief, the parent requests that her claims be dismissed without prejudice.[7]

In an answer with cross-appeal, the district responds to the parent's claims with general denials and argues that the IHO reasonably declined the parent's request to withdraw the due process complaint notice without prejudice. The district contends that the impartial hearing had already begun at the time the parent made her request to withdraw, and that the IHO properly exercised his authority over the conduct of the impartial hearing. The district also asserts that the parent has not appealed the IHO's refusal to grant an adjournment and thus, the parent has abandoned this claim. For its cross-appeal, the district alleges that the IHO's awarded relief was unsupported by the hearing record. As relief, the district requests that the IHO's decision be vacated and that the parent's appeal be dismissed.

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]).

[6] The parent filed an amended request for review in this matter after the initial request for review was rejected due to a lack of verification. Counsel for the parent is warned that although the parent in this matter was permitted to amend the request for review with a proper verification, future filings that are not in compliance with the practice regulations, including filings that are missing required documentation, such as a verification, may be dismissed without offering leave to amend (see 8 NYCRR 279.4-279.8).

[7] Although the IHO issued a final decision addressing the parent's claims set forth in her due process complaint notice and awarded specific relief, the parent has not challenged any aspect of the IHO's decision. The parent's appeal is limited to challenging the IHO's denial of her request to withdraw her due process complaint notice without prejudice.

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]).[8] "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.).[9] 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--Withdrawal

The parent asserts that the IHO erred in preventing her from withdrawing her due process complaint notice without prejudice before the start of the hearing. Specifically, the parent contends that the IHO lacked discretion to deny a timely prehearing request to withdraw a due process complaint notice without prejudice. The district argues that the IHO reasonably declined the

[8] 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]).

[9] 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.

parent's request to withdraw. The district further asserts that the impartial hearing had already begun at the time the parent made her request to withdraw, and that the IHO properly exercised his authority over the conduct of the impartial hearing.

According to the hearing record and, as described above, the parent first requested an adjournment of the May 29, 2025 impartial hearing date via email dated May 21, 2025 (IHO Ex. IV at p. 1). The parent indicated that the parent's witness was not available "to call in for the hearing" (id.). In a response dated May 22, 2025, the IHO denied the request for an adjournment and directed the parties to review the "attached Omnibus Part rules, item #1, stating no adjournments w[ould] be considered except in 'extraordinary circumstances'" (id.). The IHO further directed the parties to review the requirements for requesting an adjournment and stated that the impartial hearing would proceed on May 29, 2025 (id.).

The parties convened before the IHO on May 29, 2025, and according to the transcript of the proceedings, the IHO indicated that a brief discussion had occurred off the record, and once transcription commenced, the IHO asked counsel for the parent to restate her request on the record (Tr. p. 4). Counsel for the parent requested that the IHO address pendency "before the hearing proper" began (id.). Parent's counsel stated the basis for the pendency request and then stated "[a]dditionally, [the] parent does request an adjournment of this matter. We have been unable to obtain an affidavit of unavailability, but if, if granted leave to obtain that, we would. And this is pursuant to the standing order of rules" (Tr. pp. 4-5). Counsel for the parent further stated, "[i]f our adjournment request is denied here today, then we would request to withdraw without prejudice" (Tr. p. 5). The district requested that the impartial hearing proceed, and the IHO denied the parent's requests (Tr. pp. 5-6). With regard to the parent's request to withdraw the due process complaint notice without prejudice, the IHO stated, "[a]nd to avoid any issues with respect to withdrawal with or without prejudice" that he "would like to just go on the record today and do the hearing," that he understood " may not be ideal," however he thought "for the cleanliness of the record, that [wa]s the best way to proceed" (Tr. p. 7).

Following a discussion of the district's motion to dismiss, the parent stated that she "underst[oo]d that [the] IHO … want[ed] to proceed today, but parent ha[d] not submitted any evidence. And so, we would be unable to proceed today, as we have not submitted anything in order to proceed" (Tr. p. 8). The IHO stated that he understood and reminded the parent of the Standing Part Rules (id.). In response, the parent stated, "[c]orrect. So, then we would just simply request to withdraw without prejudice, before we officially start the hearing today" (id.). The IHO responded that he was "going to deny that request," and stated that the parent had received notice in January that the impartial hearing was scheduled for May 29, 2025 (id.). The IHO also noted that the parent "could have disclosed even if [the parent] had sought to withdraw," but the IHO "did not receive any documents, so we're going to move forward" (id.). The IHO then admitted the district's evidence into the hearing record, the parties waived opening statements, no witnesses were called, both parties provided closing statements, and the impartial hearing ended (Tr. pp.8-15). The IHO issued a decision on the merits on July 8, 2025 (IHO Decision at pp. 1-15).

Here, the IHO erred in refusing to grant the parent's request to withdraw her due process complaint notice without prejudice. Specifically, 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]). If a party withdraws the due process complaint notice prior to the first date of an impartial

hearing—meaning the first date the evidentiary hearing is held after the initial prehearing conference if one is conducted—the withdrawal shall be without prejudice unless the parties otherwise agree (8 NYCRR 200.5[j][6][i]). After 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" (8 NYCRR 200.5[j][6][ii]). The IHO's written decision that such withdrawal shall be "with or without prejudice" is binding upon the parties unless appealed to an SRO (8 NYCRR 200.5[j][6][ii]). Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial hearing officer, 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]).

Review of the hearing record indicates that the parent made "a request" in an off-the-record discussion prior to the start of the impartial hearing on May 29, 2025 (Tr. p. 4). It is unclear if the entirety of the on-the-record statement made by parent's counsel—which included a request for pendency, a request for an adjournment, and a request to withdraw in the alternative—was also made during the off-the-record discussion and thus, prior to the commencement of the impartial hearing. If the parent made the request to withdraw prior to the start of the impartial hearing, the parent should have been permitted to withdraw the due process complaint notice without prejudice (8 NYCRR 200.5[j][6][i]). Even if the parent did not request withdrawal prior to the commencement of the impartial hearing, the IHO should have issued an order of termination and determined whether or not to issue the order of termination with or without prejudice following a "request of the other party and upon notice and an opportunity for the parties to be heard" (8 NYCRR 200.5[j][6][ii]).

While it is unclear whether the parent's withdrawal occurred prior to the commencement of the impartial hearing, which would have required the IHO to permit the parent to withdraw without prejudice (8 NYCRR 200.5[j][6][i]), the IHO nevertheless erred in failing to issue an order of termination as State regulation provides that upon a request for withdrawal an IHO "shall issue an order of termination" (8 NYCRR 200.5[j][6][ii]). At that point the IHO could have attempted to clarify the parent's request for withdrawal, in that instead of agreeing with the district's position that the hearing should go forward, the IHO may have attempted to have the parties' state their positions regarding a withdrawal, and then, if the parent were faced with the possibility of the withdrawal being with prejudice the parent may have been permitted to withdraw her request for a withdrawal. However, as that did not happen, the parties' positions regarding the parent's request for a withdrawal in this matter are not clear. Pertinent to this matter, a withdrawal shall be presumed to be without prejudice, except when the other party requests that it be with prejudice and the IHO provides an opportunity for the parties to be heard (8 NYCRR 200.5[j][6][ii]).

Simply put, the IHO erred in not issuing an order of termination and in further compounding this error by conducting an impartial hearing on the merits of the parent's claims over the parent's objections and in issuing a decision without an adequately developed hearing record. As the IHO erred in failing to issue an order of termination and as the district did not request that the order of termination be issued with prejudice during the hearing, the parent's appeal must be granted, the IHO's decision vacated, and the matter terminated without prejudice to refile.

VII. Conclusion

Based on the foregoing, the IHO erred by failing to issue an order of termination dismissing the parent's due process complaint notice without prejudice.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated July 8, 2025, is vacated; and

IT IS FURTHER ORDERED that the parent's December 17, 2024 due process complaint notice is deemed withdrawn without prejudice.

Dated: **Albany, New York**
November 14, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER