



The University of the State of New York

The State Education Department

State Review Officer

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No. 23-282

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 Brian J. Reimels, 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 withdrew the parent's consolidated due process complaint notices regarding her daughter's educational programs for the 2022-23 and 2023-24 school years with prejudice. The appeal must be sustained.

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, 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 the matter was marked as withdrawn with prejudice and with no record development, including no testimony taken or exhibits entered into evidence—the description of the facts and educational history of the student in this matter is limited to the procedural history, including the

parent's filing of two due process complaint notices, the IHO's consolidation of the two due process complaint notices, and the IHO's determination to withdraw the matter with prejudice.¹

In a due process complaint notice dated August 23, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Due Process Compl. Not. at p. 2). According to the parent, a CSE found the student eligible for special education services as a student with a speech or language impairment and developed an IESP for the student on March 24, 2023, which recommended five periods per week of special education teacher support services (SETSS) and two 30-minute sessions per week of speech-language therapy (*id.* at pp. 1-2).² For the 2022-23 school year, the parent unilaterally placed the student in a nonpublic school (*id.* at p. 1). The parent asserted that she was unable to locate SETSS and related services providers and that the district failed to implement its own recommendations or provide a placement thereby denying the student a FAPE (*id.* at p. 2). Among other relief, the parent sought a finding that the district failed to offer the student a FAPE for the 2022-23 school year and an order that the district fund a bank of compensatory periods of SETSS and related services for the 2022-23 school year or the parts of which the student did not receive services (*id.*).

In a second due process complaint notice dated September 7, 2023, the parent alleged that the district failed to implement the student's March 24, 2023 IESP and requested an order of pendency (see Order on Consolidation at pp. 3-4).³ The parent repeated many of the same allegations that were raised in her August 23, 2023 due process complaint notice, including that she has been unable to locate SETSS and related service providers for the student (*id.* at p. 4). As relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2023-24 school year, along with an order that the district fund the providers located by the parent for the 2023-24 school year at a reasonable market rate and an order that the district fund a bank of compensatory periods of SETSS for the 2023-24 school year or the parts of which the student did not receive services (*id.* at p. 5).

The matter came before an IHO appointed by the Office of Administrative Trials and Hearings (OATH). In an interim decision dated September 22, 2023, an IHO determined that it was in the interests of judicial economy to consolidate the parent's August 23, 2023 due process

¹ No impartial hearing was held in this matter and therefore no exhibits were entered into evidence. As part of the hearing record submitted on appeal, the district included the parent's August 23, 2023 due process complaint notice as required by State regulation (8 NYCRR 200.5[j][5][vi][a]; 279.9[a]) and further provided five district exhibits that it disclosed to the parent and IHO (see Dist. Exs. 1-5). These five district exhibits have not been considered on appeal.

² The parent's August 23, 2023 due process complaint notice appears to contain typographical errors, referring to the March 24, 2023 CSE meeting as an "IEP" meeting in two instances instead of an "IESP" meeting as it otherwise was referred to in the due process complaint notice and which is consistent with the IESP that the district disclosed to the parent (see Due Process Compl. Not. at p. 2; Dist. Ex. 2).

³ The parent's September 7, 2023 due process complaint notice is attached to the IHO's September 22, 2023 Order on Consolidation. The September 7, 2023 due process complaint notice appears to contain some typographical errors, referring to the March 24, 2023 CSE meeting as an "IEP" meeting instead of an "IESP" meeting as it otherwise was referred to in the due process complaint notice and which is consistent with the IESP that the district disclosed to the parent (see Order on Consolidation at p. 4; Dist. Ex. 2).

complaint notice with the parent's September 7, 2023 due process complaint notice (IHO Interim Decision). After consolidation, a prehearing conference was held on September 28, 2023 (Tr. p. 1). The parent did not attend the prehearing conference (Tr. pp. 1, 4). The IHO directed the parties to submit their disclosures of evidence by October 27, 2023 and be prepared to present their cases on the merits at the next scheduled hearing date, November 3, 2023 (Tr. pp. 4-5).⁴

An impartial hearing was conducted on November 3, 2023, for which the parent's attorney appeared late (Tr. pp. 7-10). At the onset of the hearing, the IHO noted that she had confirmed with the parties the November 3, 2023 hearing date and that she had accommodated the parent's request to schedule the hearing in the morning (Tr. pp. 8-9). The IHO also noted that she had reminded the parties of the disclosure deadlines and that the IHO had received the district's disclosure of evidence, but had not received any disclosures from the parent (Tr. pp. 8-10). The district confirmed that it had not received any disclosure of evidence from the parent, and then made a motion to dismiss the consolidated matter on the ground that the parent had failed to prosecute the case (Tr. p. 9). As the IHO was orally reciting her intention to grant the district's motion to dismiss, the parent's attorney appeared at the hearing and immediately requested that the consolidated matter be withdrawn (Tr. p. 10). The district consented to the parent's request to withdraw the matter so long as the withdrawal be with prejudice, arguing that the parties were scheduled to present their respective cases on the merits (Tr. p. 11). The parent requested that the case be withdrawn without prejudice, explaining that the parent was not prepared to proceed and dismissing a case with prejudice should not be done "because the parent failed to appear once or twice" (Tr. pp. 11-12). The IHO declared: "I am dismissing the matter with prejudice, and I'll send an order to the parties. Okay? And I'm sorry, I'm withdrawing it as per your request" (Tr. p. 12).

By email to the IHO dated November 6, 2023, the parent's attorney advised that she was retracting her request to withdraw the consolidated cases, stating that she never requested that it be withdrawn with prejudice, which causes "severe" harm to the student (Nov. 6, 2023 email at p. 4). The parent requested that the IHO issue a pendency order and adjourn the hearing to a future date when the parent is prepared to proceed (*id.*). The IHO responded on the same day via email that the matter would remain withdrawn with prejudice (*id.* at p. 2). As explained by the IHO, the parent's attorney did not appear at the September 28, 2023 prehearing conference; the parent's attorney did not disclose any evidence as required and directed to by the IHO; and the parent's attorney confirmed that she was available on November 3, 2023 for the impartial hearing but appeared late after the IHO had already granted the district's motion to dismiss for failure to prosecute (*id.*). The IHO granted the parent's request to withdraw the matter but advised it would be with prejudice because the district was present and prepared to move forward with the impartial hearing and the parent's attorney "made no effort to appear on this matter" (*id.*).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred in withdrawing the matter with prejudice contrary to the parent's request. The parent contends that she had no opportunity to be heard and withdrawing with prejudice is in contravention of State regulations because the IHO did not issue

⁴ The IHO indicated that she would send a copy of the transcript of the prehearing conference to both parties so that they were aware of the next hearing date and expectations (Tr. pp. 4-5).

a written decision or termination order. The parent argues that the IHO orally stated on the record that she was withdrawing the matter as per the parent's request. The parent further asserts that the student has been harmed by the withdrawal with prejudice because she has not received her mandated services. The parent requests that the matter be deemed as withdrawn without prejudice.

In its answer, the district asserts that the IHO acted within her discretion when she dismissed the parent's complaints for failure to prosecute. The district also argues that it was proper for the IHO to withdraw the matter with prejudice because the hearing had already commenced, the district had made a motion to dismiss, and the district had timely disclosed evidence to the parent. According to the district, this is not a case where the parent's attorney was "caught off guard" as she was aware of the nature of the hearing date and agreed to the hearing date. The district further asserts that the parent had an opportunity to be heard because the IHO allowed the parties to argue their respective positions of whether the parent's withdrawal of the matter should be with or without prejudice. Finally, the district argues that any "ambiguity" with the IHO's oral ruling at the November 3, 2023 hearing or "imperfections with the IHO's handling of the matter" should be excused as the IHO provided a written clarification and explanation as to why the withdrawal was with prejudice in an email to the parties dated November 6, 2023. The district requests that the parent's appeal be dismissed and that an SRO uphold the IHO's order dismissing the matter with prejudice.

In a reply, the parent argues that the district improperly conflates dismissal with a withdrawal request; admits that she was never "caught off guard" but needed additional time to prepare for the hearing; and that the IHO's oral ruling at the November 3, 2023 hearing was ambiguous. The parent emphasizes that the IHO never issued a written decision or termination order as required by State regulations. Lastly, the parent asserts harm to the student if the matter is withdrawn with prejudice.

V. Discussion

The crux of the parties' dispute is whether the case should be withdrawn with or without 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 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" (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]).⁵ Lastly, State regulations provide that nothing in the withdrawal section shall "preclude an impartial hearing officer, in his or her

⁵ If a party "subsequently files a due process complaint notice within one year of the withdrawal of the complaint that is based on or includes the same or substantially similar claims as made in a prior due process complaint notice that was previously withdrawn by the party," the district shall appoint the same IHO who was appointed to the "prior complaint unless that [IHO] is no longer available to hear the re-filed due process complaint" (8 NYCRR 200.5[j][6][iv]).

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]).

Upon my independent review of the parties' arguments and the procedural posture of this matter, I find that the IHO erred in failing to issue a written termination order or final decision as required by State regulations. Here, the transcript of the November 3, 2023 hearing indicates that upon the parent's belated appearance, she immediately asked that the matter be withdrawn without prejudice (Tr. p. 10). The IHO allowed both parties an opportunity to be heard on whether the withdrawal should be with or without prejudice (Tr. pp. 11-12). The IHO then issued an oral ruling on the record that she was "dismissing the matter with prejudice, and I'll send an order to the parties. Okay? And I'm sorry, I'm withdrawing it as per your request" (Tr. p. 12). In an email dated November 6, 2023 to the IHO, the parent sought to revoke her request to withdraw the matter.⁶ The IHO responded via email that the matter would remain withdrawn with prejudice.

Although the IHO rendered an oral decision at the November 3, 2023 hearing and subsequently sent an email dated November 6, 2023, the IHO failed to issue a termination order or written decision as required by State regulations (8 NYCRR 200.5[j][6][ii]). Upon the parent requesting to withdraw the matter, it was incumbent upon the IHO to issue a written decision or termination order so the parties could clearly understand the IHO's final ruling and rationale on whether the case was being withdrawn with or without prejudice. In this case, it is undisputed that the IHO never issued a written decision or termination order—the IHO subsequently admitted in an email dated December 21, 2023 to the district's personnel staff in the impartial hearing office and appeals unit that she did not issue a written order because she thought the transcript was sufficient.⁷ However, the IHO's November 3, 2023 oral ruling illustrates the ambiguity and confusion that can result from oral rulings that are not memorialized into a written decision, particularly in this instance when the IHO indicated to the parties on the record that she would transmit a written order to the parties and then failed to do so (see Tr. p. 12).

Moreover, the IHO's November 6, 2023 email to the parties does not satisfy the requirement for a written decision as to hold otherwise and allow email correspondence to constitute a final written decision would lead to confusion and violate federal and State regulations requiring an IHO to issue final written decisions (see 34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). Further, while State regulations allow a party requesting a hearing to withdraw the due process complaint notice, an IHO lacks the unilateral ability to do so, but may dismiss a due process complaint notice under appropriate circumstances. Nevertheless, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub.

⁶ As the IHO expressed in this matter, I am troubled by the parent's failure to appear at the prehearing conference, her belated appearance at the impartial hearing, and her failure to disclose any evidence or demonstrate any indication that she was ready to proceed with the impartial hearing. Upon realizing that the IHO was inclined require the withdrawal the matter with prejudice, the parent sought by email dated November 6, 2023 to retract her request to withdraw the matter and instead requested a pendency order. The IDEA due process procedures should not be misused as a mechanism to seek to prolong pendency while evading a hearing on the merits and final disposition.

⁷ The latter portions of the email thread resulted from an inquiry by staff of the Office of State Review on December 15, 2023 regarding the hearing transcript and the lack of a written order as part of district's submission of the hearing record.

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). Here, although the district made a motion to dismiss for failure to prosecute (Tr. pp. 9-10), there is no written decision by the IHO dismissing the consolidated matter and explaining the rationale and grounds for dismissal. The IHO's November 6, 2023 email stated the matter remained "withdrawn with prejudice," but the parties did not agree that the matter was withdrawn with prejudice, and the IHO did not issue a termination order. To the extent that the IHO indicated that she was withdrawing the matter with prejudice, the right to withdraw belongs to the party presenting the due process complaint notice, not the IHO. Accordingly, the IHO herself lacked the authority to "withdraw" a due process complaint notice and an email fails to meet the requirement for a written decision or a termination order. For the forgoing reasons, where there is no written decision or termination order and only ambiguous oral rulings, the matter cannot be marked as withdrawn with prejudice. Because the parent withdrew the case on the record, remand is not appropriate and the only remaining recourse is to hold that the matter was withdrawn without prejudice as contemplated by State regulations.

VI. Conclusion

Having determined that the IHO erred by failing to issue a written decision or termination order as required by State regulations, I find that the matter was withdrawn without prejudice.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the district shall mark the consolidated matter consisting of the parent's August 23, 2023 due process complaint and September 7, 2023 due process complaint as withdrawn without prejudice.

**Dated: Albany, New York
February 12, 2024**

**JUSTYN P. BATES
STATE REVIEW OFFICER**