The University of the State of New York

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

No. 24-108

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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Carey Cummings, 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 her request that respondent (the district) fund the unilaterally obtained services delivered to her son for the 2023-24 school year. The appeal must be sustained and the matter remanded for further proceedings.

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, 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

The hearing record is sparse with regard to the student's educational history, but given the limited issues to be resolved on appeal, a complete recitation, even if available, is unwarranted. A prior written notice dated September 23, 2022 indicated that a CSE convened on September 15, 2022, determined that the student, who was eight years old at the time of the meeting, was initially eligible for special education services as a student with a speech or language impairment, and

developed an IESP (Dist. Ex. 1 at pp. 1, 2).[1] The prior written notice stated that the student was parentally placed in a nonpublic school and that the CSE recommended that he receive special education teacher support services (SETSS) and individual speech-language therapy (id. at p. 1). The notice indicated that the CSE reviewed: a June 21, 2022 social history, a July 6, 2022 psychoeducational assessment, a July 8, 2022 speech-language assessment, a July 26, 2022 classroom observation, and a September 24, 2022 teacher report (id. at p. 2). According to the notice, the CSE considered a general education placement and integrated co-teaching services, but found that the student "require[d] the support of [SETSS], [s]peech [l]anguage [t]herapy and specially designed instruction to promote involvement and progression in the general education curriculum" (id.). Further, the notice indicated that the student's "reading, writing, and math delays interfere[d] with the ability to decode text, compose text, and solve computations in an age-appropriate manner" (id.). Additionally, the notice also stated that the student presented "with a moderate receptive/expressive language delay" (id.).

By due process complaint notice dated September 7, 2023, the parent asserted that the district failed to implement the student's September 2022 IESP, resulting in a denial of a free appropriate public education (FAPE) for the 2023-24 school year (Sept. 7, 2023 Due Proc. Compl. Not. at pp. 1-2).[2] Initially, the parent requested pendency, pursuant to the September 2022 IESP, consisting of three periods per week of direct group SETSS in Yiddish and two 30-minute sessions per week of individual speech-language therapy in Yiddish (id. at p. 2).[3] The parent contended that without supports, the parental "mainstream placement [wa]s untenable," and that she was unable to find a SETSS and related service provider for that school year via the district's online resources; however, she located a provider independently for the 2023-24 school year at the providers' prevailing rate (id.). As relief, the parent requested: a finding that the district's failure to implement the student's IESP resulted in a denial of a FAPE for the 2023-24 school year; an order that the district fund the providers located by the parent for the 2023-24 school year at their prevailing rate; and an order that the district fund a bank of compensatory periods of SETSS and related services for the entire 2023-24 school year, or the parts of which were not serviced (id.).

The IHO emailed the parties on November 9, 2023 indicating that she was scheduling an omnibus hearing for cases including this matter, for December 28, 2023, and that the date for the hearing was a firm date (IHO Ex. I at p. 4). On December 22, 2023, the parent's representative emailed the IHO and district to withdraw several cases which had been scheduled for the omnibus hearing, and to inform the district that the parent would be ready to proceed on the remaining cases; however, the email was cut off and the remaining cases were not listed (id. at p. 6). On December 28, 2023, at 10:21 a.m. the district's attorney emailed the IHO and parent to indicate that she was "having some IT issues" and requested time to troubleshoot (id.). At 10:29 a.m., the

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 8 NYCRR 200.1[zz][11]).

[2] The due process complaint notice was not entered into the impartial hearing record given the limited nature of the hearing but was submitted to the Office of State Review on appeal (see Tr. pp. 1-17; IHO Ex. I; Dist. Ex. 1).

[3] Attached to the due process complaint notice was a pendency program form (Sept. 7, 2023 Due Proc. Compl. Not. at pp. 4-5).

IHO emailed the parties to notify them that this matter would be the first case called at 11 a.m. (id.).

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on December 28, 2023 at 11:07 a.m. (Tr. p. 1). After the IHO and counsel for the parties introduced themselves, the IHO confirmed that the parties had received each other's disclosures (Tr. pp. 3-4). Next, the IHO stated that "the invite sent out for this matter was from 10:30 a.m. to 5 p.m.," and that she had "made it very clear that all parties should be ready to proceed with any of the cases that we are going forward with" (Tr. p. 5). The representative for the parent confirmed to the IHO that the parent was not available at that time, and the IHO stated that she would not accept the parent's affidavit "given the fact that she [wa]s not present for cross-examination purposes" (Tr. p. 6). At that point, the parent's representative stated that she did not want to proceed with the hearing without the parent and requested to withdraw the case without prejudice (id.). The IHO advised that the request to withdraw was "too late" as the due process hearing had already begun (id.). The parent's representative explained that she was not "aware that these cases were scheduled for specific times," and that she did not "receive an email that said the specific times for each case, so [she] did not realize that it had to be at certain times" (id.). The IHO responded that the "invite for this matter" provided a time, between 10:30 a.m. and 5 p.m., and that parent's counsel "should [have] be[en] ready to proceed with any of those cases that were on the list at any of those times" (Tr. p. 7). The IHO denied the request for the parent to withdraw the case, but gave the parent's representative "a five-minute recess to call your client to see" if the parent could appear, advising that if not, the IHO would proceed with the hearing (Tr. p. 8). The parent's representative agreed and the IHO confirmed that the hearing was adjourning at 11:13 a.m. and would resume at 11:18 a.m. (Tr. p. 9).

At 11:19 a.m., the IHO and the district's attorney went back on the record, and the parent's representative did not appear (Tr. p. 9). The IHO admitted one of the district's exhibits into the hearing record and the district's attorney made an opening statement (Tr. pp. 9-13). At 11:23 a.m., the IHO observed that the parent's representative had not returned to the hearing, nor had the IHO received an email indicating that she was having difficulty logging back into the hearing (Tr. p. 13). As such, the IHO determined to "proceed accordingly," the district made a closing statement and requested an extension of the compliance date which the IHO granted, and the hearing adjourned at 11:29 a.m. (Tr. pp. 13-17).

In a decision dated February 21, 2024, the IHO found that the district failed to provide the student a FAPE for the 2023-24 school year (IHO Decision at pp. 5, 7). The IHO then determined that the parent failed to meet her burden to show that the unilaterally-obtained services were appropriate for the student as there was no testimonial or documentary evidence in the hearing record on the issue (id. at p. 6). The IHO noted that the hearing record was devoid of this information despite parent's advocate knowing that the hearing had commenced (id. at pp. 6-7). The IHO further noted that the parent's advocate was present for the start of the hearing, but did not return after a recess in the proceeding (id. at p. 6).

IV. Appeal for State-Level Review

The parent appeals. The parent argues that it was an unreasonable abuse of discretion for the IHO to refuse to hear the case at a different time. The parent contends that it was unreasonable

to expect the parent to be available for six and half hours to testify by video and that this was a violation of due process. She contends that a twenty-minute grace period should have been given for appearances. Further, the IHO's insistence that the matter could only be heard at 11 am was unduly burdensome. The parent argues that this is the first IHO to enforce such harsh scheduling practices for omnibus hearings. Moreover, the parent notes that there were technical difficulties during this hearing and that those difficulties should not deprive students of their due process rights. The IHO had the discretion to move the hearing, and the parent asserts that her counsel does not have access to the Impartial Hearing System. Despite the IHO's claim/belief, the parent's counsel had no way of knowing what time the case was scheduled for. The parent contends that it was an abuse of discretion for the IHO to refuse to consider an adjournment and proceed with the impartial hearing without the parent or parent's counsel present. The parent argues that adjournment would have benefited the student's educational interests as it would have allowed the parent to be present.

The parent asserts that the IHO's refusal to consider a withdrawal or dismissal without prejudice was unreasonable and an abuse of discretion. The parent contends that the IHO knew prior to the commencement of the hearing that the parent was not available based on off-the-record discussions. Moreover, placing names on the record should not constitute the commencement of a proceeding. Even if the hearing had commenced, the parent asserts that she should have been able to withdraw without prejudice based on the circumstances.

In its answer, the district contends that the parent did not explicitly appeal the IHO's finding that she did not meet her burden of proving that the unilaterally-obtained services were appropriate. The district argues that the IHO's finding should be found as final and binding. The district asserts that IHOs are granted broad discretion on how to conduct the impartial hearing and it was not an abuse of discretion for the IHO to continue the hearing despite the parent's unavailability. The district notes that the parent's counsel still has not provided a reason as to why she did not return after the recess. Lastly, the district argues that the hearing had commenced as both sides had made disclosures and were present at the start of the hearing. The district contends that the IHO's refusal to continue the case was proper.[4]

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

[4] I note that the individual who appeared on behalf of the parent is variously referred to as either a "parent advocate" or as counsel for the parent in the IHO's decision and the pleadings. While I generally refer to her in the decision as the parent's representative, I have also deferred to the IHO's, parent's and district's characterizations when citing to the decision and pleadings. I further note that only one individual appeared on behalf of the parent on December 28, 2023 as reflected in the transcript for this matter.

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]).[5] "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.).[6] 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]).

[5] 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]).

[6] 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.

VI. Discussion

It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]).

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation provides that the IHO "shall exclude any evidence that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (Letter to Anonymous, 23 IDELR 1073). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence.

In addition, 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). 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]).

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]).[7] 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]).

[7] 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]).

Initially, I note that the district's assertion that the parent did not appeal the IHO's finding that the parent failed to meet her burden of proof is without merit. Review of the request for review shows that the parent clearly appeals the IHO's decision and the conduct of the impartial hearing.

Next, the evidence in the hearing record does not support the decision by the IHO to render a finding on the merits without allowing the parent to present a case. Here, the IHO entered into the hearing record emails regarding the order of the omnibus cases scheduled for the December 28, 2023 hearing date (see IHO Ex. I). These emails do not demonstrate that the IHO informed the parties prior to the hearing that if a party failed to appear, they would be subject to dismissal, nor is there anything in the hearing record indicating that the parties had notice the IHO would take such an action (Tr. pp. 1-17; IHO Ex. I; Dist. Ex. 1). The parent was given 31 minutes notice that her case would be called first (see IHO Ex. I at p. 6). Further, the assertion that there may have been technical difficulties is supported by the hearing record as the district's counsel sent an email indicating she was "having IT issues" and the transcript reflects two instances in which a party was unable to hear something (Tr. pp. 4, 8; see IHO Ex. I at p. 6).[8] Review of the parent's additional evidence shows that there is nothing in these additional emails to indicate that the IHO warned the parties of her intention to dismiss any cases should a party not be available (see SRO Ex. A).

Based on all the information in the hearing record, the IHO's decision to render a finding in this case without allowing the parent an opportunity to present her case was unduly harsh. The parent's representative appeared ready to proceed on that day, but not at the specific time the IHO required. It is noted that the omnibus nature of this proceeding could have contributed to the lack of clarity about when the parent had to be available. Moreover, the IHO indicated that after the hearing had concluded and the record was closed, the parent's representative "re-appeared" and the IHO informed her that the hearing had concluded (IHO Decision at p. 4).

An SRO may consider whether the case should be remanded to the IHO for a determination of the issues that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]).

[8] With the request for review, the parent submitted additional emails between the parties and the IHO, which appear to be a continuation of IHO Ex. I (compare SRO Ex. A with IHO Ex. I). Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). The emails help provide clarity regarding the circumstances leading up to the December 28, 2023 hearing and as such, will be reviewed. Although the parent did not formally request the emails be entered into the hearing record on appeal, for the sake of clarity, the emails with be cited to as SRO Ex. A.

As such, I find that the case must be remanded to allow the parent an opportunity to present her case and the IHO's February 21, 2024 decision is vacated. The matter is remanded for the IHO to address all of the claims set forth in the parent's September 7, 2023 due process complaint notice.

VII. Conclusion

The matter must be remanded to allow the parties an opportunity to present their case. The February 21, 2024 decision is vacated and the matter is remanded for further development of the hearing record and for the IHO to render a decision on the claims raised by the parent in the September 7, 2023 due process complaint notice.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the February 21, 2024 decision is vacated;

IT IS FURTHER ORDERED that the matter is remanded for further proceedings to develop the hearing record on all of the claims set forth in the September 7, 2023 due process complaint notice.

Dated: **Albany, New York**
July 5, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER