The University of the State of New York

The State Education Department
State Review Officer
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No. 24-166

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 dismissed the parent's due process complaint notice regarding the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her daughter for the 2023-24 school year 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 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

Given the limited nature of the appeal and the procedural posture of the matter—namely that it was dismissed with prejudice prior to the introduction of evidence—there was no development of an evidentiary record regarding the student through testimony or exhibits entered into evidence. Accordingly, the description of the facts and history of this matter is limited to the procedural history including the parent's filing of the due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.

In a due process complaint notice, dated February 22, 2024, the parent alleged that the district failed to implement the recommendations in the student's May 22, 2023 IESP which the parent asserted constituted a denial of a free appropriate public education (FAPE) to the student for the 2023-24 school year (Due Process Compl. Notice at p. 2). According to the parent, the

May 2023 IESP recommended eight periods per week of direct group special education teacher support services (SETSS) in Yiddish; two 30-minute sessions per week of individual speech-language therapy in Yiddish; two 30-minute sessions per week of individual physical therapy (PT) in English; one 30-minute session per week of group speech-language therapy in Yiddish; and one 30-minute session per week of group counseling in Yiddish (id.). As relief, the parent sought direct funding of the SETSS and related services located by the parent and a bank of compensatory services for those services the student did not receive during the 2023-24 school year (id. at p. 3).

After appointment of the IHO by the Office of Administrative Trials and Hearings (OATH) an impartial hearing was conducted on March 25, 2024 (Tr. pp. 1-23). In a decision dated March 25, 2024, the IHO dismissed the parent's due process complaint notice with prejudice (IHO Decision at pp. 5-8).

IV. Appeal for State-Level Review

The parent appeals pro se and argues that the IHO erred in dismissing the due process complaint notice with prejudice. The parent seeks her "day in court" and to have her daughter's case heard on the merits or that she be permitted to withdraw her case without prejudice (Req. for Rev. at pp. 2-6).

In an answer, the district responds to the parent's allegations generally denying the material allegations and argues that the IHO's decision should be upheld. The district asserts that the IHO acted within his discretion because of the parent's failure to comply with the IHO's directives (Answer ¶¶ 5-6, 9).

V. Discussion

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]).

In an email dated February 22, 2024, the IHO scheduled the hearing in this matter for March 25, 2024 at 10:00 a.m. (IHO Ex. IV). In that email, the IHO also stated that a prehearing conference would not take place because "this case" has been filed three times "and a hearing on the merits will take place, or a dismissal order with prejudice will ensue" and that a "withdrawal without prejudice will not be accepted" (IHO Ex. IV). In the email the IHO further advised the parties to "read the attached Order carefully as it [would] be strictly enforced" (id.). The attached order, dated February 22, 2024, indicated it was intended "to set firm expectations of the [p]arties to resolve the matter fairly and efficiently" (see generally IHO Ex. III; IHO Ex. IV). The Order included, among other things, expectations for scheduling the hearing and disclosure of evidence, and extensions (IHO Ex. III at pp. 1-3). The Order references a withdrawal of the due process complaint notice after the disclosure of exhibits and witness lists stating that, absent extraordinary

circumstances, a withdrawal "after the disclosure date, shall be deemed to be with prejudice" (IHO Ex. III at p. 2).

In that same February 2024 email, the IHO requested a response from the parties as to their availability for the hearing scheduled for March 25, 2024 (IHO Ex. IV). An assistant from parent's counsel's office responded on February 23, 2024 indicating that their office was available on the scheduled hearing date (IHO Exs. IV; V at p. 1). The district did not respond (see IHO Exs. I-V).

According to evidence introduced by the IHO, the district sent its disclosure of evidence to the IHO on March 18, 2024 at 3:00 p.m. and counsel for the parent sent the parent's disclosure to the IHO on March 19, 2024 at 9:03 a.m. (IHO Exs. I; 2).

Counsel for both parties were present at the March 25, 2024 impartial hearing (see Tr. pp. 1-23). At the beginning of the hearing, district's counsel raised the fact that the parent's disclosure was "untimely" (Tr. p. 3). In clarifying this objection, district's counsel asserted that the disclosure was sent to the wrong individual at the district, and he personally did not receive a copy of the disclosure documents directly from counsel for the parent (id.). The IHO explained to district's counsel why the disclosure was served on the wrong individual at the district in that counsel for parents, in general, do not receive the notices of appearance of the attorneys for the district even though the district's attorney filed her notice of appearance in this matter on February 29, 2024 (Tr. pp. 3-5). However, the IHO noted that the "relevant issue is the fact that it was a day late" to which the counsel for the parent indicated she was only objecting on that basis (Tr. p. 4). In response to this objection, parent's counsel contended that the "five-day disclosure rule shouldn't be strictly construed" and that he was prepared to proceed with his case if the district and IHO were willing to accept the late disclosure, otherwise he would seek an adjournment to give the district time to review the disclosure or a withdrawal (Tr. pp. 5, 21). In response, counsel for the district stated, "that this case has been going around for some time and this hearing date was selected, I do believe that [p]arent's counsel should have been prepared and disclosed timely" and that the IHO's "procedural rules" should be followed (Tr. pp. 5-6).

Next, the IHO recounted that this was the third time this case was filed: one case filed on September 7, 2023 and withdrawn on the date of the hearing of October 23, 2023; and another one filed on October 25, 2023 and later withdrawn on December 4, 2023 (Tr. p. 6). In response, parent's counsel stated that the prior withdrawals were based on the parent not being prepared to address evidence disclosed by the district but at this time the parent was ready to proceed and prepared to give the district additional time if needed (Tr. pp. 6-7, 21). Additionally, parent's counsel stated that this was not an "attempt" "to gain the system or to ride out the year on pendency" and the student is "effectively not getting pendency given the [d]istrict's positions" (Tr. p. 7). Then, the IHO stated that the parent was not ready to proceed because the parent's disclosure was not timely pursuant to the IHO's February 2024 Order and the IHO then reminded the parties that pursuant to his February 2024 email, "a hearing on the merits w[ould] take place or dismissal order with prejudice w[ould] ensue" and asked why the matter should not be dismissed with prejudice for a failure to prosecute (id.).[1] Although argued by the parent that a dismissal with prejudice was a "very harsh penalty," the IHO stated that the parent was "on notice" of the potential

[1] The IHO stated that during the three proceedings, he was the IHO but there were three separate attorneys representing the district (Tr. p. 8).

outcome (Tr. pp. 8-9, 12-13). The IHO further advised parent's counsel that he had not been prepared for hearings three times in a row and it was a "question of [the attorneys] ability to handle the quantity of cases that [he] ha[d]" (Tr. pp. 9-10). Counsel for the parent stated that since the district would not accept the disclosure, he wanted a one day adjournment of the hearing (Tr. pp. 10-11). The IHO stated that this was not the proper manner in which to seek an adjournment and the late disclosure was not a "proper reason to grant an adjournment" (Tr. p. 10). Furthermore, the IHO stated that a request for an adjournment would not change the date for the five-day disclosure rule (Tr. p. 12).[2]

As the IHO precluded the parent's evidence, the IHO next indicated that the question presented was whether to allow counsel to withdraw the due process complaint notice without prejudice (Tr. pp. 12). Parent's counsel stated he was being "forced" to be ready for the hearing and there was no flexibility to allow the parent "time to try to get - - try to get their documents in order" (Tr. pp. 13-14). In response, counsel for the district argued that there have been two resolution periods in which the cases were on track for a hearing and the parent's counsel had sufficient time to prepare his case and be ready and the "excuses really don't carry that much weight" since the case had been on the calendar for some time (Tr. p. 14). The IHO was also not persuaded by the arguments of parent's counsel as the date of the hearing was scheduled a month prior to the hearing date (Tr. pp. 15-16).

Next, the IHO again raised the issue of the parent withdrawing the case and speculated that if the IHO permitted a withdrawal without prejudice, then the resolution period would end in April 2024 and essentially "the entire school year [would have] been covered by pendency" then to allow another third withdrawal the IHO questioned how this was not "gaming the system" (Tr. pp. 16-17).[3] The IHO stated that the prejudice was "self-imposed" due to the failure of the parent's counsel to be prepared to proceed (Tr. pp. 17-18, 20). Parent's counsel continued to state that the IHO was the one "not inclined to grant adjournments or to extend compliance" so the parent had "no other alternative but to ask for a withdrawal to have the case heard properly" (Tr. p. 18). Again, the IHO stated that the initial due process complaint notice was filed on September 7th, which was

[2] The Order stated that where a hearing is adjourned, the due date of the disclosures remained unchanged and was based upon the original date scheduled for the first hearing date (IHO Ex. III at p. 2).

[3] 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. However, it is worth noting that in this matter, the due process complaint notice did not raise any allegations regarding the student's educational programming, in effect the parent agreed with the recommendations contained in the May 2023 IESP and the parent sought only implementation of the May 2023 IESP for the 2023-24 school year (Due Process Compl. Not. at p. 2). The parent also sought pendency as implementation of the May 2023 IESP (id.). Essentially, any delay in the proceeding was merely delaying a determination as to the district's implementation of the student's educational programming. Additionally, as the district was responsible for implementing pendency during the course of this proceeding, even if the parent's due process complaint notice were dismissed with prejudice, it is not clear that the parent would not be able to seek the same relief as requested in this matter, in a subsequent proceeding seeking to enforce the student's right to pendency in this proceeding. Accordingly, the IHO's reasoning as to impact of further delays on this proceeding was misplaced.

now almost seven months ago, and the parent was still late with the disclosure and further on notice of the potential result from being untimely (Tr. pp. 19-20).[4]

The arguments then returned to whether a withdrawal would be with or without prejudice with parent's counsel stating that being one day late on the disclosure did not warrant that the withdrawal be with prejudice (Tr. p. 21). Counsel for the district stated that she "would oppose any withdrawal without prejudice" because the student would have received pendency for a majority of the school year without the matter being litigated and it would "severely prejudice the [district] in this matter with another refile" and the resolution period starting again (Tr. p. 22).[5]

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]).[6] 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]).

Pertinently, the IHO's February 2022 order and the IHO's conduct during the proceeding appears to have overstepped the regulations regarding withdrawals of due process complaint notices. Specifically, as noted above, the regulations provide that "[a] withdrawal shall be presumed to be without prejudice except that the impartial hearing officer 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] [emphasis added]). In this instance, the IHO's initial email to the parties indicated that "[a] withdrawal without prejudice will not be accepted" (IHO Ex. IV at p. 1). Additionally, the IHO's February 22, 2024 order provided that, absent extraordinary circumstances, "a request to withdraw a [due process complaint notice] after the disclosure date, shall be deemed to be with prejudice" (IHO Ex. III at

[4] Although the merits of the parent's claims for the 2023-24 school year are not being addressed as part of this appeal, it is worth mentioning that a due process complaint notice filed on the first day of school concerning the implementation of an IESP developed for that school year may be premature.

[5] The attorney for the district did not explain how pendency impacted the district's position in this proceeding, a question that should have been answered as the parent's request on the merits of this proceeding, and with respect to pendency, was for implementation of the May 2023 IESP.

[6] 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]).

p. 2).[7] Finally, rather than the opposing party making the request for a dismissal with prejudice, the issue was first raised by the IHO during the hearing and then, after extended discussions between the IHO and the parent's counsel, counsel for the district did not state an argument supporting a withdrawal with prejudice other than to repeat part of the argument already raised by the IHO (Tr. pp. 6-22).

The IHO then issued an order of termination with prejudice (see IHO Decision). In his decision, the IHO stated that a parent cannot file multiple proceedings on the same issues and then withdraw them without prejudice "ad infinitum" (IHO Decision at p. 6). The IHO stated that with respect to this student, the parent had approximately seven months, and a total of three filings, with "clear instructions" set forth in the scheduling order to be prepared for the hearing (id.). The IHO was unable to overlook "[t]he amount of time, resources, and potential deprivation of valuable hearing timeslots for other litigants in an already overburdened due process system" (id.). Further, the IHO stated his directives and communication with the parties were "clear" and the parent still did not comply with the five-day disclosure rule (id. at p. 8). The IHO agreed that a dismissal or withdrawal with prejudice was "an extreme sanction" but in this matter the parties were well aware of the consequences of noncompliance (id.). The IHO did not address pendency in his order of termination, which was the only reason given by the district as to why a dismissal without prejudice should not be granted (see Tr. p. 22; IHO Decision).

Turning to the issues that led to the parent's request for a withdrawal, the parties' disclosures were due on March 18, 2024 which was five business days prior to the start of the hearing on March 25, 2024. The district emailed its disclosures on March 18, 2024 (IHO Ex. I). The parent's disclosure was emailed to the IHO and copied to a district individual on March 19, 2024 at 9:03 a.m., which was approximately nine hours late (IHO Ex. II). Parent's counsel did not offer an explanation, reason, or possible excuse for why the disclosure was late.

Federal and State regulations provide that a party has the right to prohibit the introduction of evidence that has not been disclosed to that party at least five business days in advance of the impartial hearing (34 CFR 300.512[a][3]; 8 NYCRR 200.5[j][3][xii]). However, courts have not enforced absolute adherence to the five-day rule for disclosure but have upheld the discretion of administrative hearing officers who consider factors such as the conditions resulting in the untimely disclosure, the need for a minimally adequate record upon which to base a decision, the effect upon the parties' respective right to due process, and the effect upon the timely, efficient, and fair conduct of the proceeding (see New Milford Bd. of Educ. v. C.R., 431 Fed. App'x 157, 161 [3d Cir. June 14, 2011]; L.J. v. Audubon Bd. of Educ., 2008 WL 4276908, at *4-*5 [D.N.J. Sept. 10, 2008], aff'd, 373 Fed. App'x 294 [3d Cir. 2010]; Pachl v. Sch. Bd. of Indep. Sch. Dist. No. 11, 2005 WL 428587, at *18 [D. Minn. Feb. 23, 2005]; Letter to Steinke, 18 IDELR 739 [OSEP 1992]; see also Dell v. Bd. of Educ., Tp. High Sch. Dist. 113, 32 F.3d 1053, 1061 [7th Cir. 1994] [noting the objective of prompt resolution of disputes]). Undoubtedly the disclosure was untimely, but I tend to agree that a dismissal with prejudice, resulting from a refusal to permit a party to introduce evidence due to a minimally late disclosure, is harsh when the district does not

[7] The IHO's indication that this presumption of a withdrawal with prejudice would occur for any request "after the disclosure date" appears to be contrary to State regulation which provides that "[p]rior to the commencement of the hearing, a voluntary withdrawal by the party requesting the hearing shall be without prejudice unless the parties otherwise agree" (8 NYCRR 200.5[j][6][i]), as the disclosure date is set as "5 business days before the scheduled hearing date" (IHO Ex. III at p. 2).

describe how the late disclosure or a short adjournment of the matter would have prejudiced their case.

In terms of the efficient management of the due process system, the IHO and the district are correct to note the parent's history of filing duplicative due process complaint notices. In this matter, considerable public resources have been expended unnecessarily. Parents and their counsel are charged with the responsibility of being personally aware of the due process proceedings they have brought (see Application of the New York City Dep't of Educ., Appeal No. 23-082).

However, the practical effect of a dismissal of the parent's due process complaint notice with prejudice "operates as a rejection of the plaintiff's claims on the merits and [ultimately] precludes further litigation' of them" (N.S. v. Dist. of Columbia , 272 F. Supp. 3d 192, 200 [D.C. Cir. 2017], citing Belizan v. Hershon, 434 F.3d 579, 583 [D.C. Cir. 2006]). Under the circumstances presented in this matter, while the parent engaged in a pattern of conduct that could warrant a dismissal with prejudice, the overall method the IHO took to steer this matter towards a withdrawal with prejudice, including a failure to give thoughtful consideration to the only reason raised by the district for taking such a path, weighs in favor of removing the "with prejudice" portion of the dismissal and allowing the parent an opportunity to be heard if she chooses to bring another proceeding. As alleged in the due process complaint notice, according to the parent there was an issue with the implementation of the May 2023 IESP which included SETSS, speech-language therapy, physical therapy, and counseling services for the student (Due Process Compl. Notice at p. 2).

Therefore, the IHO's decision will be modified to dismiss the parent's due process complaint notice without prejudice. As a final note, I will caution the parent that if they file another due process complaint notice relating to the student's May 2023 IESP they should ensure that they comply with any and all directives of the IHO.

VI. Conclusion

Based on the foregoing, the IHO erred by dismissing the parent's February 22, 2024 due process complaint notice with prejudice and the parent's request to change the terms of the IHO's order of termination will be granted.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the decision of the IHO, dated March 25, 2024, is modified to provide that the parent's February 22, 2024 due process complaint notice is dismissed without prejudice.

Dated: **Albany, New York**
May 31, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER