



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-353

**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:**

Gulkowitz Berger LLP, attorneys for petitioner, by Shaya M. Berger, 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 dismissed her due process complaint notice against respondent (the district) with prejudice. The 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 programming for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, State law provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law

§ 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). Incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

### **III. Facts and Procedural History**

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

procedural history including the parent's due process complaint notice filings and the IHO's dismissal of the due process complaint notice with prejudice.

In a second amended due process complaint notice dated April 26, 2024,<sup>1</sup> the parent alleged that the district failed to provide the student with a free appropriate public education (FAPE) and/or equitable services for the 2023-24 school year (Second Amended Due Process Compl. Notice at p. 1). The parent alleged that she was unable to locate service providers for the student at the standard rate, and that the district failed to provide any service providers (id.). She alleged that she found providers at an enhanced rate and sought funding from the district for the private providers at the enhanced rate (id. at pp. 1-2). The parent also further sought compensatory relief for services allegedly not provided for the 2023-24 school year, as well as pendency determination (id.).

After appointment of the IHO by the Office of Administrative Trials and Hearings (OATH), the IHO issued an "omnibus interim order," dated April 4, 2024, which contained the following warning:

If any party, or witness, becomes unavailable or unable to appear on the scheduled Due Process Merits Hearing (or other scheduled evidentiary hearing date/time). In that case, the relevant party must file an Affidavit of Unavailability and Request for Adjournment as soon they become aware of the unavailability or inability to proceed. The failure to provide timely notice of unavailability and then subsequently fail to appear at the previously scheduled date/time, the IHO provides a warning and reserves the right to: hold the hearing in their absence, dismiss the case, or otherwise issue a summary determination; preclude evidence; draw adverse inferences; and/or limit affirmative defenses.

(IHO Omnibus Interim Order at p. 3 [emphasis in original]).

A prehearing conference was held on June 3, 2024, and, while the parent's representative appeared, the district failed to appear (Tr. p. 2). The IHO noted that the district was aware of the date of the conference, and that the district had not provided any communication or notice as to its failure or inability to appear (id.). In accordance with the interim order, the IHO proceeded in the district's absence (id.). The IHO asked the parent's representative how he would like to proceed with respect to pendency, and the parent's representative stated his preference to attempt to resolve pendency with the district directly, but that if a hearing or other proceeding before the IHO was required to resolve the matter, that the IHO would be notified, and that such a proceeding could take place on the date of the scheduled hearing (Tr. p. 4). The IHO asked the parent's representative

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<sup>1</sup> The original due process complaint notice is dated February 29, 2024. The parent subsequently filed the first amended due process complaint notice, dated April 9, 2024, because according to the parent, the student had received a new IESP on March 15, 2024 that had changed the student's services (see First Amended Due Process Compl. Notice). The parent further alleges that the second amended due process complaint, dated April 26, 2024, was filed to include a request for compensatory relief. The district alleges that the second amended due process complaint also clarified some aspects of the 2024 IESP in relation to the parent's claims.

to let him know if anything changed with respect to pendency, and that he would be open to addressing pendency sooner if the parties wished (Tr. pp. 4-5). The IHO and parent's representative also scheduled the impartial merits hearing for the agreed-upon date and time of July 10, 2024 at 3:00 p.m. (Tr. p. 3).

The IHO then issued a prehearing conference and summary order dated June 3, 2024. With respect to pendency, the IHO noted that "[p]endency is disputed, and the parties will attempt to reach an agreement on the issue. The parties will contact me if a pendency hearing is needed" (IHO Prehearing Order at p. 2). The order noted the date and time of the impartial hearing on the merits that had been scheduled during the prehearing conference (*id.*). Finally, the prehearing order contained the same warning regarding a failure to appear to the one found in the omnibus interim order (*id.* at p. 4).

The matter proceeded to the scheduled impartial hearing on July 10, 2024. The district appeared for the matter, but the parent's representative and parent did not appear (Tr. p. 9). The IHO noted that he did not receive any communication from the parent's representative regarding an inability to appear on that date, and that the parent's representative's office was aware of the date of the scheduled hearing, as they had agreed to it during the prehearing conference, had not notified the IHO of any conflicts that had arisen; had accepted an email invitation to the scheduled hearing date, had served disclosures for the hearing, and had emailed regarding an objection to a subpoena (Tr. pp. 9-10). Once again, in accordance with the interim order, the IHO elected to proceed without the parent or parent's representative (Tr. p. 10). The district moved to dismiss the matter for the parent representative's failure to appear and his failure to prosecute the matter (*id.*). The IHO stated: "[a]t this time, I intend to grant that application unless I receive good cause from the Parents in the subsequent few minutes. But otherwise, I will be dismissing this case " (*id.*). The IHO further notified the district that if the IHO subsequently heard from the parent's representative, then he may hold a brief conference to hear the parties' arguments (Tr. pp. 10-11).

The IHO subsequently issued an order of termination dated July 10, 2024. The IHO noted how the hearing had been scheduled with the parent representative's input and agreement, the parent representative's communications leading up to the scheduled hearing date, and the warning the IHO provided in the prehearing order (IHO Decision at pp. 3-4). The IHO further stated: "[t]here was no prior communication from Parent's Representative that they were unavailable or the filing of an Affidavit of Unavailability and Request for Adjournment, as required by the Prehearing Conference Summary and Order" (*id.* at p. 3). The IHO dismissed the due process complaint notice with prejudice, finding the parent representative's failure to appear "willful and intentional" (*id.*).

#### **IV. Appeal for State-Level Review**

The parent appeals, alleging, among other things, that the IHO abused his discretion in dismissing the due process complaint notice with prejudice. The parent alleges that the IHO did not provide adequate notice that the matter could be dismissed with prejudice, and that the record does not support a dismissal with prejudice. Further, the parent alleges that mere office error was

the reason for the failure to appear. The parent also alleges that the IHO further erred by not addressing the student's pendency request.<sup>2</sup>

In an answer, the district alleges, among other things, that the parent had adequate notice of dismissal, even if the warning was not explicit with respect to a potential dismissal being with prejudice, and that the parent had ample opportunity to prosecute this matter. The district further alleges that, due to the sparse record in this matter, pendency would more appropriately be addressed by an IHO upon remand, should this office remand the matter.<sup>3</sup>

## V. Discussion—Dismissal with Prejudice

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

Nevertheless, a dismissal with prejudice should usually be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). In upholding a dismissal with prejudice, SROs have considered whether there was adequate notice to the party at risk for dismissal and whether the party engaged in a pattern of conduct or in conduct

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<sup>2</sup> Briefly, I am not persuaded by the parent's arguments regarding pendency. The hearing record is devoid of any showing that the IHO was contacted regarding pendency after the June 3, 2024 prehearing conference as the parent agreed to do if unable to resolve pendency with the district directly (see Tr. pp. 4-5; IHO Prehearing Order at p. 2). Additionally, there is no evidence in this hearing record that could provide an SRO with a basis for a pendency determination. In any event, as discussed later in this decision, the IHO did not abuse his discretion in dismissing this matter with prejudice.

<sup>3</sup> The district submits additional evidence with their verified answer. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an IHO'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 a Student with a Disability, Appeal No. 08-003; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). Regardless of whether the documents provided by the district could have been offered prior to the July 10, 2024 impartial hearing, they are not necessary in order to render a decision on this matter, and, as such, they will not be considered.

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).<sup>4</sup>

Initially, despite the parent's contentions to the contrary, I find that the parent was provided with adequate notice of a potential dismissal with prejudice. As discussed above, the IHO provided at least two separate warnings, found in both the omnibus interim order and the prehearing conference and summary order, with respect to the consequences for a failure to appear without filing an affidavit of unavailability and request for adjournment in advance. The IHO warned that should a party or witness fail to appear without submitting the above filings, the IHO "reserve[d] the right to: . . . dismiss the case, or otherwise issue a summary determination" (IHO Omnibus Interim Order at p. 3; see also IHO Prehearing Order at p. 4). I note that there is no explicit requirement that the IHO specify what type of dismissal may be forthcoming when the IHO is providing notice of such dismissal (see Application of a Student with a Disability, Appeal No. 24-274). Here, the parent had explicit notice of the potential consequences for failing to appear without first providing an affidavit of unavailability and request for an adjournment. Just as the IHO's warnings did not explicitly identify that a potential dismissal with prejudice could be issued, so too was there no indication that a dismissal without prejudice would be issued (see id.). The parent received notice of a potential dismissal or summary determination, and the parent bore the risk of what type of dismissal or consequence that could be (see id.).

Additionally, I note that, 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).

The IHO's prehearing orders specified the proper procedure for party or witness unavailability on the date of the hearing, i.e., that an affidavit of unavailability and request for adjournment must be filed in advance (IHO Omnibus Interim Order at p. 3; IHO Prehearing Order at p. 4). No such written request or affidavit appears in the hearing record. Additionally, I note that the consequences of failing to appear without providing the proper notice and filings under this IHO's prehearing orders was not only applied to the parent in this matter. The IHO proceeded

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<sup>4</sup> 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]).

consistently under his imposed rules, when he also held the prehearing conference on June 3, 2024, and scheduled the impartial hearing on the merits, without the district, who failed to appear and provide the proper notice and filings (see Tr. pp. 2-7). The primary goal of the impartial hearing system under the IDEA is to ensure the timely resolution of disagreements and, while federal and State regulations provide that impartial hearings must be "conducted at a time and place that is reasonably convenient to the parents and child involved" (34 CFR 300.515[d]; 8 NYCRR 200.5[j][3][x]), the hearing record reflects that the parent's representative did not request a different date, time, or place for the impartial merits hearing. The IHO engaged in effective hearing management with clear expectations for the parties, and the IHO's dismissal for the parent's failure to appear, and for the parent's failure to abide by the hearing procedures that were explicitly set forth by the IHO.

One relevant factor remains that may be considered, which is the degree to which the parent's attorney has engaged in similar activity in the past. In Application of a Student with a Disability, Appeal No. 24-210, the parent's attorney similarly alleged calendaring difficulties as the reason when failing to appear for a hearing on the merits. Furthermore, in a trio of cases, Application of a Student with a Disability, Appeal No. 24-014, Application of a Student with a Disability, Appeal No. 24-015, and Application of a Student with a Disability, Appeal No. 24-016, the parent's attorney also failed to appear and was found to be "not without fault for the failure to effectively manage his caseload or prepare for scheduled hearing dates."<sup>5</sup> This was derived from a brief search for cases that reached the appellate level and the undersigned does not find it necessary to inquire of further incidents at the trial level.<sup>6</sup> The parent's attorney has already been granted multiple reprieves from dismissals with prejudice by SROs in due process proceedings during this school year alone, and now continues to do so despite being cautioned that failure to appear was unacceptable. An attorney has the responsibility to diligently calendar all relevant dates in a case, including hearing dates, and ensure attendance at all scheduled hearing dates or risk significant legal consequences for their clients, including potential dismissal of the case or other sanctions. The hearing officers are not provided the resources to chase down absent attorneys and, when setting clear, reasonable rules in prehearing orders regarding appearances and notification of absences, a hearing officer should expect the rules to be followed. If the rules are not followed, the parties, or their attorneys, should expect increasing consequences over time until corrective measures are taken, including dismissal with prejudice. Here, the IHO clearly set forth prehearing directives requiring the parties to timely notify the IHO if they could not appear at a scheduled hearing date and that dismissal was an option for failure to appear. This is not the first time that this attorney has failed to appear and later blamed it on calendar difficulties. In this

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<sup>5</sup> The attorney attempts to argue in mitigation that these missteps rarely occur as he "is the attorney of record on thousands of cases over the last few years," but as a partner and private practitioner, he is responsible to ensure that the resources are in place to effectively represent and maintain sufficient levels of communications with parents, hearing officers, and opposing counsel. His first case in this forum was filed in 2019 (Application of a Student with a Disability, Appeal No. 19-029). It is unclear how a private practitioner could effectively take on thousands of clients and be counsel of record in their due process hearings in that time span.

<sup>6</sup> If considering a dismissal with prejudice, an IHO should also be prepared to describe repeat instances of similar conduct by attorneys for either party in other proceedings. The failure to appear should be objectively verifiable, such as by citation to the proceedings by case number.

instance, dismissal with prejudice was not an abuse of the IHO discretion, and it was not an impermissible denial of due process.

**VI. Conclusion**

Having found that the IHO did not abuse his discretion in dismissing the parent's due process complaint notice with prejudice, the inquiry is at an end.

**THE APPEAL IS DISMISSED.**

**Dated: Albany, New York  
October 9, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**