The University of the State of New York

The State Education Department
State Review Officer
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No. 24-494

Application of a STUDENT WITH A DISABILITY, by his parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the Dryden Central School District

Appearances:
Hancock Estabrook, LLP, attorneys for respondent, by Emily A. Middlebrook, Esq. and Whitney M. Kummerow, 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. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO) which dismissed their due process complaint notice against respondent (the district) with prejudice. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to 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.[1] Accordingly, the description of the facts and history of this matter is limited to the

[1] The parents simultaneously filed a second appeal with the Office of State Review related to a different due process complaint notice, which was also dismissed with prejudice; the other matter was assigned IHO case number 638577 and SRO appeal number 24-495 (see Application of a Student with a Disability, Appeal No. 24-495).

procedural history including the parents' due process complaint notice and the IHO's dismissal of the due process complaint notice with prejudice.[2]

In a due process complaint notice stamped received by the district on August 16, 2024, the parents, who were pro se, alleged that the district and CSE refused to allow the student to return to his special education program after an IHO in a prior matter determined that the student's suspension was a manifestation of his disability and ordered for the student to return to school (see Due Process Compl. Notice). The parents also alleged that they disagreed with the CSE's decision regarding compensatory education and that the district refused to provide the student services during the 2022-23 school year (id.). Further, the parents alleged that the district failed to hold a CSE meeting at a time and place of their choosing to allow the student's father to discuss the student's special education programing (id.).[3] As relief, the parents requested that the members of the district's board of education be removed (id.; see also IHO Decision at p. 3).

On August 29, 2024, the parents sought to terminate the remainder of the resolution period (IHO Decision at p. 1).[4] On September 5, 2024, the district, in turn, filed a motion seeking dismissal of the due process complaint notice filed by the parents arguing the parents failed to

[2] No exhibits were marked or formally entered into evidence on the record in this matter. The record on appeal consists of the materials entered into the hearing record by the IHO which included: the parents' due process complaint notice; various correspondence between the parties; the IHO's interim decision dated August 20, 2024 on issues of whether the matter should be treated as an expedited hearing and whether the IHO should be assigned given the relatedness to prior complaints; a decision and order of dismissal for a prior matter involving the same parties dated April 29, 2022; the district's motion to dismiss and the parents' response; the district's motion exhibits A-C (cited herein as district exhibits A-C); and the IHO's final decision (District Amend. Certification of Rec.; see 8 NYCRR 200.5[j][5][vi]; 279.9[a]). According to the district's certification of the hearing record, when the IHO issued his final decision, he included a zip drive labeled "evidentiary record" which consisted of a document purported to be a parent exhibit, eleven documents purported to be district exhibits, and eight documents purported to be IHO exhibits. The documents are various correspondence between the parties. All of the documents submitted have been thoroughly reviewed but it is only necessary to cite some of the documents in this decision. As such, for purposes of this decision, the following documents will be cited and referred to as follows: the email from the parent dated August 6, 2024 at 2:55 p.m. will be referred to and cited as district exhibit D; the email from the district dated August 16, 2024 at 3:57 p.m. consisting of the resolution session invitation will be referred to and cited as IHO exhibit I; the email from the district secretary to the parents dated August 16, 2024 at 4:00 p.m. shall be referred to and cited as IHO exhibit II; the student's father's email response to the resolution session invitation dated August 16, 2024 at 6:12 p.m. shall be referred to and cited as IHO exhibit III; the student's mother's email response to the resolution session invitation dated August 16, 2024 at 6:23 p.m. shall be referred to and cited as IHO exhibit IV; the email from the district superintendent dated August 20, 2024 at 1:41 p.m. shall be referred to and cited as IHO exhibit V; the student's mother's email response to the district dated August 20, 2024 at 2:27 p.m. shall be referred to and cited as IHO exhibit VI; and the student's father's email response to the district dated August 20, 2024 at 4:20 p.m. shall be referred to and cited as IHO exhibit VII. The pages for each exhibit will be cited by reference to their consecutive pagination with the cover page for each document as page one.

[3] According to the IHO in his decision, the parents filed their due process complaint notice on or around August 13, 2024 alleging the district refused to allow the student to return to his special education program and that it filed a false Child Protective Services report demanding the student be placed in a residential program (IHO Decision at pp. 2-3).

[4] A copy of the parents' motion to terminate the resolution period was not submitted with the hearing record.

participate in a scheduled resolution meeting (Aff. in Support of Dist. Mot. to Dismiss).[5] In addition to the dismissal of the action, the district sought, as a sanction, that the matter be dismissed with prejudice based on the fact that the parents failed to conduct themselves with civility and decorum by using combative and profane language despite being directed not to engage in such conduct (id. ¶¶ 3, 39). The IHO noted the parents requested until on or about October 6, 2024 to respond to the district's motion to dismiss, citing work commitments, and the request was granted (IHO Decision at p. 2). On or about September 29, 2024, the IHO received a response from the parents to the district's motion to dismiss (Parent Response to Mot. to Dismiss).

In a decision dated October 4, 2024, the IHO dismissed the parents' August 16, 2024 due process complaint notice with prejudice (IHO Decision at pp. 1-22). As for the parents' motion to terminate the resolution period, the IHO noted that the motion was granted as there was no dispute that a resolution meeting was held and, therefore, the resolution period ended upon the parents' motion (id. at p. 3).

Next, the IHO addressed the district's motion to dismiss on the basis that the parents failed to participate in a resolution meeting, noting regulatory provisions relating to the resolution period (see IHO Decision at pp. 4-14). The IHO found that State regulation was clear and unambiguous that the district could seek dismissal of the action if the district, after making reasonable efforts, had been unable to obtain the participation of the parent for a resolution meeting and further opined that the regulation embodied the intent underlying the IDEA that these proceedings not be "inherently adversarial," noting that the IDEA and implementing regulations were "designed for collaboration for the mutual benefit of all Students with special needs" (id. at pp. 4-5 [emphasis in the original]). The IHO also noted that, absent language to the contrary in State regulation, whether one or both parents appeared at the resolution meeting was a decision exclusively left to the parents (id. at p. 5). The IHO indicated that, though the regulation requires a district to take steps to ensure parental participation, this "d[id] not mean that the scheduling of the resolution meeting [had to] be free of all personal and professional encumbrances of the Parent[s'] nor d[id] it permit the Parent[s] to unilaterally decided the time and place of the meeting" (id.).

The IHO then addressed the district's efforts to obtain parental attendance at the resolution meeting and the parents' defenses to why they did not attend the resolution meeting (IHO Decision at pp. 5-10). The IHO listed documents evidencing the scheduling of a resolution meeting for August 20, 2024, and the communications that followed wherein the parents stated their limited availability (see id. at p. 6). The IHO determined that, given the circumstances, the district made reasonable efforts to schedule the resolution meeting (id.). The IHO determined that the district attempted to work with the parents to find a mutually acceptable time and it was reasonable to not adhere to the parental demands regarding scheduling (id. at pp. 6-7).

The IHO in his decision addressed the parents' "defenses" which he described as "mitigating circumstances" (IHO Decision at pp. 7-10). The IHO noted State regulations were drafted in a way where a dismissal for the parents' failure to attend a resolution meeting was not

[5] In the same motion, the district also sought to dismiss IHO case number 638577 relating to the proceeding commenced by the parents' in an August 3, 2024 due process complaint notice (Aff. in Support of Dist. Mot. to Dismiss at p. 1).

compulsory but rather an application that was based on the unique facts and circumstances of the case (id. at p. 7).

The IHO noted that the parties had exchanged several correspondences regarding this matter "and the companion case" and that the student's father had "remained rigid and inflexible" regarding his availability (IHO Decision at p. 7). Regarding the parents' argument that they were not provided reasonable notice of the resolution meeting, the IHO noted regulations do not prescribe a specific time by which notice of the resolution meeting must be provided but rather indicate that a "school district shall take steps to ensure that one or both of the parents of the student with a disability are present at the resolution meeting, including notifying parents of the meeting early enough to ensure that they will have the opportunity to attend" (id., citing 8 NYCRR 200.5[j][2][i]). The IHO found that the district provided notice to the parents on August 16, 2024 regarding the August 20, 2024 resolution meeting and that four days was sufficient notice (IHO Decision at p. 8).

The IHO then addressed the parents' argument that the district did not consider the parents' schedule, specifically the father's, when scheduling the resolution meeting noting it was the parents' "chief argument" (IHO Decision at pp. 8-9). The IHO indicated that, according to the parents, the father's schedule only permitted him to be available Monday through Friday between 6:00 p.m. and 8:00 p.m. and on weekends (id. at p. 8). The IHO noted that the IDEA and implementing regulations require the district "to engage a parent to find mutually convenient times that minimize the impact towards their employment and other lifestyle considerations" and that such requirement "must be based on the unique facts of the case and does not mean that any date selected must be free of all encumbrances both personally and professionally," or simply put, "the requirement [wa]s to be reasonable and to work together, not to adhere to the whims of the Parent" (id.). The IHO indicated that the parents, like the district, "must endeavor to be flexible and work with one another to achieve a desired outcome, in this case the scheduling of a resolution meeting that minimizes the impact on everyone's schedule" (id.). The IHO also noted that scheduling a resolution meeting "after traditional work hours or on a weekend may be reasonable under certain circumstances, but doing so should be an examination of the facts and circumstances unique to the case" (id.). The IHO indicated the parents in this matter sought an accommodation because of the father's work schedule but determined that the parents provided no proof to the district regarding the need for the accommodation at the time of scheduling or in response to the district's motion to dismiss; rather, the IHO noted the parents instead mentioned administrative regulations that govern the father's profession as "a commercial freight relocation engineer" (id. at pp. 8-9). Reviewing the regulations referenced by the parents, the IHO found no requirement that a driver must work particular hours or that his employment would be in jeopardy (id. at p. 9). The IHO opined that "[l]itigation . . . and [i]nteracti[ons]with government entities" typically took place "during traditional business hours" and that being required to take time off of work would be "some sort of hardship" to most (id.). The IHO determined that "a deviation, so significant, from normal practices require[d] a showing of unique hardship that the parents ha[d] failed to demonstrate" (id.).

The IHO then addressed the parents' argument that the district scheduling a meeting during times when the student's father was driving created a safety risk (IHO Decision at pp. 9-10). The IHO stated he did not refute the statement that a commercial vehicle operator "must remain focused on the task at hand," but determined that such argument "ignore[d] the obvious" options of "pulling

over and stopping the vehicle for the time the meeting [wa]s conducted or making alternative arrangements" (id. at p. 9). The IHO determined that the decision not to stop the vehicle to attend the resolution meeting was the parent's choice; that the parent did not establish there could be financial penalties if he stopped for the resolution meeting; and that, given the "uncertainty inherent with the transportation of goods on public highways," it was difficult . . . to conclude, without proof, "that accommodations could not have been made" (id. at pp. 9-10).

The IHO noted that the regulations regarding the resolution period were "abundantly clear" that the parties were required to "engage in a resolution meeting in order to discuss the complaint, explore solutions, and better understand the grievances of the petitioner" and that this was "a mandatory and compulsory procedure" for both the parents and the district (IHO Decision at p. 10). The IHO further noted that penalties for parties who fail to participate in the resolution session were "clearly delineated in the regulations" (id.). Based on the forgoing, the IHO determined the "parents failed to appear at the resolution meeting" and "[t]he efforts of the District to work with the Parent[s] [we]re clear, unambiguous and . . . sufficient . . . considering the inflexibility and rigidness" of the parents (id.).

The IHO also considered other grounds for dismissal (IHO Decision at pp. 10-12). The IHO addressed the parents' requested relief in their due process complaint notice and noted that he did not have jurisdiction to remove any employee of the district or members of the district's board of education (id. at pp. 10-11). As the parent did not seek any relief within the IHO's jurisdiction, the IHO found that the due process complaint should be dismissed on this ground as well (id. at p. 11).

The IHO then addressed the district's request for the IHO to dismiss the parents' due process complaint notice with prejudice (IHO Decision at pp. 12-17). Regarding the parents' conduct, the IHO noted authority that would support an IHO's ability to sanction a party and indicated that the goal of a sanction in this matter was not "to punish but rather curb the behavior of the parties" (id. at pp. 12-13). The IHO determined the conduct of the student's father leading up to and during the proceedings was "combative" and with a lack of respect to the proceedings and the IHO's directives (id. at p. 14). The IHO noted that when he informed the father of his expectations as to behavior, the father responded, "I will never agree to any ethics code the court requests" (id.). The IHO also noted that the parent continuously engaged in correspondence excluding the district's counsel of record after being directed to include her; that the parent referred to the district's counsel of record as a "witch" on no less than 14 separate occasions; and that the parent referred to the IHO as a "slave" on no less than four occasions (id. at pp. 14-15).[6] The IHO further noted that the father made unsupported claims that the district's counsel of record threatened his life and that she was under criminal investigation by the police (id. at pp. 15-16). The IHO indicated that the parent stated "[it was] going to be a long year with all the due processes we can and will file" and that, though the parent was notified of the potential sanctions due to his conduct, he continued to engage in such conduct (id. at p. 16). The IHO opined that the student's father had "zero regard for the

[6] The ten emails referenced by the IHO to be ex parte communication by the parents were not submitted with the hearing record; however, such emails were submitted as part of the hearing record for Application of a Student with a Disability, Appeal No. 24-495 (see Application of a Student with a Disability, Appeal No. 24-495 IHO Ex. I at pp. 52-53, 59).

proceedings and would rather continue on his course of conduct . . . than effectively adjudicate the matters and have a final determination made" (id. at p. 16).

Based on all of the foregoing, the IHO dismissed the parents' due process complaint notice with prejudice (IHO Decision at p. 17).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the pro se parents' request for review and the district's answer thereto is presumed and, therefore, the allegations and arguments will not be recited here.[7] The crux of the parties' dispute on appeal is whether the IHO erred by dismissing the parents' due process complaint notice with prejudice.[8]

V. Discussion

Here, the parents have not alleged a sufficient basis to modify the IHO's well-reasoned and well-supported decision dismissing the parents' due process complaint notice with prejudice. The decision shows that the IHO considered the arguments presented by both parties, and further, that he weighed the evidence and supported his conclusions.

The parents in their request for review argue the IHO "used his feelings" to dismiss the case with prejudice, "accept[ed] everything the [d]istrict state[d] as fact," and "demand[ed] more of the parents than he d[id] the district counsel." 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

[7] The parents did not file an affidavit of verification as required by State regulation (8 NYCRR 279.7[b]). Additionally, the parents filed an affidavit of personal service indicating they personally served the notice of intention to seek review and request for review on the district by leaving it with a district secretary on October 28, 2024 (Parent Aff. of Service). Personal service on a school district is made "by delivering a copy thereof to the district clerk, to a trustee or member of the board of education of such school district, to the superintendent of schools, or to a person who has been designated by the board of education to accept service" (8 NYCRR 279.4[b]). The district has not raised an issue in its answer with service of the parents' request for review or with the lack of verification and thus the undersigned will not address these procedural issues further.

[8] The parents also argue on appeal that the IHO did not ensure the district provided the student's pendency program. Based on a review of the evidence, it appears that there was no dispute over what constituted the student's pendency program during the duration of this proceeding (see Application of a Student with a Disability, Appeal No. 24-495 IHO Ex. I at pp. 71, 82, 84, 112, 143, 151-53, 193, 204; see also Req. for Rev. ¶ 9). Further, based on the email correspondence between parties, it appears the student attended the pendency program (see Application of a Student with a Disability, Appeal No. 24-495 IHO Ex. I at pp. 106, 204-05). Additionally, the parents have not indicated the relief they seek due to the IHO's alleged failure to issue an order on pendency in their request for review; as such, the issue of pendency will not be further discussed.

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]; C.E. v. Chappaqua Cent. Sch. Dist., 695 Fed. App'x 621, 625 [2d Cir. June 14, 2017]).

A review of the IHO's decisions and the hearing record supports a finding that the IHO was not biased against the parents. An independent review of the hearing record demonstrates that the parents engaged in multiple conversations with the IHO and district's legal representatives and were given opportunities to respond to any of the IHO's questions and motions of the district (see generally Parent Response to Mot. to Dismiss; Application of a Student with a Disability, Appeal No. 24-495 IHO Ex. I). Thus, the IHO conducted the preliminary proceedings within the bounds of standard legal practice and the hearing record does not support a finding of bias (Genn v. New Haven Bd. of Educ., 219 F. Supp. 3d 296, 311 [D. Conn. 2016] [rejecting the parent's claim of IHO bias and noting that conduct that was described as "curt" and "harsh" nevertheless did not amount to bias]).

Next, the parents argue that the IHO erred by not finding the district's motion improperly filed given that the motion addressed two separate matters involving the student (see Aff. in Support of Dist. Mot. to Dismiss). As a general matter, summary disposition procedures akin to those used in judicial proceedings are a permissible mechanism for resolving certain proceedings under the IDEA (see, e.g., Application of a Student with a Disability, Appeal No. 19-102; Application of the Dep't of Educ., Appeal No. 11-004), but generally regulations do not address the particulars of motion practice. Instead, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in such matters, 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]).

Thus, while perhaps the district's combining of the matters into one motion is not the best practice, the IHO's decision to rule on the combined motion was a matter within his discretion and is not a basis for reversal.

Regarding the resolution meeting, the IDEA, as well as State and federal regulations provide that, within 15 days of the receipt of the due process complaint notice, the district shall convene a resolution meeting where the parents discuss their complaint and the school district has an opportunity to resolve that complaint with the parents and the relevant members of the CSE who have specific knowledge of the facts identified in the complaint, including a representative of the school district who has decision-making authority but not including an attorney of the school district unless the parents are accompanied by an attorney (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]). The resolution period provision allots 30 days from the receipt of the due process complaint notice for the district to resolve the complaint to the parent's satisfaction or the parties may proceed to an impartial hearing (20 U.S.C. § 1415[f][1][B][ii]; 34 CFR 300.510[b][1]; 8 NYCRR 200.5[j][2][v]). Except where the parties have agreed to waive the resolution process or use mediation, a parent's failure to participate in a resolution meeting "will

delay the timeline for the resolution process," as well as the timeline for the impartial hearing, until the meeting is held (34 CFR 300.510[b][3]; 8 NYCRR 200.5[j][2][vi]). Further, a school district may request that an IHO dismiss a due process complaint notice if, at the conclusion of the 30-day resolution period and notwithstanding reasonable efforts having been made and documented, the district was unable to obtain the participation of the parent in the resolution meeting (34 CFR 300.510[b][4]; 8 NYCRR 200.5[j][2][vi][a]). On the other hand, if the district fails to convene the resolution meeting within 15 days of receipt of the parent's due process complaint notice or fails to participate in the resolution meeting, the parent may seek the intervention of the IHO to begin the impartial hearing timeline (34 CFR 300.510[b][5]; 8 NYCRR 200.5[j][2][vi][b]). If a parent does not feel that their concerns have been adequately addressed at the resolution meeting, the parent is free to proceed with the due process proceedings and seek what they feel will adequately remedy them (see Polanco v. Porter, 2023 WL 2242764 at *5 [S.D.N.Y. Feb. 27, 2023] [noting that the resolution period is a time where the district may remedy any alleged deficiencies in the IEP without penalty, but if the parent feels their concerns have not been adequately addressed and a FAPE has still not been provided, then the parent may continue with the due process proceeding]).

Here, as noted above, the IHO considered the documentation of the district's efforts to schedule a resolution meeting with the parents (see IHO Decision at p. 6). According to the hearing record, on August 16, 2024, the district sent a notice of a resolution session to the parents indicating that, because they requested for their due process complaint notice to be expedited, a virtual resolution meeting was scheduled for August 20, 2024 at 10:15 a.m. (Dist. Ex. C; IHO Exs. I-II). The student's father responded the same day via email stating that the scheduled time did not work for the parents and requesting for the resolution session to be scheduled sometime between 6:00 p.m. and 8:00 p.m., Monday through Saturday (IHO Ex. III). The father also requested that, if the district refused to "produce a time acceptable to [our] safety and availability," it waive the resolution period (id.). The student's mother also responded the same day via email indicating that she was only free in the evenings due to the student's many appointments during the week and that she was waiving the resolution period because of what occurred at a prior resolution meeting (IHO Ex. IV).[9] The parents did not attend the resolution meeting scheduled for August 20, 2024 (IHO Ex. V). On August 20, 2024, the district sent an email to the parents requesting their availability Monday through Friday between 8:00 a.m. and 5:00 p.m. to reschedule the resolution meeting (id.). Both parents responded separately via email the same day (IHO Exs. VI-VII). The mother indicated that both parents were only available from 6:00 p.m. to 8:00 p.m. and further stated that she was waiving the resolution period and would be waiving it for all future due process complaint notices they may file (IHO Ex. VI). The father argued they did not fail to appear at the August 20, 2024 resolution meeting because the district did not schedule the meeting at a date and time that was mutually agreed upon and also indicated that he could file another due process complaint notice for this "one occasion" (IHO Ex. VII). The father also stated that, if the district did not respond to his email by noon on August 21, 2024, he would deem the district to have waived the resolution period (id.).

[9] According to the hearing record, the parents appeared at a resolution meeting on August 9, 2024 relating to a different due process complaint notice (see Dist. Exs. A-B).

The parents, on appeal do not dispute that they did not attend the resolution meeting scheduled for August 20, 2024,[10] or that they would not agree to a meeting during the timeframes proposed by the district. Instead, the parents argue that the IHO erred by failing to properly consider the father's profession as a reason that the district must accommodate his limited availability in scheduling a resolution meeting.[11] However, contrary to the parents' allegation, the IHO's decision shows that the IHO weighed the obligations of the father's profession, in addition to other factors, when making his determination (IHO Decision at pp. 8-9).[12] Here, the parents do not present a convincing argument that the IHO erred in finding that the district made reasonable efforts to accommodate the parents' requests and that the parents were being unreasonable.

As for other grounds identified by the IHO as supporting dismissal, the parents argue in their request for review that the IHO erred by sua sponte addressing subject matter jurisdiction, asserting that the IHO improperly raised the defense on behalf of the district. However, subject matter jurisdiction is not an affirmative defense, as it refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). As such, the IHO was permitted to raise subject matter jurisdiction sua sponte as a lack of jurisdiction "can never be forfeited or waived" (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]).

As noted above, the parents requested in their due process complaint notice for all members of the district's board of education to be replaced (Due Process Compl. Not.); however, the IHO found that removal of any employee of the district was outside of the IHO's jurisdiction (IHO Decision at p. 11). Other than alleging error in the IHO raising the jurisdictional question, the parents do not otherwise dispute the IHO's determination that he did not have jurisdiction to grant the parents' requested relief; accordingly, it is unnecessary to further discuss the issue and the IHO's determination stands as another basis for dismissing the parents' due process complaint notice.

Finally, with respect to the IHO's dismissal of the due process complaint notice with prejudice, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable

[10] The parents argue that the IHO's decision is internally inconsistent in that it stated both that no meeting was ever held and also that the parents never attended the meeting; however, it appears the parents are referencing the IHO's granting of their request for an end of the resolution period, which the IHP found had ended because a resolution meeting was held (see IHO Decision at p. 3) and the IHO's finding that a meeting was held is not inconsistent with a finding that the parents did not attend.

[11] On this issue, the parents indicate they had written a 33-page response "for this appeal" but "discovered" they could not use it; however, pursuant to practice regulations governing appeals before the Office of State Review, the parents could have submitted a 30-page memorandum of law to support their arguments on appeal (see 8 NYCRR 279.4[g]; 279.8[d]). Additionally, a request for review could be up to 10-pages; however, the parents only submitted a 4-page request for review (see 8 NYCRR 279.8[b]). In any event, I have considered the entirety of the hearing record, including the parents' arguments presented to the IHO regarding the father's profession (see Parent Response to Mot. to Dismiss at pp. 6-7, 10-11).

[12] Generally, if parents indicate to a district that certain circumstances prevent them from attending the resolution meeting in person, the district should, as it did here, offer alternative means of participation, such as videoconferences or conference telephone calls (Resolution Meeting, 71 Fed. Reg. 46,701 [Aug. 14, 2006]; Letter to Eig, 59 IDELR 81 [OSEP 2012]).

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). Turning to the IHO's reasoning underlying his decision to dismiss the parents' due process complaint notice with prejudice, the parents allege only that the IHO erred by claiming the parents were engaging in ex parte communications (see IHO Decision at pp. 14-15). The parents do not dispute the IHO's findings regarding the father's combative conduct and refusal to respect the proceedings and the IHO's directives (id. at pp. 14-16). Accordingly, even if the IHO erred in the limited factual consideration regarding the parents exclusion of the district's attorney from communications, this would not warrant reversal of the IHO's decision to dismiss the due process complaint notice with prejudice.

VI. Conclusion

Based on the forgoing, the hearing record supports the IHO's dismissal of the parents' due process complaint notice with prejudice.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 23, 2024

STEVEN KROLAK
STATE REVIEW OFFICER