The University of the State of New York

The State Education Department
State Review Officer
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No. 24-495

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 an August 16, 2024 due process complaint notice, which was also dismissed with prejudice; the August 16, 2024 due process complaint notice was assigned IHO case number 638889 and SRO appeal number 24-494 (see Application of a Student with a Disability, Appeal No. 24-494).

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

According to the IHO in his decision, the parents filed their due process complaint notice on or around August 3, 2024 alleging the district: promoted the student when he failed to meet promotion criteria; failed to provide adequate meeting notice; failed to provide for parental participation; and refused to provide compulsory education and services (IHO Decision at pp. 2-3). According to the IHO, as relief, the parents requested: (1) monetary relief in the amount of $300,000.00 on condition that they will use the monies to purchase a home outside of the district; (2) for the superintendent, the CSE chair, the principal of the district high school, the principal at the district's Board of Cooperative Educational Services (BOCES) program, and the principal of the district middle school to all resign, with new employees to be selected by the State Education Department; (3) for the district to allow only the father to choose the services for the student and how the district would provide the services; and (4) for the district to accept all costs associated with the student including housing, food, and healthcare outside of education because the district "demand[s] that the father not be allowed to work so he can be available whenever they want to do anything" (id. at p. 3).[3]

[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 6, 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 parents' motion to convene a hearing; 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]). Additionally, according to the district's certification of the hearing record, there were no exhibits entered into the hearing record given that the parties never proceeded to an impartial hearing; however, 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 eighteen 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 2:25 p.m. will be referred and cited as district exhibit D; the email from the parent dated August 6, 2024 at 2:55 p.m. will be referred and cited as district exhibit E; the email from the parent dated August 21, 2024 at 11:39 a.m. will be referred and cited as district exhibit F; the email from the parent dated August 6, 2024 at 3:03 p.m. will be referred and cited as district exhibit G; and the emails between parties from August 3, 2024 to September 30, 2024 which is 303-pages will be referred and cited as IHO exhibit I. 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] After two letters from the Office of State Review directing the district to file the due process complaint notice in this matter, the district filed a due process complaint notice dated July 28, 2024, in which the parents alleged that the district denied the student a free appropriate public education (FAPE) by failing to hold a CSE meeting at a "mutually agreed on time and place" of their choosing to discuss the student's special education programing as ordered in a prior IHO decision (see July 2024 Due Process Compl. Notice). Given the discrepancies in the allegations described by the IHO and those set forth in the due process complaint notice submitted in this matter—and noting that the hearing record indicates that the parent has filed several due process complaint notices—it appears that the parents' due process complaint notice underlying this matter may be missing from the hearing record on appeal. The Office of State Review endeavors to identify any deficiencies in the hearing record; however, the district is reminded that it carries the responsibility to file a complete copy of the hearing record

On or about August 9, 2024, the parties met for a resolution meeting (IHO Decision at p. 2). According to the IHO's decision, the district argued that, although the parents technically appeared, their appearance did not constitute participation as required by State regulations (id.).

Then, on August 29, 2024, the parents sought to terminate the remainder of the resolution period (Parent Mot. to Convene Hearing). The district, in turn, filed a motion seeking dismissal of the due process complaint notice filed by the parents arguing the parents failed to participate in a resolution meeting scheduled for the parents' Aug. 3, 2024 due process complaint notice (Aff. in Support of Dist. Mot. to Dismiss).[4] In addition to the dismissal, the district sought as a sanction that the matter to 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 such was granted (id. 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 3, 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 the resolution period of this matter terminated on September 2, 2024 and thus determined that "through the passage of time," the motion had become moot (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 (see IHO Decision at pp. 4-14). The IHO noted that neither party disagreed that the parents attended a resolution meeting regarding the due process complaint notice but that the district argued the parents' attendance was "perfunctory and failed to meet any definition of participation" and the parents argued the district failed to provide timely notice and failed to consider the parents' schedule, which demonstrated valid reasons for any defect in their participation (id. at p. 4). The IHO recited the regulatory provisions relating to the resolution period, finding that they were 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). The IHO also opined that "mere presence [wa]s not enough to satisfy the requirements" for participating in a resolution meeting under State regulation (id. at p. 5). The IHO also noted that, absent language to the contrary in State regulation, whether

with the Office of State Review and that failure to do so could result in remedial actions such as striking an answer, dismissing a cross-appeal, or making a finding that the district violated the parent's right to due process (8 NYCRR 279.9[a]-[b]). In this instance, given that the there is no allegation that the IHO inaccurately summarized the parents' allegations, I decline to exercise my discretion to take remedial action against the district for the outstanding record deficiency (8 NYCRR 279.9[b]).

[4] In the same motion, the district also sought to dismiss IHO case number 638889 relating to the parents' August 16, 2024 due process complaint notice (Aff. in Support of Dist. Motion to Dismiss at p. 1).

one or both parents appeared at the resolution meeting was a decision exclusively left to the parents (id. at p. 6). 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 decide the time and place of the meeting" (id.).

The IHO concluded that the issue to be determined was whether or not the parents' attendance fulfilled the requirement for participation in the resolution meeting (IHO Decision at p. 6). The IHO noted that the August 9, 2024 resolution meeting was attended by the student's father and mother and also the superintendent of the district and the district director of special education (id. at p. 7). Based on an audio recording submitted to the IHO for consideration as an exhibit to the district's motion to dismiss, the IHO noted that the superintendent attempted to engage the parents in a discussion as it related to the nature of their due process complaint notice and how the resolution could be achieved, that there was confrontational language used by the student's father, and, for some unknown reason, the parents stopped responding after about four minutes and left the meeting (id.).[5] The superintendent of the district and the district director of special education left the meeting open for 45-minutes, but the parents did not return and the meeting was terminated (id.).

Based on the forgoing, the IHO determined that the district attempted to hold the resolution meeting on August 9, 2024, however brief, and engaged in good faith conversations with the parents but such engagement "quickly eroded to profanity" from the father (IHO Decision at p. 8). The IHO noted the parents allege that a collision occurred during the meeting; however, the IHO did not credit this statement as the parents did not submit an accident report and no other audio could be heard to suggest that an accident did, in fact, occur (id.). The IHO opined that it was "[f]ar more plausible . . . that the noise heard was the nature of a person driving or an orchestrated attempt to deceive" (id.). As such, the IHO determined the evidence supported a conclusion that the parents did not participate at the resolution meeting and that their actions could "be only described as antics that were not an attempt to meaningfully participate in a possible settlement but rather an attempt to obfuscate and thwart the efforts of the District to engage in a statutorily mandated meeting" (id. at p. 9).

The IHO then addressed the parents' "defenses" which the IHO described as "mitigating circumstances" the parents wanted the IHO to consider (IHO Decision at p. 9). The IHO noted State regulations were drafted in a way where a dismissal for the parents' failure to attend a

[5] The IHO noted that after about 20 seconds of no responses from the father at the four-minute mark, where no audible noise could be heard from the parents, an excerpt of John Legend's "All of Me" played (IHO Decision at p. 7). The IHO noted that that the excerpt played two more times during the course of the meeting at timestamps at 5:43 and 6:34 and at about timestamp 7:13, the father left the meeting (id.). The IHO noted the mother attended but did not contribute to the meeting and apparently dropped out of the resolution meeting at some point (see generally id. at p. 7 n. 4). The IHO characterized the parents' behavior as "bizarre" noting that the repeated playing of the musical refrain of a popular song, without context or clarity as to why (id. at p. 8). The IHO determined the music playing was not simply a microphone picking up a song playing in the background, otherwise the entire song would have played, or other background interference, but was the intentional playing of an excerpt of the song (id.).

resolution meeting was not compulsory but rather an application that was based on the unique facts and circumstances of the case (id.).

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" (IHO Decision at p. 9, citing 8 NYCRR 200.5[j][2][i]). The IHO found that the district provided notice to the parents on August 7, 2024 regarding the August 9, 2024 resolution meeting and that two days was sufficient notice as both parents did attend the resolution meeting, although they did not meaningfully participate (IHO Decision at pp. 9-10).

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. 10-11). 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 weekends (id. at p. 10). 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 that 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 only mentioned administrative regulations that govern the father's profession as "a commercial freight relocation engineer" (id.). Reviewing the regulations referenced by the parents, the IHO found no requirement that a driver must work particular hours or his employment would be in jeopardy (id. at pp. 10-11). The IHO opined that "[l]itigation" . . . and [i]nteracting 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. at p. 11). 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. 11-12). 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. 11). The IHO determined that the decision not to stop the vehicle during

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 [wa]s difficult . . . to conclude, without proof, that accommodations could not have been made" (id. at pp. 11-12).

Next, the IHO addressed the parents' argument that, because the district demanded a proposed resolution at the outset of the meeting, this demonstrated that the district was not interested in the true purpose of the resolution meeting (IHO Decision at p. 12). Here, the IHO determined that, based on the audio recording of the resolution meeting, there was insufficient evidence to support the parents' argument and further, because the meeting was not completed, it was impossible to draw a conclusion that the district was not interested in the true purpose of the resolution meeting (id.).

Next, the IHO noted that the student's mother appeared at the resolution meeting but chose not to participate and that the district presented options and attempted to work with the student's father to arrive at a mutually agreeable time (IHO Decision at p. 13). The IHO also determined that the parents' argument that the district attempted to circumvent the father to favor the mother's participation was not supported by the evidence (id.).

Based on the above, the IHO determined there was "good cause" to dismiss the parents' due process complaint based upon their failure to participate in the scheduled resolution meeting (IHO Decision at pp. 13-14). The IHO also determined that mitigating circumstances argued by the parents were moot based on the fact that they did attend the resolution meeting and that there was insufficient evidence to excuse the parents' lack of participation (id. at p. 14).

The IHO also considered other grounds for dismissal (IHO Decision at pp. 14-16). The IHO addressed the parents' requested relief in their due process complaint notice and noted that he could only award relief within the confines of his jurisdiction (id. at pp. 14-15). The IHO determined that he was unable to award the parents' requested monetary relief in the form of purchasing a home out of district, stating it would constitute a form of punitive damages (id. at p. 15). The IHO also determined he could not grant the parents' request for resignation of district personnel as such decisions rested with the board of education (id.). As to the parents' request for complete autonomy over both their children's special education services, the IHO determined the "IDEA clearly envisions a collaborative process with no one person given final decision making authority" and that "it [wa]s simply impossible and a complete contravention of the law to suggest that the parent[s] would be awarded this type of unilateral authority within the context of the IDEA" (id.). As to the parents' request for child support, the IHO determined such request was also outside of his jurisdiction and also could never be granted within the context of an administrative hearing under the IDEA (id.). Based on the foregoing, the IHO determined that, despite his ability to craft legal and appropriate relief, the parents failed to state, "their own version of legal and appropriate relief" and the district had no notice of the relief that he "may be inclined to grant", and thus, based on the matter of jurisdiction, the parents' due process complaint notice must also be dismissed (id. at p. 16).

The IHO also addressed the district's request for the IHO to dismiss the parents' due process complaint notice with prejudice (IHO Decision at pp. 16-21). 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. 16-18). The IHO determined the conduct of the student's father leading up to and during the proceedings was "combative" and with a lack respect to the proceedings and the IHO's directives (id. at pp. 18-19). The IHO also 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. at p. 19). 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 fourteen separate occasions; and that the parent referred to the IHO as a "slave" on no less than four occasions (IHO Decision at pp. 19-20; see IHO Ex. I at pp. 2-4, 8, 11, 15, 27-28, 90, 106, 193). 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 (IHO Decision at p. 20). 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 pp. 20-21). The IHO opined that the student's father had "zero regard for the proceedings and would rather continue on his course of conduct . . . than effectively adjudicate the matters and have a final determination made" (id. at p. 21).

Based on all of the foregoing, the IHO dismissed the parents' due process complaint notice with prejudice (IHO Decision at p. 22).

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.[6] The crux of the parties' dispute on appeal is whether the IHO erred by dismissing the parents' due process complaint notice with prejudice.[7]

[6] 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 upon the district the notice of intention to seek review and request for review by leaving it with a district secretary on October 28, 2024 (Parent Aff. of Service). The parents also submitted a receipt indicating they mailed a letter, but the receipt does not indicate the specific address to which it was mailed or what was mailed. 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.

[7] 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 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 the parties, it appears the student attended the pendency program (IHO Ex. I at pp. 106, 204-05). Additionally, the parents have not indicated any 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.

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 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 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 decision 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 preliminary conversations with the IHO and district's legal representatives and was given opportunities to respond to any of the IHO's questions and motions of the district (see generally IHO Ex. I; Parent Response to Mot. to Dismiss). Further, the IHO noted that the parents were proceeding pro se and provided definitions of legal terms to assist the parents in defending their case; thus, contrary to the parents' argument on appeal, the IHO did take into consideration they were not attorneys (IHO Ex. I; see also Req. for Rev. ¶ 11). 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 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 found that the district attempted in good faith to hold the resolution meeting on August 9, 2024 but that the parents' attendance was not sufficient to meet the requirements for participation in the resolution meeting and, instead, their actions were intended to thwart the district's efforts (see IHO Decision at pp. 6-8). The parents have not appealed these specific findings of the IHO; as such, the IHO's findings in this regard are final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar, 21. 2013]).

Instead, the parents in their request for review argue the IHO failed to properly consider the father's profession as a reason the district must accommodate his limited availability in scheduling a resolution meeting, and that the district effectively has been led to believe it can force

the father to attend meetings it sets up; however, a review of the hearing record does not support the parents' argument.[8]

Contrary to the parents' allegation, the IHO's decision shows that he weighed the obligations of the father's profession, in addition to other factors, when making his determination (IHO Decision at pp. 10-12).[9] The parents in their response to the district's motion to dismiss cite to the federal regulations to support their argument that for the student's father to attend the resolution meeting via cell phone was against the law and also argued that if the father was "to stop for hours at the whim of the district he could miss a delivery appointment, which would result in a monetary penalty, due to production lines, crane rental costs or other restrictions placed by customers who require timely deliveries"; however, as identified by the IHO, such argument does not consider that the father could have pulled over and stopped the vehicle during the resolution meeting, made other arrangements or that the student's mother could have attended the resolution meeting alone (see Parent Response to Motion to Dismiss at pp. 7, 13; see also IHO Decision at pp. 11-13).[10] Additionally, the federal regulations cited to by the parents regards hand-held devices and does not include information that a hands-free device may be used by a commercial truck driver (see Parent Response to Motion to Dismiss at p. 7, citing "Cell Phone Use and Texting," New York Dep't of Motor Vehicles [last visited Dec. 2, 2024], https://dmv.ny.gov/points-and-penalties/cell-phone-use-and-texting). The father's choice to attend the August 9, 2024 resolution meeting via telephone while operating a vehicle, which was categorized by the parents as unsafe, was his own and such decision to place the father in an "unsafe" circumstance cannot now be imputed onto the district. Further, the evidence supports that the student's father was able to send emails during the week days between the hours of 9:00 a.m. and 4:00 p.m. (see Dist. Exs. D at p. 1; E at p. 1; F at p. 1; G at p. 1).[11] Accordingly, the

[8] 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, 13).

[9] 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 Saturday (Dist. Ex. E at p. 1; see IHO Decision at p. 10). The parents argued that, because the district had events after school hours such as sporting events and parent teacher conferences, the district was able to schedule a resolution meeting between 6:00 p.m. and 8:00 p.m. during the week or on Saturday (see IHO Ex. I at p. 283).

[10] 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]).

[11] Further, the parents conceded in their response to the district's motion to dismiss that the father was able to write emails during the course of his workday from the cab of his truck. In their response, while addressing the district argument that sanctions should be applied to the parents because of their threatening, harassing, and obstructionist behaviors, the parents argued that "[i]n this case we have words stated by written email, from the cab of [the father]'s truck that [wa]s not on Government property, thus cannot be restricted as per the above

hearing record supports a finding that the IHO properly considered and weighed the parents' arguments concerning the father's profession, and the parents' conclusory allegation on appeal that the IHO failed to do so, while not challenging any of his specific findings related to the issue, are therefore unavailing.

Regarding the limited discussion that occurred during the resolution meeting on August 9, 2024, the parents argue on appeal that the IHO "refused to accept the legislature structure provided in the law regarding resolution session," arguing the district only asked the parents to state what they requested as a resolution to their due process complaint notice rather than allowing them to discuss the complaint and the facts that formed the basis for such complaint. Here, review of the audio recording of the resolution meeting supports the IHO's finding that, because there was no meaningful participation by the parents during the August 9, 2024 resolution meeting and the meeting ended without any meaningful discussion, there is no evidence to support the parents' argument that the district was not interested in the "true purpose" of the resolution meeting or that the IHO misapplied the provisions of the IDEA or implementing regulations governing resolution meetings (see IHO Decision at p. 12; see also Parent Response to Mot. to Dismiss at p. 12).

Accordingly, the parents do not present a convincing argument that the IHO erred in finding that the dismissal of the due process complaint notice was warranted based on the parents' failure to participate in the scheduled resolution meeting (IHO Decision at p. 21).

As for the other the ground 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 because the IHO raised such claim 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]). Additionally, according to the hearing record, the IHO raised the issue of subject matter jurisdiction on the basis of the parents' requested relief in their due process complaint notice and allowed the parties an opportunity to submit arguments on whether the IHO had subject matter jurisdiction over the matter (see IHO Ex. I at pp. 82, 84, 94). As such, the parents were given an opportunity to respond to the question of IHO's subject matter jurisdiction over the parents' claims and requested relief but declined to do so.

As noted above, the parents do not dispute the IHO's recitation of the relief sought in their due process complaint notice, which included monetary relief in the amount of $300,000 on the condition that they will use the monies to purchase a home outside of the district; for the superintendent, the CSE chair, the principals of the district's high school, middle school and BOCES school all resign, with new employees to be selected by the State Education Department; and for the district to allow only the student's father to choose the special education services for his both of his sons who attend the district and how the district will provide the services to his sons, including all costs associated with housing, food, and healthcare outside of education (IHO

captioned decision" (Parent Response to Mot. to Dismiss at p. 16). The parents do not explain how the father was able to send emails during the course of his workday given his description of the constraints of his job, including time constraints (see Req. for Rev.; see also, Parent Response to Motion to Dismiss).

Decision at p. 2). 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 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). For example, 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]).

Generally, a dismissal with prejudice should be reserved for extreme cases (see Nickerson-Reti v. Lexington Pub. Sch., 893 F. Supp. 2d 276, 293-94 [D. Mass. 2012]). Accordingly, in upholding a dismissal with prejudice, SROs have considered such factors as whether there was adequate notice to the party at risk for dismissal or 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).

With respect 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 (IHO Decision at pp. 19-20); however, the hearing record supports that the parents were told the prior district's counsel of record was removed and a new one was appointed, yet the parents continued to write emails that did not contain the new district's counsel of record (see IHO Ex. I at pp. 52-53, 59). Moreover, 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 (IHO Decision at pp. 18-19). While it is understandable that the parents of children with disabilities may at times experience frustration with the due process system, and the IEP development process underlying their claims, they nonetheless have an obligation to comply with the reasonable directives of the IHO. Accordingly, even if the IHO had erred, as the parents contend, 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 based on the evidence in the hearing record, unrebutted by the parents on appeal, that the student's father repeatedly failed to comply with the IHO's reasonable directives and otherwise engaged in conduct that impeded the IHO's ability to manage the impartial hearing.

VI. Conclusion

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
December 20, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER