

INDIVIDUALS WITH DISABILITIES EDUCATION ACT
BEFORE THE REVIEW OFFICER
FOR THE SOUTH CAROLINA DEPARTMENT OF EDUCATION

STATE OF SOUTH CAROLINA	)	
	)	
COUNTY OF LANCASTER	)	
	)	
In the Matter of:	)	
	)	DECISION OF THE
A.B. & K.B. on behalf of K.C., ¹	)	STATE REVIEW OFFICER
Appellant	)	
	)	
v.	)	
	)	
Lancaster County School District, ²	)	
Appellee	)	

This matter is before me as the State Review Officer (SRO) pursuant to an appeal by the Parent of a decision by Brian P. Murphy, the Local Hearing Officer (LHO). As explained in specific detail *infra*, the LHO dismissed the Parent’s case with prejudice under the Individuals with Disabilities Education Act (IDEA). In the absence of a hearing, the record in this case consists of dated documents, including various email communications, that were exchanged

¹ Assuming that this cover section will undergo redaction, the rest of this decision will generically use “Parent” (without differentiation as to father and/or mother, except for the unusual final, dismissal stage in this case) and “Student” (without name or other personally identifying information). The rest of the decision will also use general roles, such as “designated legal representative” (without names), and “he” or “his” (without differentiation as to actual gender) for the same purpose. Moreover, cross references within this decision are, per legal citation style, via “*supra*” (above), “*infra*” (below), and “*Id.*” (same as preceding footnote).

² For overall consistency, the rest of this decision will generically refer to “District.”

among the parties and the LHO and that culminated in the dismissal decision.³ In light of this limited context, these documents are identified simply by their respective dates.⁴

I. RELEVANT BACKGROUND⁵

On November 29, 2022, the Parent filed the complaint for a due process hearing (DPH), claiming that the District denied the Student a free appropriate public education (FAPE) under the IDEA. More specifically, the complaint identified nine nonacademic services, related services, and supplementary aids and services that the Parent had requested and that the District had rejected for the Student’s individualized education program (IEP). The requested relief included direct compensatory payment, reimbursement for services at Parent’s expense, prospective provision of services, and legal fees. The alleged FAPE violations and any resulting remedies are referred to herein as “the merits of the case.”

On December 7, 2022, the District issued its response to the complaint, asserting that the proposed IEP met the standards for FAPE. The response also included a counterclaim asserting that the Parent failed to cooperate with the Student’s reevaluation.

On December 28, 2022, after some initial correspondence to the LHO from the Parent and/or the District,⁶ the LHO sent an email to the parties directing them to provide, by January 2, 2023, their availability for hearing sessions during the three weeks starting January 23, 2023. The email specifically warned the parties to “NOT include any other information or argument” in their responses. The email also informed the parties that after receiving their responses, the

³ Per the SRO’s status order on 2/9/23, the scope of these documents was specific to the dismissal order as contrasted with the merits of the case. These documents all are in the case record under their date.

⁴ The footnotes only cite those documents, including emails, that require clarification as to the dated source. E.g., *infra* note 7.

⁵ Due to this same limited prehearing context, this broadened standard section subsumes the customarily separate “Findings of Fact” section. In the absence of the evidentiary procedures for a hearing, it is a recitation of the mutually available correspondence related to the limited scope of this SRO appeal.

⁶ With the limited exception of an accompanying 12/9/22 “Please see attached” cover email from the District, the parties did not provide to me, and I do not need, this intervening correspondence.

LHO would issue a scheduling order or determine whether a prehearing conference call was necessary.⁷

On January 3, 2023, after receiving timely and compliant responses from both parties, the LHO issued a scheduling order, which included a January 13 deadline for subpoena requests, a January 23 deadline for disclosure of witness lists and documents, and hearing dates of January 30 and 31.

Also on January 3, the LHO provided the parties with a summary of the procedures for the hearing, which apparently were the LHO's standard set of expectations. In addition to the various evidentiary steps for the hearing, the summary included an explanation that the IDEA hearing would focus on the legal requirements for the Student, not on conflict and confrontation between the party representatives. In doing so, it included an emphatic warning: "Any person who is disrespectful or disruptive will be excluded from the proceedings."

On January 9, 2023, the Parent responded with a motion for "clarification, objection and subpoenas." The objection was to any involvement of the designated legal representative of the South Carolina Department of Education (SCDOE) based on said representative purportedly having "knowingly, unethically, and illegally, attempted to change the order of a [SRO]." The motion also included broad-based subpoena requests for (a) all communications between SCDOE's designated legal representative and the LHO and (b) "[a]ny and all guidance received from the [U.S.] Office of Special Education Programs OSEP since March of 2020 to SCDOE or LCSD." It also requested a prehearing conference and reported that the Parent "can not afford [legal] counsel." On the same date, the Parent issued a separate subpoena request for the purported Student's FERPA-covered records, including informal observations, notes between IEP team members, and "emails between team members that did not include parents

⁷ This initial correspondence is part of a document with the abbreviated label "12/28/22–1/25/23 emails."

but pertained to students.”

On January 12, 2023, the Parent provided a witness list, which consisted of eight District employees and eight non-District employees.⁸

Subsequently on January 12, 2023, the LHO issued an order that responded to the Parent’s January 9 motion.

On January 13, 2023 the District requested a subpoena to SCDOE for all records of DPH and SRO matters specific to the Student.

Also on January 13, 2023, the Parent requested subpoenas for the eight District employees and four of the non-employees on the January 9 witness list. Alleging in this document that the LHO had abruptly changed “standard practice,” the Parent also requested “the laws, procedural guidelines and regulations that you are using as far as what a lawful administrative hearing consists of and/or standard procedure,” including “any guidance either from the SEA, DOJ or OSEP, that ... has changed the procedures of a hearing.”

On January 17, 2023, the LHO issued orders in response to both parties’ subpoena requests.

Also, on January 17, 2023, the Parent emailed a second request for a prehearing conference.⁹

On January 19, 2023, the Parent asserted that the LHO’s January 17th orders were not in accordance with “standard practice, nor within IDEA regulations or in accordance with present case law within the state of SC for due process hearings” and repeated the accusations about SCDOE and its designated legal representative. The document culminated with a request for the LHO’s recusal based on the explanation that although “the LHO has a reputation of being

⁸ *Id.*

⁹ *Id.*

just,” the allegedly illegal orders must be logically attributable to “the authority and correspondence of [SCDOE’s designated legal representative].”

On January 20, 2023, the LHO denied the motion for recusal; granted the Parent’s request for virtual testimony by two witnesses; sustained the District’s objection to the superintendent serving as a witness; denied the Parent’s objection to the hearing location; ruled that a prehearing conference was not warranted in this case; and declined to address the Parent’s continued rearguments.

On January 23, the District provided its witness list.

Also on January 23, 2023, the Parent asserted that a printer problem accounted for not timely providing the requested documents.¹⁰

On January 24, 2023, the District filed a motion to bar the Parent’s introduction of untimely evidence at the hearing based on the Parent’s failure to comply with two applicable deadlines, including the disclosure deadline of January 23.

Also on January 24, 2023, the Parent sent two consecutive emails to the LHO. The first one contained the following assertion:

This entire pre-hearing has been a disaster. I have now been in 4 DPH[s] and each one was VASTLY different then [sic] the one before, making up new pre hearing, and hearing rules, procedures, and timelines. Will someone PLEASE stop playing games and ACTUALLY do the right thing.

The second email more pointedly accused the LHO of “willfully and purposedly and negligently [] deny[ing] this child an impartial [DPH] pre hearing.”¹¹

Also on January 24, 2023, the Parent filed a motion for an extension of the disclosure deadline. The motion contained the assertion that the LHO’s January 20 order included “a lie” and amounted to “negligence ... [and] collusion and Conspiracy to commit a crime against a

¹⁰ *Id.*

¹¹ *Id.*

child with a disability.”

On the morning of January 25, 2023, the Parent sent an email to the District’s legal counsel, which referred to the counsel’s husband and his employing school district. This email also included the following statements:

I am eager to present this case in federal court to see how a judge feels about these pre-hearing matters. Lord willing, it will be in a different state. We are waiting to hear back from the 4th circuit to get the case moved out of South Carolina to [C]harlotte. Please make no mistake, that I will continue to fight against the tyranny, corruption, greed that is the Ponzi scheme in the South Carolina Department of Education, And those who judicially participate unethically.¹²

In the early afternoon of January 25, 2023, the LHO issued an order that denied the requested extension and also remonstrated the Parent for the continued violations of “the basic rule of decency” set forth in the LHO’s January 3 directive.¹³ The order also provided a contingency in case of Parent’s further violations.¹⁴

Later that afternoon, the LHO issued a second order, which contained two successive and related parts. By way of introduction, this order explained that 90 minutes after making clear to the parties that the LHO would not tolerate any further rudeness and *ad hominem* attacks,¹⁵ the Parent had responded with “a salvo that touches every prohibited base.” The quoted excerpts from the Parent’s response included the following examples:

¹² *Id.*

¹³ More specifically, his explanation included the following specific warning:

Mother’s most recent email, referencing District’s counsel, her husband, and his employer is just the latest example of her wasteful and disrespectful communications Any further rude emails, “side notes,” or comments (including political attacks on the DOE or South Carolina) from Mother will result in an Order barring her from participating in this action. Likewise, any rudeness, incivility, or speeches on political issues at the hearing will result in Mother being barred from participating in the hearing.

¹⁴ The specific notification was as follows: “Student’s father should, however, be aware of the possible need for him to participate in the hearing and to represent Student if Student’s Mother violates this Order and is barred from proceeding. If there is no Petitioner present at the hearing, I will dismiss this action.”

¹⁵ *Supra* note 13 and accompanying text.

[T]here are attorneys who choose to fight cases to get 50k in their pocket easily, especially if they 'can't' lose. It's also great practice litigation. In most LHO cases, 95% of the time. I.E Fairfax County Class action Suit. It's also needlessly expensive because of the propaganda being taught at the State universities as well as the lack of proper IDEA law education to the educators themselves....

* * * *

.... Because the SCDOE has attorney bills out the wazoo because of greed and corruption by [its designated legal representative], and choosing to do the wrong thing over and over again. It is a ponzi scheme wasting TAXPAYER money. No one's money but my own sir, paid to attorneys and judges in circles. Your welcome.

* * * *

You continue to what we mental health/psychologists call "gaslighting" and "deflection" When an abuser wants to divert the attention from their behavior they accuse others of the same offense.

* * * *

THE SCDOE . . . is the problem and it trickles all the way down to the school districts then to individual schools and to the individual child.

* * * *

If you feel it is more important to use your judgment against the benefit of the child, than if it is your prerogative and your choice. You too have been warned, by 'WE THE PEOPLE' of South Carolina. If you conduct the hearing in the manner in which you conducted and gave orders for the pre hearing, You have my word that your name will also be added to the Federal Complaint.¹⁶

The resulting first part of the order was as follows: "Based on the clear warning in the Order that Mother obviously read and intentionally violated, I am barring Mother from participating further in this matter . . . [and] from attending the hearing in any capacity." As a second part, because the hearing was specific to the Student and because the father was a co-petitioner who had not engaged in the prohibited conduct, the LHO offered him the opportunity to represent the Student, with a deadline of the next day.¹⁷

¹⁶ For the full text of the referenced response, see the 1/25/22 Parent's objection to the LHO's order.

¹⁷ Expressly balancing the interests of the Student and the District within the IDEA's tight regulatory timeline for the hearing, the LHO specifically ruled as follows:

I am giving Student's father until Noon tomorrow to communicate his intentions to proceed without Mother. This is short notice, and I understand that it puts Father in a difficult position. Father may need accommodations under the circumstances. He is encouraged to make any requests that will enable him to proceed. The IDEA does permit the extension of deadlines for good cause. Given the circumstances, which are none of Father's fault, I am inclined to find good

The Parent's subsequent email on January 25, 2023 reported that the Parent and the former spouse were "on the same team and ... best friends" after an uncontested divorce and that the former spouse "does not care to give you a response."

On January 26, 2023, the LHO provided a notice to the parties cancelling the two imminent, scheduled hearing dates.

Also on January 26, 2023, the District filed a motion to dismiss the case with prejudice based on the Parent's "refusal to cooperate in the process or to pursue and prosecute their claims." In its motion, the District also withdrew its counterclaim.

In a subsequent communication on January 26, 2023, which was in response to the District's motion, the LHO notified the Parent's former spouse that the deadline for his response was January 31.

On January 28, 2023, the Parent responded with a repetition of previous arguments and accusations, adding a claim against the LHO of defamation¹⁸; characterizations of "tyranny and totalitarianism" and "the psychological manipulation tactic of 'fear mongering'"; and the intent to pursue the matter to "a United States District Court with an actual trial with a jury."

On January 31, 2023, the LHO issued a final order, dismissing the case with prejudice. First, the LHO recited the Parent's successive actions during the prehearing process, including (a) the failure to meet the two disclosure deadlines; (b) the initial repeated failures to adhere to the January 3 civility directive; and (c) the immediate and blatant failure to comply with the January 25 final warning. Second, the LHO recounted the resulting barring of the Parent's

cause and entertain any reasonable request that would preserve Student's rights and allow this case to move forward. Of course, I will provide District with an opportunity to respond to any requests.... If I do not hear something from Father by Noon tomorrow, I will have to assume that Father does not intend to proceed. At that point, I will entertain a Motion from District regarding how it believes I should proceed, if at all. I will also provide Father an opportunity to respond to any such motion.

¹⁸ More specifically, disclaiming "any disruptive behavior whatsoever by either petitioner," the Parent promised to detail the alleged defamation "in federal court."

further participation and the unsuccessful accommodation to salvage the hearing via the former spouse representing the Student.¹⁹ Third, the LHO explained that the dismissal was based on the “Parent’s refus[al] to participate appropriately and to cooperate.”²⁰ Finally, the LHO explained that the dismissal was with prejudice for two reasons: “(1) Parents have repeatedly shown that they intend to abuse this process (and everyone associated with it), even after being warned of the consequences; and (2) District is prejudiced by Parents’ conduct.” The LHO premised the abuse of process on the Parent’s repeated statements that (a) express a “desire to gain an audience in federal court to raise various grievances about the system, while ignoring the important issues before me and the interests of Student” and (b) refer to previous serial filings that “paint everyone associated with those cases with the same brush,” thus confirming that “[a]llowing another round after Parents intentionally and repeatedly violated my orders would be an unwarranted waste of public funds.”²¹ The LHO premised the District’s prejudice on the continuing expenditure of attorneys’ fees and personnel time in responding to repeated and repetitious motions and emails that obstructed rather than facilitated a hearing focusing on the Student.

¹⁹ The LHO included an explanation of his taking into consideration the District’s objection that the co-petitioning former spouse was just as responsible as the Parent for the failure to meet the two prescribed deadlines: “We do not know the arrangement on Parents’ side. Until January 25, Father was not on notice that he might need to take the reins. Before considering whether dismissal with prejudice is appropriate, I intended to exhaust every avenue to obtain compliance and participation.” Similarly clarifying that the former spouse did not make any claim of not receiving the representation notice, the LHO reiterated that “the focus was on trying to salvage the hearing, and my email made clear that I was inclined to grant any reasonable request from Father that would allow us to have a merits hearing.”

²⁰ In a footnote, the LHO explained that the Parent had gone well beyond the latitude customarily accorded to pro se parents and subject to much less drastic action: “This is not a case in which a pro se parent needed to be corrected once or twice about comments that cross the line. . . . Likewise, this is not a case in which a parent was sincerely confused or did not understand the importance of a deadline.”

²¹ In another footnote, the LHO added:

For reasons that are unclear, Mother sent me and many others an unsolicited copy of an “Amended Brief Supporting Appellant and Urging Remand and Amendment” she apparently filed in the Fourth Circuit. That Brief makes several allegations about prior hearing officers, employees of South Carolina, members of the federal judiciary and family members of the same. This filing makes clear that, at each level, Parents are looking for an outlet to voice their views on South Carolina politics and the legal system.

On or about February 3, 2023, not without further unnecessary complications,²² the Parent timely filed an appeal of the LHO's final order.

On February 7, 2023, SCDOE confirmed my acceptance of appointment as the SRO in this case and specified a due date of March 5 for my decision.

In response, the Parent sent an email on February 7 to SCDOE objecting to submission to me of only the LHO orders rather than the "entire record," arguing that "[the LHO] was untruthful in his orders and the SRO should not have a biased view by way of only reading [his] orders first."

On February 8, 2023, I emailed the parties advising them that I would not review the attachments from SCDOE until after the District had an opportunity to respond to the objection.

On February 9, 2023, after receiving emails with attachments from both parties, I notified them that, because this case did not have a "hearing record" and was specific to an order for dismissal with prejudice, (1) any further correspondence and documents during the prehearing process specific to the dismissal but not extending to the merits of the case must be emailed to me by 5 pm on February 15, and (2) the parties' written arguments and supporting legal authority must be emailed to me by 5 pm on February 23 and must be strictly limited to three questions: (a) whether the LHO had authority to issue a dismissal with prejudice?; (b) assuming for the sake of argument that the LHO had such authority, whether the circumstances of this case justified taking this action?; and (c) assuming for the sake of argument that the

²² Although the LHO's final decision clearly specified the procedures for appeal, the Parent first emailed the SCDOE representative on February 2 with this message: "Was the SEA going to be sending the notice of the decision with next steps for the appeals process?" When the SCDOE promptly replied that its state-level notices only applied to SRO decisions, the Parent responded with a series of argumentative questions, followed by the appeal. A series of exchanged emails continued thereafter concerning receipt of the notice of appeal, culminating in the Parent's February 7 email that projected "proper Discovery in trial." Moreover, interspersed with these communications were a series of emails starting with the Parent's February 2 request for an "amendment hearing," which was subsequently clarified to be a matter separate from this case and specific to the FERPA rather than IDEA hearing process. 2/2/23–2/7/23 emails; 2/2/23–2/15/23 emails.

circumstances did not warrant dismissal with prejudice, what proposed action was warranted instead?

On or before the February 15 deadline, the parties provided me with the additional submissions.

On February 16, I notified the parties that I had excluded only two documents, which were for prior, separate cases and which could be submitted with the written arguments if within the scope of the specified three questions, and that they were amply sufficient without additional information.

On February 19, I received the Parent's appeal brief, which was a 51-page document almost entirely unresponsive to the three questions that I had specified in the February 9 email. Given the early submission and the pro se status of the Parent, I immediately replied, pointing out various examples of the many parts that were well outside the bounds of these questions,²³ and strongly suggested that the Parent take the remaining time before the applicable deadline to prepare "a revised document that is reorganized into each of the successive questions, carefully limiting the arguments and supporting legal authority for each one to its specified scope without extraneous material."

On February 23, each party submitted its written arguments (alternatively referred to herein as ("appeal briefs")). Without a line-by-line analysis, the only notable changes in the Parent's submission were (a) the deletion of a page on the merits of the case and, amounting to approximately another page, the merits-based items in the list of requested relief, and (b) the

²³ The express examples, with cited page numbers in the document, were for "the merits of the case, which are not at issue upon this review"; "extensive information about prior cases without any showing the specific relevance to the questions and, if so, which question"; "Constitutional arguments, which are beyond the IDEA basis of this case"; "[the withdrawal of the] counterclaim, which is not at issue in this review; "... broad-based personal views ... clearly beyond the scope of this review"; and "judicial rulings not specific to any of the three questions." SRO email of 2/19/23.

addition of an introductory page that asserted that its remaining broad-based coverage was relevant to the three questions and that the focus should be on the conduct of the LHO and the SCDOE, which both “[failed to] follow written applicable IDEA law,” rather than on the conduct of the Parent.

II. STANDARD OF REVIEW

The IDEA regulations provide for a SRO to make an “independent decision” after examining the entire record.²⁴ Because the record in this case does not include factual findings, including those based on credibility judgments as well as extrinsic evidence in admitted exhibits, the limited exception to the SRO’s plenary review does not apply.²⁵ Thus, the standard of review is plenary review.

III. CONCLUSIONS OF LAW

Prefatory to addressing each of the flowchart-like three questions that I identified in my February 9 communication to the parties for this review, a pair of overall legal conclusions provide a useful framework. In light of South Carolina’s two-tiered LHO-SRO system, “LHO” herein will be used to refer to what the IDEA legislation and regulations refers to more generally as the “hearing officer.”

²⁴ 34 C.F.R. §§ 300.514(b)(2). Specifically, this applicable regulation refers to examination of “the entire hearing record.” *Id.* Here, because the case did not reach the hearing stage, the scope of the record required a discretionary determination, which I limited to the exchanged communications and other documents during the prehearing process that at all reasonably related to the dismissal with prejudice that is the subject of the Parent’s appeal. Similarly, to the extent that the companion duty of the SRO to “[e]nsure that the procedures *at the hearing* were consistent with the requirements of due process” (emphasis added) apply in the limited scope of this case, I have fit it within the legal conclusions for the three questions.

²⁵ *Carlisle Area Sch. Dist. v. Scott P.*, 62 F.3d 520, 529 (3d Cir. 1995) (requiring second-tier “plenary review” with one narrow exception: “[the SRO] should defer to the hearing officer’s findings based on credibility judgments unless the non-testimonial, extrinsic evidence in the record would justify a contrary conclusion or unless the record read in its entirety would compel a contrary conclusion); *cf. Doyle v. Arlington Cnty. Sch. Bd.*, 953 F.2d 100, 104 (4th Cir. 1991) (ruling that LHO credibility findings are entitled to deference at the SRO level).

Framework Considerations

First, inasmuch as the IDEA does not provide further relevant requirements beyond the skeletal specified minimums for the LHO's competency, the LHO's impartiality, and the parties' hearing rights,²⁶ and South Carolina statutes and regulations do not add any additional requirements,²⁷ the courts relevant rulings and the agency's policy interpretations agree that LHOs are entitled to ample discretion for managing the entire process, including the prehearing stage.²⁸

Second, there is also general agreement that the hearing process must be promptly completed.²⁹ As a result, the IDEA regulations allocate a 45-day period between filing and decision, with a limited exception for extensions.³⁰ Courts have recognized this relatively short period in deferring to the expeditious actions of LHOs³¹ as well as in moving states for systemic

²⁶ 34 C.F.R. §§ 300.511(c) (1)–(2) (competency and impartiality) and 300.512 (hearing rights, including LHO's discretion in administering the disclosure rule).

²⁷ For comprehensive canvassing of the variety of state-law requirements during the prehearing and hearing process in the U.S., which reveals South Carolina's lack of additions, see, e.g., Andrew M.I. Lee & Perry A. Zirkel, *State Laws for Pre-Hearing Phase of Due Process Hearings under the Individuals with Disabilities Education Act*, 40 J. NAT'L ASS'N ADMIN. L. JUDICIARY 1, 18 (2021); Perry A. Zirkel, *State Laws for Due Process Hearings Under the Individuals with Disabilities Education Act*, 38 J. NAT'L ASS'N ADMIN. L. JUDICIARY 3 (2018).

²⁸ For examples of judicial rulings, see *O'Toole v. Olathe Unified Sch. Dist. No. 233*, 144 F.3d 692, 709 (10th Cir. 1998); *E.P. v. Howard Cnty. Pub. Sch. Sys.*, 70 IDELR ¶ 176 (D. Md. 2017), *aff'd*, 727 F. App'x 55 (4th Cir. 2018); *A.S. v. Colonial Sch. Dist.*, 77 IDELR ¶ 249 (E.D. Pa. 2020); *Price v. Upper Darby Sch. Dist.*, 68 IDELR ¶ 214 (E.D. Pa. 2016); *D.Z. v. Bethlehem Area Sch. Dist.*, 2 A.3d 712, 721 (Pa. Commw. Ct. 2010) (various matters). For examples of agency policy interpretations, see 71 Fed. Reg. 46,699 (Aug. 14, 2006) (amendments and sufficiency of complaints), *id.* 46,704 (generally); *id.* 46,707 (dismissal); Letter to Anonymous, 23 IDELR 1073, 1075 (OSEP 1995) (generally).

²⁹ See, e.g., *C.M. v. Bd. of Educ. of Henderson Cnty.*, 241 F.3d 374, 380 (4th Cir. 2001) ("IDEA disputes should be resolved quickly to ensure that disabled children receive their statutorily guaranteed free appropriate public education while they can most benefit from it."); see also *Cory D. v. Burke Cnty. Sch. Dist.*, 285 F.3d 1294, 1299 (11th Cir. 2002); *Muth v. Cent. Bucks Sch. Dist.*, 839 F.2d 113, 124–25 (3d Cir. 1988); *Spiegler v. District of Columbia*, 866 F.2d 461, 467 (D.C. Cir. 1989); *Adler v. Educ. Dep't of N.Y.*, 760 F.2d 454, 460 (2d Cir. 1985).

³⁰ 34 C.F.R. § 300.515. Similarly, agency policy interpretations have accorded the aforementioned discretion to LHOs in relation to "[the] right to a timely hearing." 71 Fed. Reg. 46,704 (Aug. 14, 2006).

³¹ See, e.g., *B.S. v. Anoka Hennepin Pub. Sch.*, 799 F.3d 1217, 1221–22 (8th Cir. 2015) (upholding pre-hearing order limiting each party to nine hours based on circumstances of the case, including state law); *M.V. v. Conroe Indep. Sch. Dist.*, 75 IDELR ¶ 134 (S.D. Tex. 2019) (upholding hearing officer's non-absolute allocation of four hours to each side in absence of prejudice).

accountability.³²

Issue Analysis

A. Did the LHO have authority to issue a dismissal with prejudice?

The answer to this question warrants a discussion of LHO authority for dismissals generally, including those without prejudice. First, the IDEA regulations and related case law make clear that LHOs have dismissal authority at the initial steps of the DPH process of sufficiency of the complaint³³ and participation in the resolution-session.³⁴ Second, although a recent agency policy interpretation opined that the IDEA does not permit any summary dispositions short of a hearing with the exception of insufficiency of the complaint or mutual agreement between the parties,³⁵ this guidance does not have the binding force of law and is unlikely to be sufficiently persuasive for courts to adopt.³⁶ More specifically, although serving as a reminder of the pronounced presumption in favor of a hearing, this guidance is contrary not only to the aforementioned regulatory and judicial authority at the resolution-session stage, but also the settled case law upholding LHO dismissal authority for various other reasons, including dismissals with prejudice based on *res judicata*³⁷ or lack of jurisdiction.³⁸

Second and specific to this case, courts have concluded that LHOs have the authority issue a dismissal or other summary disposition of an IDEA complaint based on inappropriate party conduct, but those issued with prejudice are reserved for exceptional circumstances. The

³² C.P. v. N.J. Dep't of Educ., 76 IDELR ¶ 214 (D.N.J. 2022) (denying dismissal of class action claim of systemic delays in completing due process hearings).

³³ 34 C.F.R. § 300.508(d)(2); M.S.-G. v. Lenape Reg'l High Sch. Dist. Bd. of Educ., 306 F. App'x 772 (3d Cir. 2009).

³⁴ 34 C.F.R. § 300.510(b)(4); Matthews v. Douglas Cnty. Sch. Dist. RE-1, 78 IDELR ¶ 63 (D. Colo. 2021).

³⁵ Letter to Zirkel, 81 IDELR ¶ 22 (OSEP 2022).

³⁶ See, e.g., Hernandez v. Grisham, 508 F. Supp. 3d 893, 1008 (D.N.M. 2020), *aff'd* on other grounds, 82 IDELR ¶ 52 (10th Cir. 2022) (ruling that the agency guidance for COVID-19 school reentry were unpersuasive based, in part, on lack of thoroughness). For other applicable case law, see Perry A. Zirkel, *The Courts' Use of OSEP Policy Interpretations in IDEA Cases*, 344 EDUC. L. REP. 671 (2017).

³⁷ E.g., Theodore v. District of Columbia, 772 F. Supp. 2d 157 (D.D.C. 2011).

³⁸ E.g., Chavez v. N.M. Pub. Educ. Dep't, 621 F.3d 1275 (10th Cir. 2010).

hallmarks of these limited circumstances include not only egregious or repeated misconduct after clear warning, but also the lack of adequate less severe sanctions.³⁹ In an approximately analogous case, which concerned parental misconduct at the court level, the Fourth Circuit added related factors to consideration of less drastic sanctions, including the extent of prejudice to the defendant-district, the interest of the child, and the plaintiff-parent's conduct in previous cases.⁴⁰ In this case, the Fourth Circuit upheld the sanction of a \$500 fine for contempt but modified the accompanying sanction of dismissal with prejudice to have a limited contingency for continuing the case with alternative representation of the student.⁴¹

Thus, the answer to the first question is that the LHO had this authority for dismissal with prejudice based on unacceptable petitioner behaviors, such as continued contumacious conduct. However, this severe sanction was only permitted in limited circumstances.⁴²

B. Did the circumstances of this case justify the LHO's taking the action of a dismissal with prejudice?

My conclusions about the circumstances of this case primarily focus on an objective examination of both the LHO's and the Parent's conduct, as recited in Section I of this decision

³⁹ *E.g.*, *Silva v. District of Columbia*, 57 F. Supp. 3d 62, 67 (D.D.C. 2014) (upholding a dismissal that was only with prejudice after failure to comply with the contingency of "reasonable, clearly articulated requirements and enough time to abide by them" to counter forum-shopping); *Edward S. v. W. Noble Sch. Corp.*, 63 IDELR ¶ 34 (N.D. Ind. 2014) (upholding dismissal with prejudice of legal guardian's FAPE complaint based on their repeated failure to comply with the LHO's discretionary directives after due warning of this possible consequence, reasoning that "[d]ismissal without first imposing lesser sanctions can be an appropriate sanction when there is a clear record of delay or contumacious conduct and the misconduct is of the type that no lesser sanction is adequate"); *Nickerson-Reti v. Lexington Pub. Sch.*, 893 F. Supp. 2d 276, 294–95 (D. Mass. 2012) (agreeing that a sanction was warranted for pro se parent's failure to appear but less severe than dismissal with prejudice due to lack of a prior warning of this consequence); *Stancourt v. Worthington City Sch. Dist. Bd. of Educ.*, 841 N.E.2d 812 (Ohio Ct. App. 2005) (requiring lesser sanctions, "when possible," than dismissal with prejudice for failure to timely comply with LHO's disclosure directive).

⁴⁰ *Mylo v. Bd. of Educ. of Baltimore Cnty.*, 948 F.2d 1242 (4th Cir. 1991).

⁴¹ *Id.*

⁴² For an additional but only partially analogous example of the wide but still limited latitude for impassioned advocacy, see *Luo v. Owen J. Roberts Sch. Dist.*, 81 IDELR ¶ 226 (3d Cir. 2022) (noting the pro se parent's previous lack of decorum and respect in warning of possible sanctions for further violations of this warning).

and as evaluated here in light of the applicable case law standards identified above under question A. Moreover, the measure of appropriate conduct for both hearing officers and parents generally is a reasonable range, with due allowance for LHO discretion and Parent pro se status that allows ample leeway for individual differences, that is not the same as either best practice on the one side or criminal behavior on the other extreme.

1. LHO Level.

The interactions started with rather clear and reasonable communications on January 3 from the LHO for timely proceedings and a response on January 9 from the Parent that presaged the potentially disruptive effects of personal broad-based presumptive perceptions.⁴³

Next, despite the LHO's reasonably timely and responsive communication on January 9, the Parent on January 13 asserted that the LHO had made an unwarranted change in "standard practice" and demanded that the LHO provide the legal justification for the purported change. After intervening orders, the Parent filed for recusal on January 19, which was limited to attributing the alleged violation of "standard practice" to "the authority and correspondence of [SCDOE's designated legal representative]."⁴⁴

The LHO's order on January 20, including the denial of the recusal motion and of the

⁴³ The *ad hominem* accusation about SCDOE's designated legal representative reflected the Parent's subsequently confirmed predominant perception of a systemwide conspiracy. Additionally, the subpoenas for "any and all" OSEP guidance and for email that "pertained to students" appears to be vague and over-broad.

⁴⁴ The Parent's understanding of "standard practice" appears to be deduced primarily from the cluster of DPHs against the previous school district. The only cited regulations were those for U.S. Department of Labor Administrative Law Judges, which are obviously not applicable to IDEA LHOs but which put prehearing conferences and dismissals within the discretion of the ALJ. 29 C.F.R. §§ 18.10 *et seq.* In any event, the courts have made clear that IDEA LHOs have broad discretionary authority for the many procedures of the prehearing and hearing process that are not specified in the IDEA legislation/ regulations or the corollary state legislation/ regulations. *Supra* note 28 and accompanying text. For example, contrary to the Parent's assertion, this discretionary authority extends to declining to have opening statements unless specifically required in state law. *A.S. v. Colonial Sch. Dist.*, 77 IDELR ¶ 249, at *11 (E.D. Pa. 2020). Moreover, the courts' interpretation of "appropriate standard legal practice" in the broad IDEA criteria for the competence of LHOs do not at all support the Parent's claim. *E.g.*, *A.C. v. W. Windsor Plainsboro Reg'l Bd. of Educ.*, 81 IDELR ¶ 19 at *6 (D.N.J. 2022); *Reyes v. Bd. of Educ. of Prince George's Cnty. Pub. Schs.*, 80 IDELR ¶ 286, at *9 & n.14 (D. Md. 2020); *Renee J. v. Hous. Indep. Sch. Dist.*, 333 F. Supp. 3d 674, 698–99 (S.D. Tex. 2018).

prehearing conference, was in conformity with prevailing case law.⁴⁵

The Parent’s disruptive conduct further escalated in a flurry of communications, on January 24 and 25, including increasingly intemperate *ad hominem* accusations against the LHO, such as “collusion and Conspiracy to commit a crime against a child with a disability” and similarly allegations about the District’s legal counsel and “the tyranny, corruption, greed that is the Ponzi scheme in the [SCDOE]”

The LHO’s initial response on January 25 was a warning, with a reminder about the original January 3 directive, with an accompanying contingency in case the Parent engaged in further “rudeness, incivility, or speeches on political issues.” When the Parent immediately responded with a broad-based screed that clearly violated this warning and entirely lost sight of the Student’s FAPE case, the LHO expeditiously implemented the contingency of the former spouse serving as the representative. However, the Parent promptly preempted this alternative.

The January 31 dismissal with prejudice was in response to a motion from the District and a January 28 missive from the parent repeating and expanding the accusations against the LHO and the state system. As a result, more than 60 days had passed, without reaching a hearing in a process that was supposed to promptly yield a posthearing decision on the merits within approximately 45 days.⁴⁶

2. SRO Level

As a secondary matter, my review of the circumstances extends to the 30-day period that the IDEA allocated for this SRO appeal. On the positive side, after an initial objection to SCDOE about the record, the Parent, along with the District, timely complied with the

⁴⁵ For the applicable legal standards for recusal, see Perry A. Zirkel, *The Legal Boundaries for Impartiality of IDEA Hearing Officers: An Update*, 21 PEPPERDINE DISP. RESOL. L.J. 257 (2021). For the optional provision of a prehearing conference depending on the LHO’s discretion in light of the IDEA and corollary South Carolina legislation and regulations, see Lee & Zirkel, *supra* note 27, at 11, 18.

⁴⁶ *Supra* notes 29–32 and accompanying text.

successive deadlines for the submissions and the written arguments and directive against other communications.

On the opposite side, however, much of the Parent’s appeal brief expressed personal broad-based perceptions, such as “tyranny and totalitarianism”⁴⁷ and “collusion, unethical behavior and culture of the due process hearing procedures within the state of SC among educational Attorneys, and within the IEP team meetings themselves,”⁴⁸ along with the Parent’s summary of publicly recorded disputes with the previous school district.⁴⁹ The brief similarly perseverates on alleged gaslighting, stonewalling, and fearmongering⁵⁰ and the *ad hominem* attacks on the LHO and various other individuals, while insisting on retaining the entire timeline” of its earlier version.⁵¹ Although the Parent thus opened the door widely to suppositions about the entire context of South Carolina, including but not limited to the public school system⁵² and to the DPH cases against the prior school district,⁵³ the scope of the examination focuses on the Parent’s and LHO’s conduct in the instant case, with the limited consideration of prior cases to the extent of their reasonable relationship to this particular question.⁵⁴ The case cited in the appeal brief that appears to have the closest relationship to question B is this same LHO’s dismissal of the Parent’s third DPH complaint against the

⁴⁷ Parent’s appeal brief, at 38.

⁴⁸ *Id.* at 43.

⁴⁹ *Id.* at 2–9. Although the appeal brief referred to previous filing of a fourth due process complaint (*id.* at 4), the IDEA’s required state education agency public posting appears to be limited to three LHO decisions between the Parent and the previous district, along with corresponding SRO decisions. S. Carolina Dep’t of Educ., Due Process Lookup, <https://ed.sc.gov/policy/due-process-public-lookup/>.

⁵⁰ *E.g.*, *id.* at 18, 24, and 31–32.,

⁵¹ *Id.* at 2 (“The entirety of this timeline is relevant in order to bare [sic] the burden of proof, to the lack of Impartiality among many of its officers including, [the] LHO.”)

⁵² The Parent’s references at the LHO level and in the appeal brief extend, for example, to not only “educational attorneys” (*id.* at 43) but also state universities in South Carolina (*id.* at 18), IDEA due process hearing decisions in other states (*supra* text accompanying note 16) and, by implication, the federal judiciary in South Carolina (*supra* text accompanying note 12).

⁵³ The various exhibits selectively included decisions and other documents from the previous cases, which are all enumerated in the appeals brief (*supra* note 49).

⁵⁴ *Supra* note 40 and accompanying text.

previous school district. In that decision, which the Parent included along with approximately twenty-five other exhibits, the LHO dismissed the complaint without prejudice for the Parent's failure to participate in the resolution session. In doing so, the LHO correctly concluded that the District, not the Parent, was entitled to select the District's representative(s) for the resolution session. Based on the Parent's conduct, the LHO warned:

[A]ll further communications must be civil and professional. Inappropriate comments, like claiming that a District has a "make believe job," will be construed as bad faith. Such comments also will not be tolerated in a hearing or future proceeding. Combative or uncooperative conduct may lead to dismissal with prejudice.⁵⁵

The other two cases, which were also between the Parent and the previous school district, are less related. However, they further revealed the Parent's relatively consistent pattern of conduct. In the first one, the SRO ruled in the Parents' favor with regard to the previous school district's predetermination violation that resulted in the requisite FAPE denial to the Parent, not the Student; however, the SRO ruled against the Parent's claims of bias and improper conduct of the LHO, who was not the LHO in the instant case.⁵⁶ In the second case, another LHO ruled against the Parent's FAPE claims, incidentally noting numerous prehearing motions by the Parent and the Parent's "disagree[ing] that the LHO had any discretion to manage the hearing."⁵⁷ Upon the Parent's appeal, the SRO affirmed the LHO's decision and rejected, with ample case law support, the Parent's claims of LHO bias based on alleged gaslighting, manipulation, and collusion, and alleged LHO hearing mismanagement based on

⁵⁵ K.C. v. York Cnty. Sch. Dist. Four, at *5–6 (July 1, 2022), <https://ed.sc.gov/policy/due-process-public-lookup/>. Upon the Parent's appeal, the SRO affirmed the LHO's decision. K.C. v. York Cnty. Sch. Dist. Four (Aug. 4, 2022), <https://ed.sc.gov/policy/due-process-public-lookup/>.

⁵⁶ K.C. v. York Cnty. Sch. Dist. Four (Dec. 8, 2021), <https://ed.sc.gov/policy/due-process-public-lookup/>. The SRO's decision forewarned the Parent of the broad discretionary authority of LHOs for procedural matters not addressed in the IDEA regulations and corollary state law. *Id.* at *10 (citing 71 Fed. Reg. 46,407).

⁵⁷ K.C. v. York Cnty. Sch. Dist. Four, at *3–4 (May 19, 2022), <https://ed.sc.gov/policy/due-process-public-lookup/>.

limiting the length of the hearing.⁵⁸

More significantly, despite my repeated emphasis on structuring the written arguments to fit the three identified sub-issues for the timely determination of this appeal, the Parent’s brief persisted in focusing on matters that go far beyond the boundaries of the LHO-SRO process and that leave in relatively obscurity the FAPE claims on behalf of the Student in this case.

Moreover, the Parent’s disclaimed having any responsibility within the scope of this SRO appeal, and instead offered this unpersuasive contention: “Whether or not the petitioner is able to follow adjudicator instructions is a notable bias of the LHO, but irrelevant as petitioners are parents and pro se.... The focus should be primarily on the behavior of the LHO [] and the Behavior of the [] SCDOE.”⁵⁹

In sum, subject to the refinement in the answer to the next question, the Parent’s continued contumacious conduct in this case, which encompasses and aligns with the conduct specified in the LHO’s decision at issue in this case,⁶⁰ warrants dismissal with prejudice. As pointed out by one of the several cited IDEA court decisions specifically relevant to this case,⁶¹ “the right to an opportunity is distinguishable from an absolute right to a hearing itself.”⁶²

C. What action was warranted instead of outright dismissal with prejudice?

The District’s appeal brief properly (a) recognized that pro se parents are entitled to

⁵⁸ K.C. v. York Cnty. Sch. Dist. Four (June 19, 2022), <https://ed.sc.gov/policy/due-process-public-lookup/>. The SRO’s decision also warned the Parent about relying on suppositions without providing proof. *Id.* at *7.

⁵⁹ Parent’s appeal brief, at *2. Indeed, the Parent seems to claim to be the sole source of the applicable standards. For example, the Parent argues that the LHO’s orders to “whether this type of authoritarian behavior has been accepted in the culture of law for judges and hearing officers for an extended period of time, it is certainly not just or impartial behavior.” *Id.* at 19–20

⁶⁰ *Supra* note 21 and accompanying text.

⁶¹ *Supra* notes 39–40.

⁶² *Edward S. v. W. Noble Sch. Corp.*, 63 IDELR ¶ 34, at *5 (N.D. Ind. 2014). Similarly, by the way, in response to the incidental reference in the Parent’s appeal brief to First Amendment freedom of expression, this right too is not absolute, depending in significant part on the forum of the expression, such as a public school classroom, a school board meeting, a due process hearing, or a federal court appeal, including corresponding reasonable regulation of time, place, and manner.

reasonable but still limited leeway in their conduct in DPHs⁶³; (b) cited one of the particularly key court decisions for determination of this issue⁶⁴; and (c) correctly observed that dismissal without prejudice would reinforce rather than rectify the Parent's inappropriate conduct in this case.⁶⁵ However, the District did not offer any alternative that was less drastic and yet potentially adequate.

In turn, the Parent's brief reflected the continued emphasis on expanding the pending complaint in federal court,⁶⁶ with the other alternatives being well beyond the authority of the SRO.⁶⁷

Instead of either side's suggestions, my carefully considered view in accordance with the applicable factors,⁶⁸ including the prejudice to the District in terms of its limited resources for a wider educational responsibility and the individual interest of the Student for timely opportunity for FAPE dispute resolution, is to order a contingent dismissal with prejudice. Adjusting the examples provided by two previous court decisions⁶⁹ to the specific circumstances of this case,⁷⁰ the specified contingency amounts to one last chance to continue

⁶³ District's appeal brief, at *5 (citing *Card v. Citrus Cnty. Sch. Bd.*, 65 IDELR ¶ 3 (M.D. Fla. 2021)).

⁶⁴ *Id.* at *9–10 (citing *Silva v. District of Columbia*, 57 F. Supp. 3d 62 (D.D.C. 2014)).

⁶⁵ *Id.* at *15 (citing, by analogy, *United States v. Owens*, 902 F.2d 1154, 1156 (4th Cir. 1990) ("Parties cannot be allowed to create the basis for recusal by their own deliberate actions. To hold otherwise would encourage inappropriate 'judge shopping'").

⁶⁶ Parent's appeal brief, at *43–44 ("Instead, petitioner's request that the Order indicate that Petitioners have exhausted all administrative avenues and that the [SCDOE] has made a deliberate effort to deny the Petitioners and the child with a disability of equal rights to due process under IDEA [thus, allowing] Petitioners to file their complaint in Federal Court to request a jury trial.").

⁶⁷ These alternatives include, for example, attorneys' fees, although the Parent is not an attorney; a full investigation or third-party audit of the SCDOE; and an order barring the District, SCDOE, or the LHO from "from denying either party of their constitutional rights to free speech (emails) and rights to equal due process, and the right to counsel." *Id.* at *45.

⁶⁸ *Supra* notes 39–41 and accompanying text.

⁶⁹ *Mylo v. Bd. of Educ. of Baltimore Cnty.*, 948 F.2d 1242 (4th Cir. 1991); *Silva v. District of Columbia*, 57 F. Supp. 3d 62 (D.D.C. 2014).

⁷⁰ As explained *supra*, these circumstances include a persistent pattern of contumacious conduct extending from the immediate history of the Parent's previous DPH complaints and to the Parent's appeal brief in this case, with due credit for the otherwise compliant conduct during the SRO period; more than one prior warning although not specific to dismissal with prejudice; and an abortive attempt at another less drastic alternative. This confirmed pattern eliminates the alternative of the Parent continuing in the representation role. The likelihood is much too

this case on a remand basis to the same LHO: the Parent has the opportunity within 40 days from the date of this decision to arrange for alternate representation for the Student before this LHO.⁷¹ If the Parent fulfills that opportunity via timely notice to the LHO within this 40-day period,⁷² the FAPE case will continue with the same warning about conduct in the context of what is generally understood to apply in a “civil” proceeding⁷³ and the same LHO authority for managing the hearing, and Parent will have the opportunity to accompany the duly designated representative without any oral participation or other interference in the LHO’s proceedings.⁷⁴ Conversely, if the Parent does not provide acceptable notice to the LHO within that period, the case will automatically become dismissal with prejudice.⁷⁵

IV. DECISION AND ORDER

The dismissal with prejudice is modified to be contingent, as specific above.⁷⁶

D. NOTICE OF APPEAL RIGHTS

The decision of this SRO is final unless an aggrieved party appeals the decision by commencing a civil action in any state court of competent jurisdiction or in a district court of

high of a violation of the prior warnings, thus making this alternative fatally adequate. Similarly, the alternative of sanctioning the Parent with a fine would not be effective in light of the Parent’s alleged penurious state and the unclear authority of LHOs or SROs to issue such sanctions under the IDEA and corollary South Carolina law.

⁷¹ Examples of alternatives include the former spouse of the Parent, a lay advocate, a surrogate, a guardian ad litem, or an attorney on a pro bono or other basis. Without limiting or impugning the Parent’s passionate efforts in the federal judiciary and other forums to resolve broad system-wide and policy concerns, I am confident that if the Parent channels a part of this vast energy to arrange for an alternative representative to continue the FAPE claims on behalf of the Student, both the immediate case and the separable much broader concerns will proceed to their due resolution.

⁷² For this contingency, the LHO will have the authority to grant or deny any requested extension and to determine whether the Parent’s notice meets the specified terms of this contingency.

⁷³ See, e.g., *supra* note 13.

⁷⁴ The duly designated representative would be the sole spokesperson for the Student. As determined appropriate by the LHO for the prompt completion of the proceedings, the Parent will have the opportunity to communicate with said representative, whether it be during breaks or during the transcribed session(s). Any violations of this conditional right of accompanying the representative of the Student may result in exclusion of the Parent from the proceedings.

⁷⁵ In that eventuality, although a matter for their discretion, neither the SCDOE nor the LHO is required to notify the parties, because this decision provides due notice.

⁷⁶ *Supra* notes 71–75 and accompanying text.

the United States within ninety (90) days of the date of this decision. 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516.

A handwritten signature in black ink, appearing to read "Perry Zirkel". The signature is fluid and cursive, with the first name "Perry" and last name "Zirkel" clearly distinguishable.

March 2, 2023

Perry A. Zirkel
State Review Officer