

**INDIVIDUALS WITH DISABILITIES EDUCATION ACT
STATE-LEVEL APPEAL**

STATE OF SOUTH CAROLINA	)	
	)	
	)	
K.M. and M.S.	)	
on behalf of S.S.,	)	
	)	
Petitioners,	)	
	)	MITCHELL YELL
v.	)	STATE-LEVEL REVIEW OFFICER
	)	
	)	
Lancaster County School District,	)	
	)	
Respondent	)	Decision
	)	
	)	
	)	
	)	

This matter is before me pursuant to an appeal of the Local Due Process Hearing Officer (“LHO”), Douglas Dent’s Order dated January 30, 2024, Granting the Respondent’s Motion to Dismiss. The South Carolina Department of Education (“SCDE”) received the Parents’ appeal of the LHO’s orders on February 26, 2024.

On February 27, 2024, I was appointed as the state-level review officer (“SRO”) in the appeal. Parents and District were notified of my agreement to serve as SRO on the same day. Petitioners (“Parents”) represented their minor son, S.S. (“Student”) and Lancaster County School District (“District”) was represented by Kimberly Kelley Blackburn and Vernie L. Williams. The SCDE also notified the parties that in accordance with the Individuals with Disabilities Education Act (IDEA) and federal regulations¹ the State is required to ensure that no

later than thirty days after the receipt of a request for a review, a final decision is reached in the review and a copy of the decision is mailed to each of the parties. Based on SCDE's receipt of the request for appeal on February 26, 2024, the due date for the final decision on appeal was established as March 27, 2024.

As the SRO, I have jurisdiction in this matter pursuant to a letter of appointment from the SCDE. I have the knowledge and ability to render and write decisions in accordance with the appropriate, standard legal practices. To ensure the rights of the parties pursuant to the IDEA, on March 9, 2024, I emailed the District and Petitioners (copied to the SCDE) a request that the parties adhere to the following schedule in submitting briefs to me: Parents' brief due March 16, 2024, District brief due March 20, 2024, Parents' reply brief, if needed, due March 23, 2024. PI received Parent's, District's, and Parents' reply briefs and exhibits in a timely manner.

STANDARD OF REVIEW

In the two-tier due process system used in South Carolina, the SRO's (Tier Two) review of an LHO's (Tier One) ruling is limited to the issues appealed.² An SRO is to make an independent decision, although the decision must be based on the record of the hearing, the exhibits presented, and the applicable law and regulations. According to the U.S. Court of Appeals for the 4th Circuit, if the LHO and SRO arrive at different conclusions, the SRO must provide sound reasons for departing from the LHO's ruling.³

PROCEDURAL HISTORY

January 9, 2023	Due process hearing requested by the Parents.
February 20, 2023	Executed Resolution Agreement. In the agreement, the District committed to (a) provide an independent educational evaluation (IEE) by an approved provider of their Parent's choice, (b) conduct an IEP meeting to consider the results of

¹ 34 C.F.R. § 300.515(b).

² 34 CFR §300.514.

³ Springer v. Fairfax County School Board, 134 F.3d 659, 663, 4th Cir. 1998

the IEE, (c) provide the Student with 15 hours of one-on-one tutoring in reading, (d) reimburse the Parents for prior expenses for private tutoring services (\$3,309.00), and (e) pay the Parents for private tutoring for the summer of the 2022-2023 school year. The Parents committed to (a) complete all consent forms, release, assessment forms, scales, questionnaires, and other documentation; (b) make the Student available for assessment/evaluation; (c) cooperate in scheduling and participating in any meetings required to enact the items agreed to by the District; (d) acknowledge and commit that the resolution agreement resolves their due process request and release the District from all administrative and legal claims related to and arising from the allegations asserted in their due process request (due process hearing request of January 9, 2023 dismissed with prejudice), and (e) agree that the resolution agreement was subject to revision only by way of consensus of the IEP team and express consent of the Parents for the remainder of the current and upcoming school year.

February 22, 2023

Following the agreement in the resolution session, the LHO issued an order that the Parents' DPHR is "dismissed with prejudice and the enforcement of the Resolution Agreement entered into by the parties, if necessary, shall be pursued as set forth in the agreement" (LHO Order of Dismissal).

May 19, 2023

Parents filed a DPHR.

June 6, 2023

LHO issued an order dismissing all allegations and issues that occurred prior to the resolution agreement of February 22, 2023. Parents were allowed 10 days to amend their hearing request or the matter would be dismissed in full with prejudice. Parents' opportunity to respond was extended to the end of June. No response or amended hearing request was

received by District, the SC Department of Education (SCDE), nor the LHO.

July 7, 2023

The LHO issued an order that the Petitioners' DPHR be dismissed with prejudice. The LHO also ordered that any further DPHRs from the Petitioners would need to be presented on the basis of factual information or alleged violations of the IDEA or its regulations which occurred after February 22, 2023.

January 3, 2024

Petitioners filed a DPHR. According to the LHO's ruling on January 30, 2024, the Parents raised substantially the same issues as in a previous DPHR. The District filed a Motion to Dismiss based on *Res Judicata*. The Parents responded in a timely manner but failed to address the legal issues. Rather they relied on over 230 pages of documentary evidence (see email of January 19).

January 11 to
January 23, 2024

Between these dates a series of emails were sent by the Parents, District, and the LHO. Subjects of the emails included LHO's letter of introduction and information regarding the Petitioner's rights associated with the hearing (January 11), the District's motion to dismiss and response to the Parents' DPHR (January 12), LHO's email giving the Parents an opportunity to respond to District's motion to dismiss (January 12), Parents' email to SCDE indicating that they have exhausted their administrative remedies and request to file a civil action (January 15), District's email to LHO informing him on the status of resolution period (January 19), Parents' response to the Motion to dismiss (January 19), Parents' email to the LHO (January 23), Parents' email to LHO indicating that they would review further proposals from the District (January 23), and LHO's email responding to the Parents' response to the Motion to Dismiss and reminding Parents to

copy the District's attorney on all correspondence (January 23), District's counsel's email that the Parent's response to Motion to Dismiss had not been received (January 23), LHO's email forwarding Parents' response to Motion to Dismiss to District (January 23).

January 30, 2024

The LHO issued an Order granting the Motion to Dismiss. In the order, the LHO observed that the Parents proposed that the District (a) reimburse the Parents for all attorney's fees, (b) provide compensatory education by paying for the costs of tuition at a private school. The Parents also requested that the District use a rotating list when securing LHOs and that the LHO have the jurisdiction to award attorney's fees (see letter from Parents from January 2). The LHO noted that the request for reimbursement was premature and not appropriate and that LHO's are not permitted to award attorney's fees. The LHO ordered that the Parents' DPHR be dismissed with prejudice and the District's Motion to Dismiss be granted. Parents sent an email to SCDE with the subject line "Notice of Appeal and Request to File a Civil Action..." In the email the Parents noted that they had (a) been unable to reach a resolution agreement with the District, (b) exhausted all administrative remedies, and (c) were requesting a civil action.

February 11, 2024

February 22, 2024

The SCDE sent an email to Parents responding to their two assertions. First, Parents reported that they had not received the LHO's final order on the motion to dismiss and desired to appeal the District's motion to dismiss. The SCDE pointed out that that under the IDEA, appeal rights are limited to final decisions in a hearing and that a parent has no legal right to appeal a motion. The SCDE also noted the LHO's decision

was sent to all parties via U.S. mail. Second, the Parents believed that they had exhausted all administrative remedies and were requesting a civil action. The SCDE observed that by exhausting all administrative remedies, the Parents would have had to appeal the LHOs' final order of January 30 and that the SCDE's stance is that Parents are not required to seek consent prior to filing a civil action.

February 26, 2024

Parents filed an appeal to the LHO's order of January 30, 2024.

February 27, 2024

The SCDE notified Parents and District that the notice of appeal of the LHO's order was received, and Dr. Yell was the appointed SRO. She also notified the parties that March 27, 2024, was the deadline for issuance of the SRO's decision.

DISCUSSION

As the SRO, it is my task to examine the record and arrive at an independent decision.⁴ Additionally, the SRO must exercise plenary review and make an independent decision while giving due deference to the LHO's findings unless the evidence in the record justifies a contrary conclusion.⁵ The LHO or SRO should not substitute their own notions of sound educational policy for those of local school authorities.⁶

I reviewed the briefs, emails, exhibits, and IHO's orders of February 22, 2023; July 7, 2023; and January 30, 2024. I find the rulings made by LHO, Douglas F. Dent, were consistent with the requirements of the IDEA.⁷

Prior to turning to the ruling, I will comment on three issues of importance that informed my decision. First, it is perfectly permissible for parents to represent themselves in such matters (i.e., pro se) and in this situation the parents are to be commended for their strong advocacy for their son. Although pro se parties are held to less stringent standards they must, nonetheless,

⁴ 34 C.F.R. § 514 (b)(2).

⁵ Doyle v. Arlington County School Board, 953 F.2d 105 (4th Cir. 1998).

⁶ M.S. ex.rel Simchick v. Fairfax County School Board, 553 F.3d 315, 326 (4th Circ. 2009).

⁷ 34 C.F.R. § 514 (b)(2)(ii).

adhere to the requirements of the law. There are a number of instances in this record in which the Parents have seemingly misunderstood their rights and responsibilities under the IDEA. Four examples follow:

- On February 22, 2023, the LHO dismissed the Parents' DPHR of January 9, 2023 with Prejudice, which meant that the "dismissal ended the dispute of the matters raised in that DPHR which occurred prior to that date. It was not appealed or objected to in any way and thus became final and the matters raised in that DPHR were dismissed and could not be raised again" (LHO Order Granting Motion to Dismiss, January 30, 2024). Yet, according to the LHO's Order of Dismissal of July 7, 2023, the Parents' DPHR of May 26, 2023 "included allegations of violations and its implementing regulations which were litigated and resolved by a Resolution Agreement and Order dated February 22, 2023. In the Parents' DPHR of January 2, 2024, they raised many of these same issues. Because of the dismissal with prejudice, however, these issues were over and done with and could not be relitigated."⁸
- The Parent's often did not actually address the legal issues raised by the District. For example, in the Parents' DPHR of January 3, 2024, they raised many of the same issues as they had previously. On January 12, 2024, the District filed a motion to dismiss based largely on *Res Judicata*. The Parents were given an opportunity to respond and on January 19, 2024, Parents responded, but instead of addressing the legal issue raised, they emailed over 230 pages of documentation of their evidence. This evidence would have been appropriate to be presented at a hearing if one was being held; however, it was not germane as a response to the motion. As the LHO wrote in the Order of January 30, 2024, "This case is not at the hearing stage and it is not appropriate to consider all the factual information submitted by the Petitioners" (LHO, Order Granting the Motion to Dismiss, January 30, 2024).
- In the Parents' letter of January 15, 2024, they wrote "We have been denied the right to have a hearing officer that has jurisdiction to award reimbursement for attorney fees associated with this complaint" (Email send to SCDE, Dr. Marino, and others on January 15, 2024 at 10:44 pm). As the LHO correctly points out in his Order Granting

⁸ See the definition of "with Prejudice" by the Legal Information Institute of the Cornell Law School. Available at: https://www.law.cornell.edu/wex/with_prejudice.

Motion to Dismiss, issued on January 30, 2024, “an award of attorney’s fees in not within my power” (pp 3, 4). The IDEA grants courts the authority to award attorney’s fees;⁹ however the law’s silence regarding hearing officers’ ability to award attorneys’ fees have led courts to rule that they do not have such authority.¹⁰

- In some instances, the Parents did not respond to motions and in other instances they did not respond in a timely manner. An example is the Parents’ February 26, 2024 appeal to the SRO of the LHO’s Order Granting Motion to Dismiss from January 30, 2024.

According to instruction on appealing the order of January 30, the parents had 10 days of the receipt to appeal the order with the Office of the General Counsel in SCDE. An email from the Parents to SCDE on February 11, 2024 had the subject line “Notice of Appeal and Request to File a Civil Action: KM and MS, on behalf of SS, v. LCSD.” This email was not copied to the District. The Parents reported that “As of February 11, 2024 we have not received any response from the District or Mr. Dent. Therefore, we appeal the District’s request of a Motion to Dismiss; due to noncompliance” (email from Parents to SCDE on February 11, 2024 at 5:28 pm). The Parents also requested “to file a Civil Action” and noted that they had “utilized the available administrative remedies.” In this email it was not clear that the Parents were appealing the LHO’s Order Granting Motion to Dismiss (January 30, 2024). According to the letter of appointment from SCDE, the Parents sent an email requesting an appeal of the Order on February 26, 2024, which was almost a month after the LHO’s order.

The second issue I address is the principle of *res judicata*. According to the U.S. Circuit Court of Appeals for the 4th Circuit,¹¹ “The general rule is well established that once a person has a full and fair opportunity to litigate a claim, the person is precluded, under the doctrine of *res judicata*, from relitigating it.” The District asserted that “To conclude otherwise, would be unjustifiably costly in terms of time for both parties, personnel, and funds, and ultimately make orders meaningless if a party could continue to re-litigate a matter until he or she obtains a

⁹ 20 U.S.C. § 1415(i)(3)(B)

¹⁰ See Zirkel, P.A. (2018). The remedial authority of hearing and review officers under the Individuals with Disabilities Education Act: The latest update. *Journal of the National Association of Administrative Law Judiciary*, 37 (2), 505-557. Available at: <https://digitalcommons.pepperdine.edu/naalj/vol37/iss2/2>; Zipperer v. School Board Seminole County Florida, 111 F.3d 847 (11th Cir. 1997).

¹¹ Duckett v. Fuller, 819 F.3d 740 (4th Cir. 2016).

desired result.”¹² Clearly, *res judicata* applies in this case when Parents have brought up issues that have already been litigated. However, *res judicata* does not apply when issues are litigated that involve new facts even though the area in which the litigation brought is similar. For example, it would not violate the principle of *res judicata* if parents litigated a claim that their child’s new IEP did not provide FAPE because a material part of the new IEP was not implemented, even though they had brought a similar claim under their child’s IEP from a year ago. Thus, if each claim was clearly limited to the new IEP, the ruling in the claim on the previous IEP would not prevent a decision in the next claim because of the *res judicata* principle. Of course, this case differs from the example because the LHO was not trying the facts but was rather ruling on a motion.

The third issue I examined was the LHO’s ruling in the Parents’ three DPHRs. In all three orders, the Parents’ claims were dismissed with prejudice. That is, the issues were barred from being relitigated. A permanent dismissal with prejudice is a harsh sanction and, according to Zirkel,¹³ a case from the 8th circuit found that the proper resolution for a LHO was to dismiss a case without, not with, prejudice¹⁴ and another federal court ruled that dismissal should be reserved for extreme cases, with close class, especially for pro se parents.¹⁵ Clearly a ruling with prejudice is serious and should not be taken lightly. In the first order on February 22, 2023 the LHO dismissed the DPHR with prejudice because the Parents and LCSD had entered into a resolution agreement in which the Parents released claims. The signed resolution agreement was final and not appealed. A dismissal with prejudice was appropriate. In the matter of the LHO’s second dismissal on July 7, 2023, the Petitioners submitted a DPHR which the LHO described “included allegations of violations of the IDEA and its implementing regulations which were litigated and resolved in a previous DPHR case resolved by a resolution agreement and order...” (LHO Order of Dismissal, July 7, 2023). In this instance, the LHO had sent an email to Parents, the SCDE, and Ms. Blackburn, offering Parents the opportunity to respond to the District’s seeking a dismissal based on the doctrine of *res judicata*. The Parents failed to respond and did not appeal the LHO’s ruling. The Parents’ third DPHR was filed on January 3, 2024, which the

¹² Appellee District’s Brief on Appeal, p.8.

¹³ Perry A. Zirkel (2022). Impartial hearings under the IDEA: Updated legal issues and answers. *Journal of the National Association of Administrative law judiciary*, 4(1), 1-68. Available at: <https://digitalcommons.pepperdine.edu/naalj/vol43/iss1/1>.

¹⁴ Knight v. Washington School District, F App’x 594 (8th Cir. 2011)

¹⁵ Nickerson-Reti v. Lexington Public Schools, 893 F.Supp 2d 276 (D. Mass 2012).

LHO asserted the Parents had “alleged substantially the same issues” (LHO Order Granting Motion to Dismiss, January 30, 2024). On January 12, 2024, the District submitted its motion to Dismiss to the LHO and on January 30, 2024, the LHO granted the District’s Motion to Dismiss with prejudice. The Parents’ DPHR email to SCDE on January 2, 2024, is confusing and goes over previously trodden territory, including issues that were addressed in the DPHRs of February 22, 2023 and July 7, 2023. Many of the issues brought up by the Parents in the latest DPHR are from the time covered by the first two DPHRs. The Parents brief to the SRO on March 16, 2024 includes information of their child’s problems at LCSD, but very little, if any, responses to the LRO’s order. The only statement that somewhat addresses the order is as follows. “We have significantly different issues regarding SS’s 2023 IEP; which is valid from February 2, 2023 – February 2, 2004. Therefore, we request that the Respondent’s Motion to Dismiss on Res Judicata not be considered valid” (Parents’ Brief to SRO, March 16, 2024, p. 4). In the following bullet the parents write “We, SS’s parents, have “EXHAUSTED ALL ADMINISTRATIVE REMEDIES” required; evidenced by documentation...” (emphasis in original). Parents’ reply brief to the SRO of March 22, 2024, does not address in a substantive manner the District’s Brief on Appeal to the SRO of March 20, 2024. Rather, the reply brief includes a number of cases, complaints about LCSD, “UPDATED RELEVANT CURRENT FACTS” (emphasis in original), and a summary of the Parents’ about LCSD’s programming for their child. The brief contains no information directly replying to the District’s brief. As the LHO noted in his Order Granting Motion to Dismiss (January 30, 2024), “This case is not at the hearing stage and it is not appropriate to consider all the factual information submitted by the petitioners particularly since the vast majority of it is supporting matters already decided...” (p. 3). The same can be said of the Parents Brief to the SRO and Parents’ reply brief to the District’s brief.

Although pro se parties are given a certain degree of latitude and are held to less stringent standards, they still must comply with the rules of the IDEA.¹⁶ Here the Parents have not chosen alternative dispute resolution systems offered by SCDE, such as engaging in voluntary mediation or filing state complaints but have chosen to file for a due process hearing. Allowing parents to request face-to-face hearings in front of a neutral decision maker to challenge the special education programming for their child was an important element of the Education of All

¹⁶ Card ex rel J.D. v. Citrus County School Board, 65 IDELR 3 (MD FL 2015)

Handicapped Children Act of 1975,¹⁷ renamed the Individuals with Disabilities Education Act in 1990. The conduct of most due process hearing are adversarial, highly legalistic, and more like formal judicial proceedings.¹⁸ Because the Parents have chosen this system in which to contest their child's education in LCSD, they need to abide by the rules set by the LHO. Whereas holding parents to less stringent standards may lead me to excuse lesser elements of this case, such as missing certain timelines, it does not lead me to overturn the LHO's Order.

RULING

I affirm the LHO's Order Granting the Motion to Dismiss with prejudice.

NOTICE OF APPEAL RIGHTS

Any party aggrieved by this decision may commence a civil action with respect to the complaint presented in any state court of competent jurisdiction or in a district court of the United States within ninety (90) days of the date of this decision.¹⁹



Mitchell L. Yell, Ph.D.

State-Level Hearing Review Officer

March 27, 2024

¹⁷ Mark C. Weber (2014). In defense of due process. *Ohio State Journal of Dispute Resolution*, 29(3), 501-530.

¹⁸ See Diane M. Holbein & Perry A. Zirkel (2021). Due process hearings under the Individuals with Disabilities Education Act: Justice delayed...*Administrative Law Review*, 73(4), 833-868; Perry A. Zirkel (1994). Over due process revisions for the Individuals with Disabilities Education Act

¹⁹ 20 U.S.C. § 1415(i)(2)(A)-(B); 34 C.F.R. § 300.516; S.C. Code Regs. § 43-243(V)(17).