In the matter of

STATE OF SOUTH CAROLINA

Respondent.

Docket No. 13-43-O
Individuals with Disabilities Education Act (IDEA)

DECISION OF THE SECRETARY

This case comes before me at the request of counsel for the Office of Special Education and Rehabilitative Services (OSERS). OSERS requests modification of an October 1, 2015, Initial Decision and Order on Motion for Dismissal (Initial Decision) issued by Administrative Law Judge Angela J. Miranda (Hearing Official). The Hearing Official granted OSERS' request to dismiss a hearing proceeding on a June 17, 2013, Notice of Proposed Determination (NPD), issued to the South Carolina Department of Education (SCDE). OSERS had stated its intent to issue a new NPD with an updated liability figure. However, the Hearing Official dismissed the matter "with prejudice," asserting that allowing OSERS to issue a new NPD would create an unfair result for SCDE.

Based on the following analysis, I grant OSERS' request to modify the Initial Decision.

I. Background

On June 17, 2013, OSERS issued its NPD, holding SCDE liable for $36,202,909 under the Individuals with Disabilities Education Act (IDEA). The liability derived from OSERS' finding that SCDE failed to meet the IDEA maintenance of financial support (MFS) requirement in fiscal year 2010.[1] The subsequent hearing was stayed in August 2013 to allow the parties to engage in settlement negotiations. Following the abandonment of these negotiations, on December 17, 2014, the Hearing Official held a status conference during which OSERS indicated it might withdraw its decision and issue a new one in light of new evidence. The Hearing Official set a deadline for OSERS to "file a Motion to Dismiss or other appropriate motion." That deadline passed. Later, OSERS filed a motion to amend the NPD. The Hearing Official denied the motion as late-filed and subsequently, in an April 30, 2015, order, denied a

[1] SCDE originally requested a waiver of the MFS requirement in 2010. OSERS granted the waiver in part and denied it in part. SCDE then requested a hearing on the partial denial. I initially denied the hearing request, but on appeal, the Fourth Circuit held that SCDE was entitled to notice and a hearing. *South Carolina Dep't of Educ. v. Duncan*, 714 F.3d 249 (4th Cir. 2013). On June 17, 2013, OSERS issued the new NPD providing an opportunity for a hearing.

motion to retroactively extend the time for filing the motion. OSERS requested that I review the Hearing Official's order.

On August 28, 2015, I issued a Decision on Interlocutory Review affirming the Hearing Official's April 30, 2015, order. I noted that the Hearing Official's authority to manage the hearing proceedings included the authority to deny OSERS' attempt, in the middle of the proceedings, to replace the existing NPD with a new one. I also noted that, where an office of the Department no longer stands behind a decision, a hearing official would properly grant the office's request to dismiss the proceeding. I further noted that a hearing official lacks the authority to prohibit a departmental office from carrying out future programmatic decisions, so when an office voluntarily withdraws a decision in order to reissue it, the office "face[s] no danger of prejudice."[2] Despite this, the Hearing Official subsequently issued the October 1, 2015, Initial Decision, dismissing the case "with prejudice."[3]

OSERS and SCDE have filed comments and recommendations regarding the Initial Decision. I previously informed the parties that I would review the Initial Decision.[4] I now turn to the parties' arguments and the applicable law.

II. Analysis

a. The Initial Decision and the Parties' Comments

The Hearing Official's analysis in her Initial Decision is primarily concerned with due process.[5] In this analysis, the Hearing Official turned to the Federal Rules of Civil Procedure (FRCP) for "general concepts of procedure."[6] The Hearing Official noted that the FRCP requires "more scrutiny" of a motion to dismiss when it is "pursued later in the proceeding."[7] Furthermore, the Hearing Official asserted that it is her duty to determine whether or not to attach prejudice to an order of dismissal, to fulfill her role of ensuring a fair and impartial proceeding.[8]

The Hearing Official found that dismissing the case without prejudice would be unfair to SCDE for several reasons. First, she found that OSERS did not act expeditiously on newly acquired evidence, amounting to excessive delay and a lack of diligence.[9] Second, the Hearing Official found that counsel for OSERS blatantly disregarded deadlines that the Hearing Official reasonably imposed.[10] In particular, the Hearing Official stated that she would have allowed OSERS to file an amended NPD in the middle of the hearing process if OSERS had filed a Motion to Amend in January of 2015.[11] Instead, she denied its motion filed in February of 2015,

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[2] Decision on Interlocutory Review (Aug. 28, 2015), p. 3.
[3] Initial Decision, p. 7.
[4] 34 C.F.R. § 300.182(f); Order Granting Review (Dec. 1, 2015).
[5] Initial Decision, pp. 3–4.
[6] *Id.*, p. 4.
[7] *Id.*
[8] *Id.*
[9] *Id.*, pp. 4–5.
[10] *Id.*, p. 5.
[11] *Id.*

which resulted in my previous interlocutory review. Third, the Hearing Official presumed that SCDE has already expended considerable effort and expense during this case. Fourth, the Hearing Official asserted that the motivation for OSERS requesting dismissal "must be considered" and found it "abundantly clear" that OSERS' goal was to circumvent the Hearing Official's order denying OSERS' attempt to amend the NPD.[12] Fifth, the Hearing Official found that the case is at an "advanced stage of litigation," lessening the amount of prejudice against SCDE needed to justify dismissing the case with prejudice.[13]

SCDE has filed comments in support of the Initial Decision. SCDE asserts that attaching prejudice to the dismissal falls within the Hearing Official's authority.[14] SCDE also asserts that the Initial Decision comports with my Decision on Interlocutory Review, because it only precludes OSERS from issuing a new NPD based on *existing* evidence, not new evidence.[15] Furthermore, SCDE agrees with the Hearing Official that it gained a right to preclusion of OSERS' claim for an additional $15,133,669 of liability.[16] SCDE argued that it gained this right because it would burden SCDE's right to due process if OSERS was allowed to issue a new decision at this "advanced stage of the litigation" which would force SCDE to "defend against a moving target."[17]

OSERS argues that the Initial Decision is erroneous, and must be modified, for two reasons. First, the Hearing Official lacks the authority to prevent OSERS from making a new programmatic decision, so the attachment of prejudice to the dismissal is legally ineffective.[18] Second, because OSERS is not actually prohibited from issuing a new decision, the attachment of prejudice merely denies SCDE the right to a hearing on the new NPD.

Taking into account the Initial Decision and the parties' comments, I now turn to the merits of OSERS' request.

b. The Hearing Official's Authority

The key issue in resolving this matter is whether the Hearing Official properly dismissed the case "with prejudice." An involuntary dismissal "with prejudice," without a ruling on a case's merits, is a procedural remedy that prohibits further litigation of a potentially valid legal claim in the interest of fairness to a defendant.[19] In court proceedings, such a disposition is rare.[20] In general, when dismissing a case due to a procedural defect, a dismissing court must

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[12] *Id.*, pp. 5–6.
[13] *Id.*, p. 6.
[14] SCDE Comments, unpaginated (unp.) 1–2.
[15] *Id.*, unp. 3–4.
[16] *Id.*, unp. 4.
[17] *Id.*, unp. 4–5.
[18] OSERS Comments and Recommendations, p. 3.
[19] Such an involuntary dismissal is appropriate under the Federal Rules of Civil Procedure when, for example, a plaintiff fails to comply with a court's order. FED. R. CIV. P. 41(b). However, the Federal Rules of Civil Procedure are not controlling in this proceeding. *See In the Matter of Bais Fruma*, Dkt. No. 93-171-ST, U.S. Dep't of Educ. (Mar. 9, 1995).
[20] *See In re Tomlin*, 105 F.3d 933, 937 (4th Cir. 1997) (citing *Dunham v. Fla. E. Coast Ry. Co.*, 385 F.2d 366, 368 (5th Cir. 1967) ("In any court, a dismissal order that bars subsequent litigation is a severe sanction warranted only by egregious misconduct."))

demonstrate why lesser sanctions would not have sufficed, or how the misconduct of the party suffering dismissal rose to a sufficient level of egregiousness.[21] This disposition is similarly rare in Department IDEA proceedings: I am unaware of another case where a hearing official dismissed an IDEA determination "with prejudice" in similar circumstances.[22] Dismissal with prejudice in this case would preclude OSERS from issuing a new NPD to SCDE arising from substantially the same facts in the original NPD.

Dismissing this case with prejudice was improper here. As I previously stated in my Decision on Interlocutory Review, "a hearing official is not vested with authority to prohibit OSERS from carrying out future programmatic decision making, including issuing a new proposed decision based on new evidence."[23] In this case, OSERS intends to issue a new decision under its ordinary authority as a program office of the Department.

The Hearing Official focused on the phrase "new evidence" in my order. She concluded that my statement did not apply to this matter because I had not properly considered how "new" the evidence was.[24] I contemplated that OSERS generally would be motivated by new evidence to voluntarily withdraw and reissue a decision. However, OSERS need not demonstrate that it has sufficiently "new" evidence to voluntarily withdraw a decision. Once OSERS requests a voluntary dismissal and no longer stands behind its decision, the basis for the hearing is extinguished and the hearing officer no longer has a live controversy to consider.

The Hearing Official in this case suggests that her dismissal with prejudice is necessary because, absent this result, she would permit counsel for OSERS to blatantly disregard reasonably imposed deadlines.[25] That is not the case here. The regulations provide that a hearing official may set reasonable time limits for submission of documents and may also "refuse to consider documents or other submissions if they are not submitted in a timely manner unless good cause is shown."[26] Therefore, the hearing official may proceed with issuing a merits decision without reviewing a late-filed argumentative brief or submission of evidence if warranted. However, as I previously held, a motion to withdraw a decision "would be germane at any time during the hearing proceedings, because the fact that the deciding officer no longer supports the decision conclusively extinguishes the basis for the hearing."[27]

For the foregoing reasons, I will grant OSERS' request to modify the Initial Decision to remove the phrase "with prejudice." I now turn to the Hearing Official's analysis of SCDE's due process rights.

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[21] *Webb v. District of Columbia*, 146 F.3d 964, 975 (D.C. Cir. 1998).
[22] *But see, e.g., In the Matter of Instituto Irma Valentin-Utuado (PR)*, Dkt. No. 04-43-SF, U.S. Dep't of Educ. (Nov. 15, 2005) (dismissing with prejudice a request for review of a student aid fine action where the Title IV regulations at 34 C.F.R. § 668.117(c)(3) specifically granted the ALJ the authority to terminate the hearing process against a party which failed to meet filing deadlines).
[23] Decision on Interlocutory Review, p. 3; 34 C.F.R. §§ 181(l) and 182(a) (together limiting a hearing official to applying relevant law to the facts of each case and preparing a decision on the merits).
[24] Initial Decision, p. 6, n. 11.
[25] *See id.*, p. 5.
[26] 34 C.F.R. § 300.181(j), (k).
[27] Decision on Interlocutory Review, p. 3.

c. SCDE's Due Process Rights

I write further to consider SCDE's right to due process and establish the Department's final decision that the issuance of a new NPD in this case does not infringe on those rights.

Due process is flexible and calls for such procedural protections as a particular situation demands.[28] Due process in an administrative proceeding is not the same as in a judicial proceeding, because administrative and judicial proceedings are inherently different.[29] Each administrative proceeding must be carefully assessed to determine what process is due based on the circumstances.[30] The key provision is some form of hearing that allows the individual a meaningful opportunity to be heard.[31] Based on the following analysis, I find that the Department has afforded SCDE sufficient process in this case.

First, I am not insensitive to the amount of time which has elapsed since this case began, nor am I unaware of the effort expended in litigating it. However, improper delay by counsel for OSERS is not the cause of these burdens. This matter arose in February 2010, but was delayed by related litigation until well into 2013.[32] OSERS issued the NPD in June 2013 and SCDE filed its request for a hearing in July 2013.[33] Shortly thereafter, the parties mutually agreed to stay the case and enter into settlement discussions.[34] The stay remained in effect for approximately one year, until August 2014.[35] Subsequently, the parties participated in a prehearing conference in December 2014 and the Hearing Official set a January 15, 2015, deadline for pretrial motions.[36] The majority of the time that elapsed since 2010 is not attributable to counsel for OSERS engaging in any dilatory litigation strategy. By the Hearing Official's own admission, the prejudice to SCDE "would have been negligible" if OSERS had moved to amend its decision as late as January 15, 2015.[37] The Hearing Official provides no reasoned analysis as to why issuance of the new NPD in February 2015 would have significantly compounded SCDE's effort and expense in preparing for litigation.

Second, I find no basis to conclude that OSERS engaged in a blatant, dilatory litigation strategy because it did not file a motion to withdraw its decision by January 15, 2015. OSERS asserts that it believed that deadline was set only for filing a motion to withdraw, but that it could alternatively move to amend the decision at a later time.[38] OSERS already had stated at the pretrial conference that it no longer supported its decision. Even if the Hearing Official

[28] *Ching v. Mayorkas*, 725 F.3d 1149, 1157 (9th Cir. 2013).
[29] *Id.*; *Beverly Enterprises Inc. v. Herman*, 130 F. Supp. 2d 1, 18 (D.C. Cir. 2000) ("procedural due process in an administrative hearing does not always require all of the protections afforded a party in a judicial trial").
[30] *Ching v. Mayorkas*, 725 F.3d at 1157.
[31] *Mathews v. Elridge*, 424 U.S. 319, 333 (1975).
[32] Initial Decision, pp. 1–2.
[33] *Id.*, p. 2.
[34] *Id.*
[35] *Id.*
[36] *Id.*
[37] *Id.*, p. 5.
[38] Motion for an Extension of Time to File Notice of Amended Proposed Determination (Mar. 16, 2015), p. 2.

disagreed with OSERS' interpretation of the briefing order, filing a motion to withdraw the decision after the deadline would not support dismissal with prejudice.[39] Counsel for SCDE agreed that withdrawal and reissuance of the NPD by OSERS was the correct way to protect SCDE's right to due process.[40] I find no reason to conclude that SCDE, with the benefit of a complete hearing on the new NPD, would be denied its right to due process.

Third, I disagree that OSERS' withdrawal of the decision creates an unfair result for SCDE because I do not think OSERS "is attempting to circumvent the adverse result" of the denial of its motion to amend the NPD. In fact, OSERS' effort since the pretrial hearing has been to ensure that the amount of SCDE's liability is accurate and supported by the facts. OSERS initially proposed to withdraw and reissue the NPD during the pretrial conference, which would have been procedurally appropriate.[41] However, the Hearing Official initiated a discussion about filing a Motion to Amend as an alternative to withdrawal, and apparently rejected OSERS' concerns that a Motion to Amend would not sufficiently protect SCDE's right to due process.[42] Thus, OSERS filed the Motion to Amend the NPD, leading to this protracted series of appeals. At no time has OSERS expressed any goal other than to conduct a hearing based on proper findings, either in an amended NPD or a newly issued one.

Finally, I disagree that the case is in such an advanced stage of litigation that issuance of the new NPD creates a manifestly unfair situation for SCDE. As discussed above, a significant amount of the time elapsed since February 2010 was either occupied by related litigation (until June 2013) or settlement discussions (from July 2013 to August 2014). The procedural history cited by the Hearing Official suggests that no tribunal had even received a brief filed on the merits of this case until May 2015.[43] Even then, the matter was not fully briefed because, at that time, OSERS had already maintained for months that it no longer supported the initial proposed determination. The fact that a hearing on the merits will now occur during the administrative proceeding protects SCDE's right to due process.[44]

Ultimately, this resolution provides SCDE with notice of the decision and a full hearing on the merits of that decision.[45] It also ensures that the decision under consideration in the hearing is one that OSERS fully stands behind. Therefore, this resolution protects SCDE's right to due process and a fair hearing.

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[39] *In the Matter of Missouri Valley College*, Dkt. No. 92-71-SP, U.S. Dep't of Educ. (Nov. 13, 1992) (finding dismissal with prejudice inappropriately harsh even where four years of administrative proceedings had elapsed, despite the related effort and expense of litigation).
[40] SCDE Brief on Interlocutory Appeal, pp. 10–11.
[41] Order on Motion for Extension of Time and Further Governing Proceeding (Apr. 30, 2015), p. 3.
[42] *Id.*
[43] Initial Decision, p. 6.
[44] *See Sink v. Morton*, 529 F.2d 601, 604 (4th Cir. 1975).
[45] *See Pub. Serv. Comm'n of Ky. v. FERC*, 397 F.3d 1004, 1012 (D.C. Cir. 2005) (noting that the Due Process Clause and Administrative Procedure Act require adequate notice of the issues to be addressed by a hearing to allow the respondent a chance to provide rebuttal evidence).

III. Conclusion

Accordingly, the Hearing Official's October 1, 2015, Initial Decision is hereby AMENDED to remove the "with prejudice" provision. The NPD dated September 17, 2015, is in no way precluded by the Initial Decision. The hearing on the new NPD by SCDE may proceed, and the stay of that proceeding is hereby LIFTED.

So ordered this 26th day of February 2016.

John B. King, Jr.
Acting Secretary

Washington, D.C.

Service List

Angela J. Miranda
Administrative Law Judge
Office of Hearings and Appeals
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-4616

Leigh M. Manasevit, Esq.
Tiffany R. Winters, Esq.
Brustein & Manasevit, PLLC
3105 South Street, NW
Washington, D.C. 20007

Timothy Middleton, Esq.
Nana Little, Esq.
Office of the General Counsel
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-2110