



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 17-046

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

Appearances:

Hodgson Russ LLP, attorneys for respondent, by Ryan L. Everhart, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the vision evaluation performed by respondent (the district) was appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; *see* 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student

suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2], [c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4).¹ The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

This proceeding does not implicate the student's educational program, and is limited to a determination of whether the district conducted an appropriate evaluation of the student's vision needs. The student has been found eligible for special education services as a student with a learning disability (see Dist. Ex. 11). The hearing record reflects that the student underwent an

¹ In September 2016, Part 279 of the practice regulations were amended, which amendments became effective January 1, 2017, and are applicable to all appeals served upon an opposing party on or after January 1, 2017 (see N.Y. Reg., Sept. 28, 2016, at pp. 37-38; N.Y. Reg., June 29, 2016, at pp. 49-52; N.Y. Reg., Jan. 27, 2016, at pp. 24-26). Although some of the relevant events at issue in this appeal occurred before the effective date of the amendments, the new provisions of Part 279 apply, as the request for review was served upon the district after January 1, 2017; therefore, citations contained in this decision are to the amended provisions of Part 279.

annual vision screening by a district school nurse in April 2016 when he was in second grade (Tr. pp. 331-32; Parent Ex. DD at p. 1; see Parent Ex. X at pp. 1-2). The parent was notified by letter from the school nurse that the screening results indicated the student had some difficulty reading the eye charts and the nurse recommended that the student "be examined by an eye care specialist" (Parent Ex. DD at p. 1).² The parent arranged for the student to be seen by an optometrist, who diagnosed the student with refractive amblyopia, or "lazy eye," a condition that presented in the student as reduced visual functioning in the right eye which caused him to use one eye rather than both eyes together, and ordered glasses for the student (Tr. pp. 454-55; Parent Exs. C at p. 1; X at pp. 1-2; Dist. Ex. 9).³

On April 29, 2016, the CSE convened for an annual review (Parent Ex. X at p. 1). Minutes of the April 2016 CSE meeting reflect that the CSE recommended the student receive English language arts (ELA) instruction in a 12:1+1 setting for one hour per day, consultant teacher services in math for 30 minutes per day, and two 30-minute speech-language therapy sessions (id. at p. 2).⁴ The hearing record reflects that at the April 2016 CSE meeting, as advised by the student's optometrist, the parent requested that the district conduct a "vision therapy evaluation" (Parent Ex. X at p. 2; see Tr. p. 459). The meeting minutes reflect that the CSE recommended a "vision therapy evaluation," although elsewhere on the minutes, the phrase "vision evaluation" is used (Parent Ex. X at pp. 1-2). The district recommended and the parent agreed that BOCES would complete the evaluation the following September, because the student would wear a patch on his "good eye" over the summer, in an attempt to improve his visual acuity (see Tr. pp. 202, 443, 455-56, 459-60; Parent Ex. X at pp. 1-2).⁵

On September 19, 2016, the parent signed a consent form for a "[v]ision [e]valuation" (Parent Ex. Y). On October 21, 2016, a BOCES teacher of the visually impaired conducted an "Evaluation for Educational Vision Services" of the student (Parent Ex. C). According to the October 27, 2016 report completed by the evaluating teacher of the visually impaired, the student scored within the average range on most assessments administered and was not recommended to receive educational vision services (id. at pp. 1-4). The evaluator recommended a number of additional classroom modifications and accommodations to meet the student's visual needs in the classroom (id. at p. 4).

The CSE reconvened on November 28, 2016, to review the results of the BOCES vision evaluation (Dist. Ex. 11 at p. 1). The resultant IEP reflected that the CSE determined that the

² While the due process complaint notice named both of the student's parents, the request for review was filed by the student's mother alone. Accordingly, references to "the parent" in this decision refer to the student's mother.

³ To avoid confusion, the optometrist who identified the student's amblyopia diagnosis and treated the student will be referred to hereinafter as "the student's optometrist" (see Tr. pp. 454-55; Dist. Ex. 9). The student's optometrist referred the student to a second optometrist for a vision therapy evaluation and it is this second optometrist who testified at the impartial hearing at the parent's request and from whom the parent seeks a vision therapy evaluation as an independent educational evaluation (Tr. pp. 162-67, 203-05, 466; Parent Ex. B; Dist. Ex. 12). The second optometrist will be referred to hereinafter as "the developmental optometrist."

⁴ The hearing record does not contain the IEP generated as a result of the April 2016 CSE meeting.

⁵ BOCES refers to the Board of Cooperative Educational Services (see Parent Ex. C at p. 1).

student did not qualify for "vision services" (id. at pp. 1-2). The meeting minutes indicated that the CSE discussed the student's optometrist's recommendation for vision therapy to be provided by the developmental optometrist, that the student's optometrist was preparing a new report with recommendations for the school, the differences between "[s]ervices through school" and the therapy provided by the developmental optometrist, the findings of the BOCES evaluation, and the CSE's recommendation for "no changes now," but that the CSE would reconvene after it received the report from the student's optometrist (Parent Ex. AA at p. 1).

In a memorandum to the developmental optometrist dated December 7, 2016, the student's optometrist again referred the student for a vision therapy evaluation (Parent Ex. B). The parent testified that the patch the student wore over the summer had not corrected his amblyopia (Tr. pp. 468-70).

In a January 4, 2017 letter to the director of special education, the parents requested an IEE, specifically a functional eye evaluation to be conducted by the developmental optometrist, stating that the BOCES evaluation was "limited" and "failed to give a detailed report in coordination with [the student's] diagnosis of amblyopia" (Dist. Ex. 12). The letter also stated that the parents disagreed with the findings of the BOCES evaluation and that the purpose of the IEE was to determine if the student required specific exercises to "strengthen his eye coordination" and address his amblyopia to enable him to "read better and be a successful student" (id.).

Subsequent to the January 2017 letter, the director of special education met with the parents on a number of occasions to "resolve the issue" and determine if there were other supports the district could offer to the student (Tr. pp. 426-28).

A. Due Process Complaint Notice

In response to the parent's request for an IEE in the area of vision therapy, the district filed a due process complaint notice dated February 3, 2017, asserting that the district was "not agreeable" to the requested IEE being at public expense because the October 2017 evaluation for educational vision services conducted by the BOCES teacher of the visually impaired was "appropriate and sufficient" (Dist. Ex. 2).⁶

B. Motion to Dismiss and Impartial Hearing Officer Interim Decision

Prior to the start of the impartial hearing, the parent moved to dismiss the district's due process complaint notice, asserting that the complaint was insufficient and failed to comport with State regulations (Dist. Ex. 4 at pp. 2-4). Initially, the parent asserted that the district superintendent, who signed the due process complaint notice, was not a "party" and so was not permitted to initiate a due process complaint (id. at p. 3). The parent also asserted that the complaint was insufficient because it failed to state a proposed resolution to the complaint and failed to identify the school the student attended (id.). The parent additionally asserted several procedural arguments with respect to the CSE and the district's refusal to provide the parent with

⁶ The district initially filed a similar complaint which was undated and which misspelled the student's name (see Dist. Ex. 1).

an IEE at public expense, specifically that the district failed to provide the parent with a copy of the procedural safeguards notice, failed to provide the parent with information on how to obtain free or low-cost legal assistance, and failed to provide prior written notice of the reasons for the CSE's refusal to provide an IEE at public expense (id. at pp. 3-4).

The district opposed the parent's motion at oral argument in a prehearing conference before the IHO on February 23, 2017 (Feb. 23, 2017 Tr. pp. 1-29). In an interim decision dated March 9, 2017, the IHO denied the parent's motion to dismiss (Dist. Ex. 7). Initially, the IHO found that the due process complaint notice contained a proposed remedy, specifically that the district would not be required to provide the parent with an IEE at public expense (id. at p. 3). The IHO also found that the superintendent, as a representative of the school district, was an appropriate individual to file the due process complaint notice (id.). The IHO next found that the failure to list the student's school in the due process complaint notice was not fatal in this instance because the parent had actual knowledge of the school the student attended (id.). With respect to the procedural claims raised by the parent in the motion to dismiss, the IHO declined to rule on them, stating that "[t]hese issues will be determined during the course of the hearing." (id. at p. 2).

After the denial of her motion to dismiss, the parent submitted a response to the district's due process complaint notice through her advocates, asserting that the district's evaluation of the student was not appropriate or sufficient (Dist. Ex. 5).⁷

C. Impartial Hearing Officer Decision

The parties proceeded to an impartial hearing on March 23, 2017, which concluded on March 31, 2017, after three days of proceedings (Tr. pp. 1-510). By decision dated May 19, 2017, the IHO concluded that the district was not required to provide the parent with an IEE at public expense (IHO Decision). The IHO determined that the vision evaluation conducted by the BOCES teacher of the visually impaired was appropriate and sufficient because the teacher of the visually impaired was qualified to conduct the evaluation, the parent did not challenge the particular assessments selected by the teacher of the visually impaired, and the assessments used were appropriate for the evaluation the teacher of the visually impaired conducted (id. at pp. 6-9).

With respect to the IEE the parent requested to be conducted by the developmental optometrist at public expense, the IHO noted the developmental optometrist's qualifications, and found that his evaluation would be "more medically based and would have a benefit beyond the classroom . . . and allow for the provision of vision therapy service from an OT" (IHO Decision at p. 10). The IHO also determined that because the parent had not requested the district's criteria for an IEE, and because the developmental optometrist's proposed evaluation was larger in scope and therefore did not meet the district "criteria as established by the scope of the [teacher of the visually impaired's] evaluation for educational vision services," the two evaluations were therefore

⁷ By letter to the district and the IHO dated February 27, 2017, the advocates correctly noted that the parties were not "required to attend a resolution meeting" (Dist. Ex. 6 at p. 1). While not explicitly prohibiting the parties from attempting to reach a resolution prior to holding an impartial hearing with regard to a due process complaint notice filed by a school district, the IDEA and federal and State regulations require a resolution meeting only when a parent files a due process complaint notice (20 U.S.C. § 1415[f][1][B][i]; 34 CFR 300.510[a]; 8 NYCRR 200.5[j][2][i]).

"apples and oranges" (id. at pp. 10-11). The IHO noted that the failure of the developmental optometrist to criticize the assessments used by the teacher of the visually impaired was "critical" to his determination because the teacher of the visually impaired's selection of assessments was "not disputed nor contradicted" (id. at pp. 11-12).

Lastly, with respect to the parent's procedural arguments, including the district's failure to provide the parent with prior written notice relating to its refusal to provide an IEE at public expense, failure to provide a copy of the procedural safeguards notice, and failure to "provide the requested IEP," the IHO found that these claims were not raised in the due process complaint notice and were outside the scope of the hearing (IHO Decision at p. 12). The IHO also determined that the claim that the district had failed to provide the parent with a list of free or low-cost legal services was relevant to the hearing, but the harm was "de minimis" because the parent had nonetheless obtained the services of advocates to represent her prior to the impartial hearing (id. at pp. 12-13).

IV. Appeal for State-Level Review

The parent appeals, and requests that the IHO's decision be reversed. More specifically, she asserts that the IHO erred in finding that the vision evaluation obtained by the district was appropriate and sufficient and erred in failing to order the district to provide an IEE at public expense.

As an initial matter, the parent contends that the IHO erred in failing to grant her motion to dismiss the due process complaint notice as insufficient because the due process complaint notice failed to state a proposed resolution, failed to identify the school the student attended, and was signed by the district superintendent of schools, an improper party. The parent next asserts that the IHO should have decided the parent's procedural claims in his interim decision because the district's failure to provide a prior written notice, a procedural safeguards notice, and a list of free or low-cost legal services all implicated due process and equal participation concerns with respect to the district's refusal to conduct the requested IEE at public expense, as well as the commencement of the hearing via the due process complaint notice itself. The parent additionally argues that the IHO erred in finding the proposed IEE did not meet the district criteria for IEEs because the district did not raise this issue in its due process complaint notice. The parent also contends that the IHO erred in preventing the parent from calling the district superintendent of schools as a witness on the ground that his testimony would be redundant, especially after deciding in his interim decision that the superintendent was a proper party to file a due process complaint notice. The parent further asserts that the IHO violated her due process rights by sending a copy of his final decision only by email and only to her advocates, without her consent, rather than sending a hard copy of the decision directly to her.

Next, the parent asserts that the IHO erred in finding that the district vision evaluation conducted by the BOCES teacher of the visually impaired was appropriate, because the teacher of the visually impaired was not qualified to conduct the vision therapy evaluation that the parent requested and that was required in order to fully evaluate the student's needs with respect to his diagnosis of amblyopia, nor was the teacher of the visually impaired qualified to diagnose or treat amblyopia. Relatedly, the parent asserts that the IHO erred in finding that the parent had failed to

challenge the assessments selected by the teacher of the visually impaired because it was the district's burden to establish that they were appropriate, and the parent did challenge the assessments by putting forth evidence showing that many of the assessments were "screeners" rather than standardized tests, were inaccurately reported in the teacher of the visually impaired's report, and were not the correct assessments to fully identify and treat the student's amblyopia.

With respect to the functional vision therapy IEE that the parent requests, she contends that the IHO erred in failing to order the evaluation because a functional vision therapy evaluation conducted by the developmental optometrist would more accurately and completely identify the student's needs with respect to his amblyopia, and potentially identify a need for vision therapy services to treat the condition. The parent requests a finding that the district's due process complaint notice was not sufficient and an order for the district to provide an IEE at public expense.

In an answer, the district generally admits or denies the parent's allegations and requests that the IHO decision be upheld in its entirety. Specifically, the district contends that the IHO correctly determined that the vision evaluation conducted by the teacher of the visually impaired was appropriate and sufficient, and that the IHO correctly declined to order the requested IEE because the vision therapy evaluation sought by the parent is not educationally based and is therefore outside of the district's responsibility.

V. Applicable Standards

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012] [noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005] [finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]).

VI. Discussion

A. Preliminary Matters

1. Sufficiency of Due Process Complaint Notice

The parent asserts that the IHO erred in failing to dismiss the district's due process complaint notice as insufficient because it failed to comply with the requirements of 8 NYCRR 200.5(i)(1) due to the lack of a recommended resolution, failure to have a proper party submit the due process complaint notice, and failure to name the school the student attended.

State regulations with respect to initiating an impartial hearing require a due process complaint notice to contain the following:

- (i) the name of the student;
- (ii) the address of the residence of the student . . .;
- (iii) the name of the school the student is attending;
- (iv) a description of the nature of the problem of the student relating to such proposed or refused initiation or change, including facts relating to such problem; and
- (v) a proposed resolution of the problem to the extent known and available to the party at the time.

(8 NYCRR 200.5[i][1]).

State regulation further provides that a party "may not have an impartial hearing" until the party, or an attorney representing the party, files a due process complaint notice that meets the requirements set forth above (8 NYCRR 200.5[i][2]). State regulations provide a process for challenging the sufficiency of a due process complaint notice, wherein the party receiving the notice must notify the other party and the IHO, in writing, within 15 days of the receipt of the due process complaint notice, that the receiving party believes the notice has not met the requirements (8 NYCRR 200.5[i][3], [i][6][i]). Within five days of receiving the notice of insufficiency, the IHO shall make a determination "on the face" of the due process complaint notice whether the notice meets the requirements (8 NYCRR 200.5[i][6][ii]).

Taking each argument in turn, first, the IHO correctly determined that the district's due process complaint notice contained "a proposed resolution of the problem to the extent known and available to the party at the time" as required by 8 NYCRR 200.5(i)(1)(v) (see Dist. Ex. 7 at p. 3). The district's due process complaint notice stated that the district was "not agreeable to [the developmental optometrist's] evaluation at public expense" and that the purpose of the impartial hearing was to prove that the evaluation conducted by the BOCES teacher of the visually impaired was sufficient and that the result the district sought was to "deny your independent evaluation request at public expense" (Dist. Ex. 2).

Next, the parent's assertion that the due process complaint notice was improperly filed by the district superintendent of schools because it should have been filed by a member of the board of education or an attorney representing the board of education is without merit. State regulations state that a "parent or school district may file" a due process complaint notice, as well as "the attorney representing such a party" (see 8 NYCRR 2005[i][1]). Thus, there is no specific requirement that a member of the board of education initiate the hearing. The State Education Law allows a central school district, through its board of education, to appoint a superintendent and grant that person the power to act as the "chief executive officer of the school district and the educational system" and to "enforce all provisions of law and all rules and regulations relating to the management of the schools" (Educ. Law § 1711[1], [2]; see Educ. Law § 1804[1]). The parent does not allege that the superintendent was acting without the authorization of the board of education, and the IHO did not err in refusing to dismiss the due process complaint notice on that basis.

Turning to the parent's third contention, the parent correctly asserts that the IHO erred in failing to find that the district's due process complaint notice was insufficient because it failed to contain the name of the school the student attended. State regulations do not permit the determination made by the IHO that because the parent had "actual notice" of the school the student attended, the due process complaint notice was sufficient. The regulations explicitly require the IHO to make a determination "on the face" of the due process complaint notice of whether the notice meets the requirements set forth therein, and a party "may not have an impartial hearing" until the party, or an attorney representing the party, files a due process complaint notice that meets the requirements set forth above (8 NYCRR 200.5[i][2], [6][ii]). Accordingly, the IHO should have found the due process complaint notice to be insufficient at the time the parent challenged it, and required the district to amend the due process complaint notice to comply with the filing requirements.

However, there appears to be no reason at this juncture to order relief on this basis. It does not appear that the failure to identify the student's school affected the impartial hearing process in any way. The impartial hearing proceeded, with both parties examining witnesses and presenting evidence regarding the central question raised, specifically whether the district's vision evaluation was appropriate and sufficient, and there does not appear to be any indication that the parent was under a misimpression regarding the school that the student attended at any time relevant to this case, nor is the particular school building relevant to the disputed issues. Under these circumstances, remanding the matter to the IHO to dismiss the district's due process complaint notice at this time on the basis that the district failed to include the name of the school the student attended would result in repeating the same hearing process and only waste costly judicial resources.⁸

⁸ To the extent the parent contends that the IHO erred in failing to dismiss the due process complaint notice because the district failed to provide the parent with prior written notice, a procedural safeguards notice, or a list of free or low-cost legal services, it is unclear how these alleged procedural violations would bear on the substantive appropriateness of the district's evaluation, which is the only matter at issue in this proceeding and was fully and vigorously litigated by the parent. Nonetheless, without addressing the merits of these claims, the district is cautioned to comply with its procedural obligations (see 8 NYCRR 200.5[a], [f], [j][1][iii]).

2. Scope of Impartial Hearing

The parent claims that the IHO improperly expanded the scope of the impartial hearing by referencing the district's criteria for evaluations as part of the basis for his determination to deny the parent's request for an IEE at public expense because the district's due process complaint notice only asserted that its evaluation was appropriate and did not raise a claim concerning the criteria applicable to an IEE. The district counters that the hearing was commenced to prove that the parent was not entitled to an IEE, a claim that was "premised" on the assertion that its vision evaluation was appropriate and sufficient and that the parent had not met all criteria for an IEE at public expense. For the reasons set forth below, the hearing record indicates that the IHO improperly expanded the scope of the impartial hearing by including the district's criteria for evaluations as part of his determination to deny the parent an IEE.

Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (see 20 U.S.C. § 1415[b][7][A]; 34 CFR 300.507[a]-[b]; 300.508[a]; 8 NYCRR 200.5[j][1]). Under the IDEA and its implementing regulations, the party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.508[d][3][i]; 300.511[d]; 8 NYCRR 200.5[j][1][ii]), or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.508[d][3][ii]; 8 NYCRR 200.5[i][7][b]; see, e.g., N.K. v. New York City Dep't of Educ., 961 F. Supp. 2d 577, 584 [S.D.N.Y. 2013]).

As an initial matter, the district's due process complaint notice cannot reasonably be read to include the assertion that the functional vision therapy evaluation the parent wished to obtain from the developmental optometrist would not meet the school district's criteria applicable for an IEE (see Dist. Ex. 2). It contains no reference to any criteria the district may have for an IEE, and only asserted that the district intended to prove that the vision evaluation conducted by the teacher of the visually impaired was appropriate and sufficient (id.). State regulations pertinent to a parent's request for an IEE provide that when a request is received by a district, it must either ensure that the IEE is provided at public expense or commence an impartial hearing "to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria" (8 NYCRR 200.5[g][1][iv] [emphasis added]). Thus, the district would need to specifically invoke its criteria as a basis for denying the parent's request for an IEE at public expense in order for that to be at issue in the impartial hearing, and its due process complaint notice failed to do so.

However, during the impartial hearing, the district's director of special education was asked on direct examination by the parent's advocate whether the district had "a criteria that parents are required to follow" to obtain an IEE, and he replied, "I'm certain there is, but I can't speak with 100 percent accuracy to that" (Tr. p. 379). Later, still during direct examination, the director admitted that the district failed to provide the parent with information about where she could obtain an IEE and the district's criteria that apply to an IEE (Tr. p. 419). While the parent initially raised the issue of district criteria for IEEs, she did so in the context of asserting that the district had failed to comply with its procedural obligations, and did not "open the door" to the district asserting that

the IEE requested by the parent failed to meet district criteria (see, e.g., M.H. v. New York City Dep't of Educ., 685 F.3d 217, 250-51 [2d Cir. 2012]). Furthermore, the district specifically argued in its post-hearing brief that the only issue the IHO had to rule upon was whether the vision evaluation conducted by the district was appropriate, there being no other claims properly before the IHO (see IHO Ex. 5 at pp. 15-16).

In light of the above, the IHO improperly expanded the scope of the impartial hearing by relying on the district's criteria for evaluations as part of his determination to deny the parent's request for an IEE at public expense. This error is more than a technicality, because it calls into question the reasoning underpinning the IHO's decision. In his description of the facts in the impartial hearing, the IHO noted that the parent "failed to request the criteria from the district for an IEE," and later repeated this statement in his analysis of whether the evaluation the parents sought from the developmental optometrist could constitute a valid IEE, and went on to find that it could not because the requested IEE "did not match the criteria for an evaluation for educational vision services as described by [the district's director of special education]" (IHO Decision at pp. 5, 10-11). Placing the onus upon the parent to obtain the district's criteria for an IEE was also error by the IHO, as State regulations clearly place the responsibility on the district to notify the parent about any criteria it may have (see 8 NYCRR 200.5[g][1][i]; "Procedural Safeguards Notice," Office of Special Educ. [July 2017] at p. 6, available at <http://www.p12.nysed.gov/specialed/formsnotices/documents/NYSEDProceduralSafeguardsNoticeJuly2017v2.pdf>). In addition, as the only evidence in the hearing record relating to the district's criteria for IEEs is the director of special education's testimony that he was unaware of the criteria, the IHO's finding of fact on that point is unsupported by the evidence in the hearing record (Tr. p. 379).

3. Conduct of Impartial Hearing—Examination of Witnesses

The parent asserts that the IHO erred in failing to allow her to call the district superintendent as a witness at the impartial hearing because the superintendent had been determined to be a party to the impartial hearing. The parent asserts that she intended to question the superintendent as to "why he had determined the vision evaluation for [the student] was appropriate." The district contends that the IHO correctly refused to let the parent call the superintendent because the superintendent's testimony would be unduly repetitious of other evidence and testimony already presented at the impartial hearing, the superintendent lacked "any first-hand knowledge of the facts of the case," and the parent had not provided any prior notice of her intent to call the superintendent to testify and expected him to be available immediately.

State regulations governing the conduct of an impartial hearing provide that the "parents, school authorities, and their respective counsel or representative, shall have an opportunity to present evidence, compel the attendance of witnesses and to confront and question all witnesses at the hearing" (8 NYCRR 200.5[j][3][xii]). The regulations also provide that an IHO "may receive any oral, documentary or tangible evidence except that the [IHO] shall exclude evidence that he or she determines to be irrelevant, immaterial, unreliable or unduly repetitions" (8 NYCRR 200.5[j][3][xii][c]). The regulations further provide that an IHO "may limit examination of a witness by either party whose testimony the [IHO] determines to be irrelevant, immaterial or unduly repetitious," and "may limit the number of additional witnesses to avoid unduly repetitious testimony" (8 NYCRR 200.5[j][3][xii][d], [e]).

During the impartial hearing, at the time the parent attempted to call the superintendent, counsel for the district objected (Tr. pp. 334-39). With respect to the parent's interest in ascertaining why the superintendent had determined that the district's vision evaluation was appropriate, counsel for the district argued that the superintendent had not made the determination but acted as an agent of the district in its decision to "defend [the teacher of the visually impaired's] evaluation," and that anything the superintendent had to say about the appropriateness of the district's vision evaluation would be repetitive of the testimony about the evaluation that had already been provided by the evaluator and by two of the student's special education teachers (Tr. pp. 338-39). After hearing from both parties, the IHO refused to allow the witness on the ground that his testimony would be unduly repetitious (Tr. pp. 334-40).

IHOs generally have broad discretionary authority in conducting an impartial hearing. Although all triers of facts may not have made the same ruling on precisely the same basis, the hearing record does not support a finding that the IHO abused his discretion in excluding the district superintendent as a witness at the impartial hearing because he reached a reasoned conclusion on a basis explicitly supported by State regulations.⁹

4. Conduct of Impartial Hearing—Transmittal of Decision

The parent claims that the IHO violated her due process rights by sending his decision by email to her advocates only, without her consent, rather than mailing a copy of the decision to her directly.

State regulation regarding the timeline and method of rendering a decision in an impartial hearing provides as follows:

[I]f a school district files the due process complaint, the impartial hearing officer shall render a decision, and mail a copy of the written, or at the option of the parents, electronic findings of fact and the decision to the parents and to the board of education not later than 45 days from the day after the public agency's due process complaint is received by the other party and the State Education Department.

(8 NYCRR. 200.5[j][5]).

The district does not contest that the IHO transmitted a copy of his decision to the parties by electronic means only, and does not contest that the parent did not request that form of

⁹ Another example of valid reasoning that an IHO might rely on is, "[e]ach party shall have the right to prohibit the introduction of any evidence the substance of which has not been disclosed to such party at least five business days before the hearing" (8 NYCRR 200.5[j][3][xii]; see 34 CFR 300.512[a][3]). The United States Department of Education's Office of Special Education Programs has opined that this disclosure applies to the "names of witnesses to be called" (Letter to Bell, 211 IDELR 166 [OSEP 1979]). In other words, impartial hearings cannot be used as a tool for furthering a party's desire to conduct discovery, and IHOs are authorized to exclude witnesses in instances when the name of the witness has not been identified or the anticipated substance/topic of such named person's testimony has not been disclosed in accordance with the five-day rule. Advance disclosure is critical to the fair yet efficient management of the IDEA's hearing process.

transmittal. Rather, the district asserts that the parent never requested a copy of the decision be sent to her via mail, and has suffered no harm from the delivery method.

The parties agree that the IHO did not ascertain whether the parent wanted the decision emailed and, therefore, did not render and mail his decision in compliance with State regulation, but, even so, there is little basis upon which relief may be had as there is no evidence to suggest that the parent or the student suffered any prejudice as a result of this failure, and the parent was able to timely appeal from the IHO's decision. Nevertheless, the IHO is reminded that parties may be prejudiced by irregularities in decision issuance and that the IHO must comply with the applicable methods for rendering and transmitting a decision set forth in State regulation.¹⁰

B. Evaluation of the Student's Vision

Turning to the requirements for evaluating students under the IDEA and merits of the parties' IEE dispute in this case, federal and State regulations require that a district must conduct an evaluation of a student where the educational or related services needs of a student warrant a reevaluation or if the student's parent or teacher requests a reevaluation (34 CFR 300.303[a][2]; 8 NYCRR 200.4[b][4]); however, a district need not conduct a reevaluation more frequently than once per year unless the parent and the district otherwise agree, and must conduct one at least once every three years unless the district and the parent agree in writing that such a reevaluation is unnecessary (8 NYCRR 200.4[b][4]; see 34 CFR 300.303[b][1]-[2]). A CSE may direct that additional evaluations or assessments be conducted in order to appropriately assess the student in all areas related to the suspected disabilities (8 NYCRR 200.4[b][3]). An evaluation of a student with a disability must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student, including information provided by the parent, that may assist in determining, among other things the content of the student's IEP (20 U.S.C. § 1414[b][2][A]; 34 CFR 300.304[b][1][ii]; 8 NYCRR 200.4[b]; see Letter to Clarke, 48 IDELR 77 [OSEP 2007]). In particular, a district must rely on technically sound instruments that may assess the relative contribution of cognitive and behavioral factors, in addition to physical or developmental factors (20 U.S.C. § 1414[b][2][C]; 34 CFR 300.304[b][3]; 8 NYCRR 200.4[b][6][x]). A district must ensure that a student is appropriately assessed in all areas related to the suspected disability, including, where appropriate, social and emotional status (20 U.S.C. § 1414[b][3][B]; 34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). An evaluation of a student must be sufficiently comprehensive to identify all of the student's special education and related services needs, whether or not commonly linked to the disability category in which the student has been classified (34 CFR 300.304[c][6]; 8 NYCRR 200.4[b][6][ix]).

The evaluation conducted by the BOCES teacher of the visually impaired at issue in this appeal is memorialized in a report titled "Evaluation for Educational Vision Services"(Tr. pp. 40, 53; Dist. Ex. 10). The district contends that the educational vision evaluation was appropriate to determine the extent to which the student's amblyopia affected his educational performance, and

¹⁰ To the extent the parent asserts that the IHO erred in transmitting his decision to her advocates, rather than to her, it was not unreasonable in this case for the IHO have the viewpoint that the parent's desire was to have the decision transmitted to her advocates; however, when a lay advocate appears to assist a parent at a hearing the better practice would be to clarify on the record to whom the parent would prefer the decision to be transmitted.

the services, accommodations, and modifications needed to address it. The parent maintains that the vision evaluation completed by the BOCES teacher of the visually impaired was limited and did not sufficiently address needs related to the student's amblyopia. She requests that a functional vision therapy IEE be completed by the developmental optometrist to more accurately and completely identify the student's needs with respect to his amblyopia, and potentially identify a need for vision therapy to treat the condition.

At the outset of this discussion, a description of the student's diagnosis of amblyopia is warranted. The teacher of the visually impaired described amblyopia as a condition where "the eye shuts down where there's no information going through the optic nerve to the back of the brain where the occipital lobe is," which can result in "eye tiring" because the person "might be just using one eye" (Tr. p. 50). She indicated that a student with amblyopia would not be able to work for as long as someone using both eyes and could experience blurriness and headaches (Tr. p. 51). Her report indicated that when completing close work, amblyopia could result in loss of place, eye fatigue, blurring of print, and poor concentration (Dist. Ex. 10 at p. 4).

The developmental optometrist testified that amblyopia is a condition where a person cannot see well even when provided with optical correction or compensatory lenses (Tr. p. 170). His testimony indicated that there are multiple reasons for the condition and that a developmental or functional optometrist must conduct a differential diagnosis to determine the cause of the amblyopia and then treat it appropriately (*id.*). With amblyopia, instead of the two eyes working together as a team, the poorer seeing eye can interfere with the good eye, causing reduced attention, reduced ability to sustain attention to task, and fluctuations in the ability to work through an activity, due to visual fatigue (Tr. p. 175). According to the developmental optometrist, amblyopia can have an adverse effect on a student's educational performance by interfering with reading, visual tracking, visual spatial skills, problems with directionality and laterality, and by causing reversals when reading and writing (Tr. p. 171). He also indicated that amblyopia can cause midline shift syndromes, which may cause postural skews while writing and reading, general fatigue, and increased distractibility (Tr. pp. 171-72). He opined that amblyopia can adversely affect activities of daily living by interfering with a student's motor performance, and that children with amblyopia often have poor spatial skills (Tr. p. 172).

The developmental optometrist also indicated that amblyopia and ocular motor dysfunction often "run hand in hand" (Tr. p. 175). He indicated that ocular motor dysfunctions include difficulties in visual tracking and vergence disorders (the eyes' ability to converge or move in together when we look at something up close), and can adversely affect educational performance by causing poor tracking, delays in visual-verbal processing, reversals when writing, poor handwriting, fine visual motor control, and associated visual perceptual abilities, and difficulty copying from a chalkboard (Tr. pp. 172-74).

Testimony by the teacher of the visually impaired indicated that she has a "master's in education for the teaching of the blind and visually impaired along with elementary education," "a master's degree in special education," and a "certification for orientation and mobility" (Tr. p. 48). Her testimony further indicated that with regard to her certification in teaching the visually impaired, she completed coursework addressing specific eye conditions, equipment, how to modify the curriculum, and Braille (Tr. pp. 48-49). The teacher of the visually impaired testified

that she is not a doctor and is not certified to diagnose or treat visual disorders including amblyopia, she cannot use or prescribe vision exercises, therapeutic lenses, prisms, or other devices to promote binocular vision, and cannot perform vision therapy evaluations or supervise or provide a program in vision therapy (Tr. pp. 115-17). Her testimony also indicated that there is a difference between the evaluation for educational vision services that she performs and a vision therapy evaluation (Tr. pp. 101, 117-18).

According to the teacher of the visually impaired, teachers of the visually impaired work with classroom teachers so students can have equal access to the curriculum (Tr. pp. 114-15).¹¹ The teacher of the visually impaired testified that her focus is on student performance in school in an academic setting and that the results of her evaluation are a good indicator of the student's visual needs in the classroom (Tr. pp. 46-47, 84). The teacher of the visually impaired testified that if a student is found to have amblyopia and qualifies for services, instructions would be provided on increasing the efficiency of the student's visual skills and how well their eyes move across a written page (Tr. p. 52). She testified that low-tech equipment can be provided—such as a reading guide or a slant board—to help keep the student's eyes on the page so they do not skip lines when reading and to help them keep their eyes focused (id.). She further testified that she often arranges for accommodations to be provided to students with amblyopia (Tr. p. 53).

1. The BOCES Vision Evaluation

The hearing record reflects that the evaluation completed by the teacher of the visually impaired included interviews and a "Vision Screening–Academic Checklist" that was completed by the student's regular education classroom teacher with input from the student's special education ELA and math teachers (Tr. pp. 59, 104, 106, 230, 288; Parent Ex. CC at p. 2; Dist. Ex. 10 at p. 1). The teacher of the visually impaired also administered a variety of "screener," standardized, and non-standardized tests (Tr. pp. 108, 110-11, 113; Dist. Ex. 10 at pp. 1-3).¹² She indicated that she included in her testing both assessments of how the student's eyes moved (visual skills), as well as how the student interpreted what he was seeing (perception), because both of these elements can affect academics (Tr. p. 61). The teacher of the visually impaired testified that she also reviewed the report from the student's optometrist (Tr. p. 55; Dist. Exs. 9; 10 at p. 1).

With regard to standardized testing, the teacher of the visually impaired testified that she administered two tests, the Developmental Test of Visual Perception-Third Edition (DTVP-3), and the Visual Skills Appraisal (VSA) (Tr. pp. 111-13). The DTVP-3 is described in the teacher of the visually impaired's evaluation report as a "battery of five subtests that measure different but interrelated visual perceptual and visual-motor abilities" of students ages 4 to 10 years (Dist. Ex. 10 at p. 3). According to the teacher of the visually impaired's report and her testimony, the

¹¹ The teacher of the visually impaired testified that vision therapists do not work with classroom teachers to assist students in accessing the curriculum (Tr. p. 115).

¹² The hearing record is unclear as to whether the teacher of the visually impaired administered the "Visionalysis" test during her evaluation. The evaluation report reflected that portions of the "Visionalysis" were completed; however, the results of this test are not otherwise reflected in the report (Dist. Ex. 10). Testimony by the teacher of the visually impaired indicated that she used three portions of the "vision analysis" and that "vision analysis" is the name of a "screener" kit (Tr. p. 111).

subtests include Eye-hand Coordination, which measures the student's "ability to draw precise straight or curved lines in accordance to visual boundaries," for example, by staying within the gray area when completing a series of mazes; Copying, which measures the student's ability to "recognize the features of a design" and "reproduce" or "draw it from a model"; Figure-Ground, which measures the student's ability to "see specified figures" when "hidden in confusing, complex backgrounds" or "embedded within other images"; Visual Closure, which measures the student's ability to "recognize a stimulus figure when that figure has been incompletely drawn" and the "brain's ability to complete [the] missing information"; and Form Constancy, which measures the student's ability to "match two figures that vary on one or more discriminating features (i.e. size, position, and/or shade)," for example, "recogniz[ing] an A is an A no matter which font is used" (Tr. pp. 77-81; Dist. Ex. 10 at p. 3). The student's scores were in the average range on the Eye-Hand Coordination, Figure-Ground, and Form Constancy subtests; in the above average range on the Copying subtest; and in the below average range on the Visual Closure subtest (id.).¹³

Composite Index scores for the DTVP-3, which according to the teacher of the visually impaired provided an overall performance score based on the subtests, were also provided in the evaluation report (Tr. pp. 81-82; Dist. Ex. 10 at p. 3). The teacher of the visually impaired's testimony indicated that the Composite Index Scores separated the student's performance between subtests that involved motor skills (such as Eye-Hand Coordination), in the Visual-Motor Integration Composite, and subtests that did not require the student to use his hands, but instead, measured how the student interpreted what he saw, in the Motor-Reduced Visual Perception Composite (id.). Her testimony also indicated that the General Visual Perception composite combined the nonmotor and the motor components together (Tr. p. 82). The student's scores on all three Composite Indexes were in the average range (Tr. p. 82; Dist. Ex. 10 at p. 3).

The second standardized test administered by the teacher of the visually impaired, the Visual Skills Appraisal (VSA), was described in her report as including six subtests that are "designed to measure a [student's] ability to use vision as the primary tool for the processing of information in the learning process" (Tr. p. 113; Dist. Ex. 10 at p. 2).¹⁴ Testimony by the teacher of the visually impaired also indicated that the VSA measures how a student's eyes are moving during a variety of skills—compared to same grade peers—which is in direct relation to the student's amblyopia (Tr. p. 66). The six subtests assessed the student's abilities in the following areas: (1) Pursuits (Object Tracking), which measured the student's ability to follow a target smoothly and efficiently without head movement; (2) Scanning (Trails), measuring the ability of the eyes to follow along a line of print or through an area of space; (3) Aligning, which measured the ability of the eyes to converge in synchrony at the near-point distance and was related to the brain uniting the image of an object created in each eye into a single image; (4) Locating

¹³ The summary section of the report prepared by the teacher of the visually impaired mistakenly reflects that the student scored in the both the average range and the below average range on the Form Constancy subtest; however, the DTVP-3 Subtest scores chart included in the report indicates the student scored in the average range on the Form Constancy subtest and in the below average range in the Visual Closure subtest (compare Dist. Ex. 10 at p. 3, with Dist. Ex. 10 at p. 4).

¹⁴ Testimony by the developmental optometrist indicated that the VSA is a screening test, used to identify individuals who may have a problem so that additional evaluation can be done to determine a definitive diagnosis (Tr. pp. 219-20).

(Numbers), measuring the student's ability to maintain his place on the printed page; (5) Eye-Hand Coordination (Design Completion), measuring the ability of the eyes and hands to work together, enabling the student to reproduce what he visually perceived; and (6) Fixation Unity, which measured the ability to obtain a single clear interpretation from the right and left visual fields (Dist. Ex. 10 at pp. 2-3).

The teacher of the visually impaired's evaluation report reflected that on the Pursuits (Object Tracking) subtest the student's eyes smoothly followed the target as it moved in all directions, earning him 5/5 points (Dist. Ex. 10 at p. 2). On the Scanning (Trails) subtest, the student was able to follow 4/5 trails to their end targets accurately, but received 0/5 points, as he lost the trail on one item and took more than 10 seconds to complete the task (Tr. pp. 69-70; Dist. Ex. 10 at p. 2). The student earned 5/5 points on the Aligning subtest where his eyes moved in towards midline smoothly and equally (Tr. pp. 70-71; Dist. Ex. 10 at p. 2).¹⁵ The teacher of the visually impaired testified that she was surprised by the student's score because "with amblyopia, sometimes you see kids' eyes turn out one way or it doesn't move" and further testified that in terms of the student's amblyopia, his performance on this portion of the test indicated that "he was using both of his eyes together and the images were going back to his brain equally" (Tr. p. 71). The teacher of the visually impaired explained in her testimony that the Locating (Numbers) subtest measured how the student's eyes might jump from word to word on a page, for example, when he looks for images in a text or in a math problem (Tr. pp. 71-72). However, she indicated that the student earned 4/5 points on the Locating (Numbers) subtest and was able to identify all of the numbers without an error, but completed the task slightly slower (7.2 seconds slower), when compared to his grade level (Tr. pp. 71-73; Dist. Ex. 10 at p. 2).¹⁶ On the Eye-Hand Coordination (Design Completion) subtest the student earned 5/5 points and completed all six of the expected forms (Tr. pp. 73-74; Dist. Ex. 10 at p. 3). Finally, on the Fixation Unity subtest the student wore red and green glasses while tracing red and green portions of lines to assess whether the information traveling through his eyes back to his brain missed any information (Tr. p. 74; Dist. Ex. 10 at p. 3). On the Fixation Unity subtest, the student received 4/5 points, and while this score was in the average range, the student made three more errors on the green portion of the line than on the red, indicating his right eye is his weaker eye (Tr. pp. 74-75; Dist. Ex. 10 at p. 3). Testimony by the teacher of the visually impaired indicated that there were no significant findings from the results of the VSA (Tr. p. 75).

The student achieved 77 percent accuracy overall on the VSA, where according to the teacher of the visually impaired, the remediation criteria was 80 percent, which indicated there "might be a need for services" (Tr. pp. 66-67; Dist. Ex. 10 at p. 2). Notably, on two of the three subtests that the student scored with less than a perfect score (Scanning, Locating), the student's score was lower as a result of the amount of time it took him to complete the tasks and not his ability to demonstrate the skills (Tr. pp. 69-70, 72-73; Dist. Ex. 10 at pp. 2-3).

¹⁵ Testimony by the teacher of the visually impaired indicated that when the eyes do not cross smoothly in towards midline, some students could see double (Tr. p. 71).

¹⁶ The teacher of the visually impaired report indicated the deviation was ".72 seconds" which appears to be a typographical error (Dist. Ex. 10 at p. 2).

The teacher of the visually impaired's evaluation report also reflected the student's functioning on various visual skills that were assessed using non-standardized tests (Tr. pp. 61-64; Dist. Ex. 10 at p. 2). The first skill described in the report related to the student's visual field, and more specifically, his peripheral vision, which is defined in the report as the range of space visible to a person's eye as they look straight ahead (Dist. Ex. 10 at p. 2). The report reflected that the student demonstrated the ability to locate a target at the expected points, as the target was presented in his upper, lower, and peripheral visual fields (Tr. p. 62; Dist. Ex. 10 at p. 2). The second skill described related to the student's saccadic eye movement or his ability to shift his gaze without head movement, which was assessed from left to right, midline to right, midline to left, across midline, and fixating on the upper and lower visual fields (Tr. pp. 62-63; Dist. Ex. 10 at p. 2). For this task, the student demonstrated the ability to smoothly shift his gaze with both eyes as well as when each eye was assessed individually (Tr. p. 63; Dist. Ex. 10 at p. 2). Next, the student's color vision was assessed and the student accurately identified 16/17 numerals that were imbedded in a group of different colored circles, indicating he had normal color vision (Tr. pp. 63-64; Dist. Ex. 10 at p. 2). With regard to acuity, the report reflected that the student's near vision was informally measured 20/20 and distance acuity measured 20/20-1 (Dist. Ex. 10 at p. 2; see Tr. pp. 121-22). When assessed individually, the student's right eye measured 20/50-1 and his left eye measured 20/20 (Dist. Ex. 10 at p. 2). The student's depth perception was also assessed using special red and blue colored glasses that allowed him to see images in a 3-dimensional picture (Tr. pp. 64-65; Dist. Ex. 10 at p. 2). He was able to accurately "pinch" where the images were projected (Tr. pp. 64-65; Dist. Ex. 10 at p. 2). Lastly, the suppression test was administered to determine whether the student was suppressing either of his eyes, using red and blue glasses while viewing a target (Tr. p. 65; Dist. Ex. 10 at p. 2). The student's performance on this test indicated that he was not suppressing either of his eyes (Tr. p. 65; Dist. Ex. 10 at p. 2). The teacher of the visually impaired opined that although the student had amblyopia, she believed it was "not affecting him consistently," but rather may "come in and out" (Tr. pp. 65-66).

The Vision Screening-Academic Checklist indicated that the student's regular education classroom teacher reported that the student missed words in sentences when writing stories, such as "the" and "a," had poor comprehension when reading directions, and experienced eye strain after reading for long periods of time (Tr. pp. 84-85, 120-21; Parent Ex. CC at p. 2; Dist. Ex. 10 at p. 1). The teacher of the visually impaired testified that during her testing, the student did not reread lines or words or skip lines, words, or parts of words (Tr. pp. 85-86, 120).¹⁷

In her evaluation report, the teacher of the visually impaired did not recommend educational vision services for the student at that time (Dist. Ex. 10 at p. 4). The teacher of the

¹⁷ Consistent with the teacher of the visually impaired's assessment of the student, his special education teachers did not perceive the student's vision as requiring significant support in the classroom. The student's special education teacher for ELA testified that the student had trouble comprehending written directions and occasionally missed words when reading, but that she had not observed the student having eyestrain or needing frequent rest periods because she chunked reading into manageable portions (Tr. pp. 230-32). She further testified the student's reading was not so limited that he needed classroom accommodations in order to be able to read or function in the classroom (Tr. pp. 232-34). Testimony by the student's special education consultant math teacher indicated that she did not see the student's vision issues affecting him in the classroom, but she acknowledged that he had some difficulty comprehending word problems and needed to have lengthier word problems "chunked down" (Tr. pp. 265-69, 290).

visually impaired indicated in her report and in testimony that the student had scored just slightly below his age level on the tests administered and that, based on the services and accommodations provided in his IEP, his visual needs were being addressed within the classroom (Dist. Ex. 10 at p. 4; see Tr. p. 87). However, the teacher of the visually impaired recommended additional supports for the student because "[a]dditional modifications would reduce visual fatigue and promote an optimal learning environment for a student with amblyopia" (Dist. Ex. 10 at p. 4). These additional supports included the following classroom modifications and accommodations; frequent rest period when doing close work or during testing; provision of a reading guide to reduce eye fatigue and assist the student in maintaining his place; preferential seating with the student's good (left) eye toward instruction; a slant board (or prop writing and reading materials on a ring binder) to reduce eye strain when switching from near to far focusing (id.; see Tr. pp. 87-88).¹⁸ When asked whether the student's amblyopia could be sufficiently remediated in the classroom, the teacher of the visually impaired replied, her concern was "compensating for visual deficits" rather than "correcting" the student's amblyopia (Tr. p. 88).

2. Proposed Independent Functional Vision Therapy Evaluation

Turning next to the parent's request for a vision therapy evaluation at public expense and her contention that the district's evaluation was "limited," a relevant area of factual inquiry regarding whether the district's evaluation was appropriate is the comprehensiveness of the evaluations conducted and the proposed area of evaluation that the parent alleges was not conducted. Guidance from the United States Department of Education's Office of Special Education Programs (OSEP) indicates that if a parent disagrees with an evaluation because a child was not assessed in a particular area, "the parent has the right to request an IEE to assess the child in that area to determine whether the child has a disability and the nature and extent of the special education and related services that child needs" (Letter to Baus, 65 IDELR 81 [OSEP 2015]). In Letter to Carroll, OSEP reiterated its position and again indicated that "the public agency must ensure that in evaluating each child with a disability under 34 CFR §§ 300.304 through 300.311, the evaluation is sufficiently comprehensive to assess the child in all areas related to the suspected disability" (Letter to Carroll, 68 IDELR 279 [OSEP 2016]). As to the intensive factual inquiry required in this case, I have taken note of areas of evaluation covered by the teacher of the visually impaired which I described in detail in the preceding section. However, the inquiry does not end there. At the impartial hearing, the developmental optometrist testified that the evaluations that he conducts are "more in depth" than the evaluation conducted by the BOCES teacher of the visually impaired (Tr. pp. 201-02). While that may be the case, comparison of his testimony to that of the teacher of the visually impaired shows that many of the areas the developmental optometrist testified he may assess are similar, if not the same, as the areas tested by the teacher of the visually impaired. For example, the developmental optometrist stated he assesses ocular motor dysfunction, which he described as eye movement dysfunctions, such as difficulty with visual tracking and vergence (Tr. pp. 172-73). The teacher of the visually impaired tested the student's visual tracking with the Pursuits subtest of the VSA (Tr. p. 147; Dist. Ex. 10 at p. 2), and vergence with the Aligning subtest of the VSA (Tr. p. 147; Dist. Ex. 10 at p. 2). Although the teacher of the visually impaired was not "sure," when asked if she assessed the student's ocular

¹⁸ The student's special education teacher for ELA testified that she provided the additional accommodations recommended in the evaluation report (Tr. pp. 231-34).

motor function specifically using numbers arranged in a horizontal array, she commented that that task sounded "similar" to the Locating (Numbers) subtest of the VSA (Tr. p. 125; Dist. Ex. 10 at p. 2). She also testified that she assessed the student's speed and accuracy when following trails or lines, with the Scanning (Trails) subtest of the VSA (Tr. pp. 126-27; Dist. Ex. 10 at p. 2). Next, the developmental optometrist testified that he assessed visual motor disorders, described as difficulty using the eyes and vision system to efficiently steer the hand and body through space and across the page (Tr. pp. 178-79). The teacher of the visually impaired administered the Eye-Hand Coordination (Design Completion) subtest of the VSA, described as "[t]he ability of the eyes and hands to work together" (Dist. Ex. 10 at pp. 2-3). Also, the developmental optometrist conducts assessments for visual perceptual disorders such as visual closure (being able to understand the whole thing when we only see part of it) (Tr. pp. 179-80). The teacher of the visually impaired assessed the student's ability to recognize a stimulus figure when that figure has been incompletely drawn using the Visual Closure subtest of the DTVP-3 (Dist. Ex. 10 at p. 3). Both the developmental optometrist and the teacher of the visually impaired test for visual acuity, as did the student's optometrist (Tr. pp. 180-81; Dist. Exs. 9; 10 at p. 2). Lastly, the developmental optometrist testified that he evaluates for visual motor integration difficulties using tasks that require the student to reproduce or draw different shapes from a model, which the teacher of the visually impaired assessed via the Copying subtest of the DTVP-3 (Tr. pp. 178-79, 194-95; Dist. Ex. 10 at p. 3).

The developmental optometrist indicated that as an evaluation progresses, he determines what other tests are appropriate to the deficits that are found and tailors the evaluation to the student's particular deficits in order to "clarify and quantify" the deficits (Tr. pp. 198-99). With that in mind, the developmental optometrist testified about a number of areas he would potentially assess that appear to be related to a student's educational performance that the hearing record does not indicate were evaluated by the teacher of the visually impaired. For example, the developmental optometrist testified that he evaluates for strabismic and non-strabismic binocular dysfunctions (where an eye turns in or out causing intermittent problems with double vision, loss of place, headaches, and eyestrain), accommodative dysfunctions (focusing), and spatial orientation (being able to identify right and left, and letter reversals), areas not assessed by the teacher of the visually impaired (Tr. pp. 143-44, 168-73, 178-80; see Tr. pp. 116-17; Dist. Ex. 10). Review of the BOCES evaluation report does not show that the teacher of the visually impaired conducted assessments of the student's gross visual muscle skills (whether the student maintains efficient eye alignment to complete an academic task), ocular motilities (including how the eyes are moving during the reading process), transient visual skills (deficits that can include temporary loss of vision, or intermittent "suppressions" such as some loss of vision to the left or right, which may interfere with comprehension and loss of place when reading), or visual verbal information processing speeds, which can result in slower reading and interference with efficient decoding (Tr. pp. 125-28, 181-82, 194, 196-97; see Dist. Ex. 10).¹⁹

¹⁹ While the BOCES evaluation report indicated the teacher of the visually impaired assessed the student's saccadic eye movements using objects, she did not assess his eye movements in relation to the reading process (Tr. p. 124; Dist. Ex. 10 at p. 2). The student's reading difficulties are consistently described in the hearing record as deficits in reading comprehension, not decoding skills (Tr. pp. 238, 285, 310, 400, 454; Dist. Exs. 8 at pp. 2-3, 5-6; 11 at p. 6).

Based on the description above, the functional vision therapy evaluation, as described by the developmental optometrist, would potentially assess the student's visual functioning and needs in a number of areas not assessed by the teacher of the visually impaired, any of which could, at least in theory, have an effect upon the student's educational performance. Therefore, the teacher of the visually impaired's evaluation did not fully assess the student's needs.

Furthermore, the developmental optometrist's testimony referenced an additional unevaluated area that may be related to the student's specific difficulties with reading. The student's reading comprehension skills were described in his IEP as an area of significant weakness in that he struggled with comprehension questions, could not relate details about what he was reading or what was read to him, could not remember what he read, and "does not picture anything in his head when being read to" (Dist. Ex. 11 at p. 6). The IEP further reflected that the student could not answer comprehension questions when he reread text or when he was read the part of the text that would give him the answer, and also had difficulty recalling and linking details (*id.*). The developmental optometrist testified that reading comprehension requires visualization, which he indicated can be addressed through vision therapy (Tr. p. 199). Although the developmental optometrist indicated that visual therapy can address a student's reading comprehension skills through improving visualization skills, he did not testify about specific visual assessments he could conduct for students with reading comprehension difficulties, to ascertain if a visual disorder contributed to their reading difficulties (*see* Tr. pp. 162-220). Given the statement in the student's IEP regarding the student's inability to develop a picture in his mind related to the content of his reading and his difficulty recalling what he reads in the absence of that picture, the developmental optometrist's vision therapy evaluation may provide valuable insight into the student's needs related to his inability to visualize and his subsequent deficits in comprehension.

In light of the above, the IHO erred in determining that the district's vision evaluation was appropriate and sufficient. Having determined that the district failed to establish that its evaluation of the student's special education needs was adequate, the district shall provide the parent with an IEE at public expense.

Nor am I persuaded by the district's argument that the IHO correctly declined to order the requested IEE because the vision therapy evaluation sought by the parent is not educationally based and is therefore outside of the district's responsibility. State regulation defines "related services" as follows:

Related services means developmental, corrective, and other supportive services as are required to assist a student with a disability and includes . . . occupational therapy, . . . other appropriate developmental or corrective support services, and other appropriate support services and includes the early identification and assessment of disabling conditions in students.

(8 NYCRR 200.1[qq]; *see* 34 CFR 300.34[a] [emphasis added]).

As relevant here, the regulation uses the word "corrective" in its description of related services that may be required to "assist a student with a disability," and specifically identifies

occupational therapy as a related service (8 NYCRR 200.1[qq]).²⁰ "Occupational therapy" is defined in State regulation as "the functional evaluation of the student and the planning and use of a program of purposeful activities to develop or maintain adaptive skills, designed to achieve maximal physical and mental functioning of the student in his or her daily life tasks" (8 NYCRR 200.1[gg]).

As explained by the developmental optometrist, the vision therapy that may have been recommended by the developmental optometrist is a form of occupational therapy and would be delivered by licensed occupational therapists (Tr. p. 168). He testified that the vision therapists in his office were occupational therapists who had obtained specific certification to provide optometric vision therapy and are required to work under an optometrist who is board certified in vision therapy (Tr. pp. 167-68). The developmental optometrist indicated that optometric vision therapy "is an organized sequence of appropriate and meaningful developmental opportunities" that is "corrective" in nature (Tr. pp. 167, 199-200). As noted above, an evaluation is required "to gather relevant functional, developmental and academic information about the student that may assist in determining whether the student is a student with a disability and the content of the student's [IEP]," and must be "sufficient to determine the student's individual needs" (8 NYCRR 200.4[b][1], [4]). Furthermore, the evaluation must be "sufficiently comprehensive to identify all of the student's special education needs" (8 NYCRR 200.4[b][6][ix]). In terms of comprehensiveness and sufficiency, this is a close case. The evaluation conducted by the district has provided very important information that the CSE should consider with regard to the student's educational programming, and if the description of the areas included in the district's vision evaluation were the only evidence presented, the district might well have prevailed in establishing that its evaluation was appropriate. However, the parent offered the testimony of the optometrist to counter the district's view that the evaluation was sufficiently comprehensive, and the district's presentation of evidence does not sufficiently rebut the concerns raised by the optometrist during the impartial hearing insofar as the district's evidence does not adequately explain why the nonduplicative areas of concern to the optometrist are of no consequence to the student's educational programming. In this instance, an IEE may lead to differing opinions regarding the scope of services that should be provided to the student, and the optometrist went so far as to identify OT services as one potential area. In light of the above, the district's view that the IHO correctly refused to award the requested IEE at public expense because the vision therapy evaluation sought by the parent is not educationally based and is therefore outside of the district's responsibility is not supported by the hearing record or applicable law.

As a final note, it appears obvious that the parent is seeking the functional vision therapy evaluation because she suspects that the student may benefit from such therapy. The question of whether such vision therapy sought by the parent must be provided by the district is not at issue in

²⁰ In addition, the definition of related services includes "medical services," which are defined by State regulation as "evaluative and diagnostic services provided by a licensed physician . . . to determine whether a student has a medically related disability which may result in the student's need for special education and related services" (8 NYCRR 200.1[ee]). It is unclear from this record whether the developmental optometrist's proposed functional vision therapy evaluation would constitute an evaluative and diagnostic service provided by a licensed physician to determine whether the student has a medically related disability which may result in the student's need for special education and related services. However, based on the determination herein with respect to the parent's appeal, this question need not be resolved in this matter.

this appeal and should be considered by the CSE in light of the IEE and other evaluative information—to be clear, the district's obligation to conduct an evaluation of the student may at times be broader than its eventual obligation to provide services. From time to time a district may be required to conduct evaluations in order to adequately assess whether a service is required to support the student in benefiting from special education as required by the IDEA and State law (34 CFR 300.34[a]; 8 NYCRR 200.1[qq]; see, e.g., Application of a Child with a Disability, Appeal No. 01-081). As the parties move forward, I encourage them to work cooperatively in this inquiry. Should the parties reach an impasse and return to due process, one area remained unexplored in the hearing record in this case, and that is the controversy among professionals regarding the benefits of vision therapy. In some school districts, the controversy does not manifest because there is consensus among all CSE participants regarding the potential benefits of vision therapy for certain students (see, e.g., Application of a Student with a Disability, Appeal No. 12-235 [the district conducted a vision therapy evaluation and offered vision therapy services]). On the other hand, some professionals and school districts have disputed whether there is sufficient scientific proof to support the proponents of vision therapy services. For example, in one due process proceeding in California, a proponent of vision therapy services offered testimony which explained the controversy:

Dr. Ballinger testified in great detail regarding her visual information processing testing, referring to the Optometric Clinical Practice Guideline for Learning Related Vision Problems of the AOA. Dr. Ballinger wanted to emphasize that optometrists are trained and capable of fully testing and evaluating visual information processing deficits. Dr. Ballinger testified that, in her professional opinion, visual therapy can both treat and remediate visual information processing deficits. Dr. Ballinger also stated that much of the ophthalmological and medical communities, as well as a portion of the optometric profession, believe that visual therapy cannot assist in treating visual information processing. On occasion, Dr. Ballinger was asked a question which gave her an opportunity to set forth an argument in support of visual therapy's efficacy in treating visual information processing disorder. In making these arguments, Dr. Ballinger's tone would change and she displayed frustration at the continued resistance to the contention that visual therapy is a legitimate treatment for visual information processing.

(In re Los Angeles Unified Sch. Dist., 111 LRP 48180 [SEA CA 2011]).²¹

In this case, in which the only substantive areas of potential disagreement appear to center on the student's vision, it appears that the parent would clearly fall on the side of seeing potential benefits in vision therapy; however, the district's position and that of its evaluators is not clear, especially since the district did not provide a prior written notice describing why a vision therapy evaluation would not be needed. While I have seen arguments from both camps, I express no opinion on the issue. Should the parties find that they are not in consensus over the efficacy of vision therapy at some point in the near future, I strongly urge them to clarify, early on in the

²¹ An example of a countervailing viewpoint was expressed in a position paper published by the American Academy of Pediatrics (see "AAP Policy: Vision Problems Do Not Cause Dyslexia" [July 7, 2009], available at <https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/AAP-Policy-Vision-Problems-Do-Not-Cause-Dyslexia.aspx>)

process, whether this controversy among vision professionals is a factor contributing to any lack of consensus.

VII. Conclusion

Based on the above, the IHO's determination to deny the parent's request for an IEE at public expense is reversed. As the district failed to comply with its obligation under State regulation to provide the parent with information about where she could obtain an IEE and the district's criteria for IEEs, it has effectively waived its right to assert such criteria as a defense to the IEE awarded herewith. I have considered the parties' remaining contentions and find that I need not address them in light of the determinations made herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated May 19, 2017, is modified, by reversing so much thereof as found that the district's evaluation was appropriate and denied the parent's request for an IEE at public expense; and

IT IS FURTHER ORDERED that the district is directed to provide the parent with an independent functional vision therapy evaluation at public expense in accordance with the body of this decision.

Dated: Albany, New York
August 17, 2017

JUSTYN P. BATES
STATE REVIEW OFFICER