The University of the State of New York

The State Education Department
State Review Officer
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No. 19-019

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Howard Friedman, Special Assistant Corporation Counsel, attorneys for petitioner, by Hae Jin Liu, Esq.

Brain Injury Rights Group, attorneys for respondent, by Karl J. Ashanti, 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 district) appeals, pursuant to section 8 NYCRR 279.10(d) of the Regulations of the Commissioner of Education, from a portion of an interim decision of an impartial hearing officer (IHO) following remand, which determined respondent's (the parent's) son's pendency placement during a due process proceeding challenging the appropriateness of the district's recommended educational program for the student for the 2018-19 school year. The IHO found that the student's pendency placement was at iBrain. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in

mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has been the subject of a prior administrative appeal regarding the student's pendency placement (see Application of a Student with a Disability, Appeal No. 18-116). As this matter is an appeal of the IHO's decision following the remand, the parties' familiarity with the student's educational history and the prior due process proceedings is assumed and will not be repeated here in detail (id.).

Briefly, the parent initiated the instant administrative proceeding by filing a due process complaint notice dated July 9, 2018 (Parent Ex. A). The parties proceeded to an impartial hearing on August 24, 2018 (see Tr. pp. 1-27). In an interim decision dated September 4, 2018, the IHO noted that the district agreed with the parent that the student's pendency placement was established by an unappealed IHO decision and consisted of placement at iHope with related services (IHO Ex. I at pp. 2-3). The IHO then found that "the reasons why [the student] c[ould] no longer attend iHope [were] fundamental to a determination of pendency where pendency l[ay] in a parental placement," and must be addressed before reaching the parent's argument that the student's placement at iBrain constituted a continuation of the student's pendency placement because the program at iBrain was substantially similar to that at iHope (id. at pp. 3-4).

B. Impartial Hearing Officer Decision

Following the first hearing day and issuance of the interim decision, the parties proceeded to a second day of hearing on October 26, 2018 (Tr. pp. 28-34). On November 16, 2018, the Office of State Review issued a decision with respect to the parent's appeal of the IHO's September 4, 2018 interim decision (Application of a Student with a Disability, Appeal No. 18-116). The SRO remanded the matter to the IHO in order to "reach a determination of whether there is substantial similarity between the student's former educational placement at iHope and his current educational placement at iBrain" (id.). Specifically, the SRO directed the IHO to address factual issues as to vision, parent counseling and training, and assistive technology (AT) services, and determine whether the programs provided at iHope and iBrain were substantially similar (id.). The SRO instructed the IHO to direct the district to fund the student's pendency placement at iBrain if there were no significant differences between the two programs (id.). The SRO further directed that, if iBrain was unable to implement all of the student's programming at the start of the school year but was able to do so at some later date, the IHO should determine the date on which the programs became substantially similar and order funding from that point forward (id.).

Following the October 26, 2018 hearing date, the IHO issued a second interim order on pendency on November 22, 2018 (IHO Ex. IV at pp. 2, 5).[1] The IHO found that the parent produced no evidence regarding the reason for her unilateral change of pendency from iHope to iBrain, as previously requested by the IHO in the September 4, 2018 interim decision (id. at p. 4). As a result, the IHO determined that iHope was the student's pendency placement pursuant to an unappealed IHO decision in a proceeding regarding the 2017-18 school year, which found that iHope was an appropriate placement for the student (id. at p. 5). In addition, the IHO declined to address the issue of substantial similarity because the "fundamental issue of why the student was removed by the parent from [iHope] was not answered by the parent, which [wa]s the parent's burden" (id.).

Subsequently, the parent filed a complaint in court seeking a temporary restraining order and preliminary injunction reversing the IHO's November 22, 2018 interim order on pendency; the parent also sought a ruling that iBrain was the student's pendency placement and requested that

[1] It is unclear whether the IHO was aware that an SRO had issued a decision regarding the appeal of the September 4, 2018 decision, as there was no reference to the SRO's decision in the IHO's November 22, 2018 decision (see IHO Ex. IV).

the IHO be removed from the matter (Cruz v. New York City Dep't of Educ., 2019 WL 147500, at *1 [S.D.N.Y. Jan. 9, 2019]).[2] The District Court determined that "[a]s explained by the SRO, the evidentiary record must be supplemented to address whether [iBrain's] educational program for the 2018-19 school year is substantially similar to [iHope] for the 2017-18 school year" (id. at *10). The District Court vacated the IHO's November 22, 2018 interim order on pendency and ordered that the case be remanded to the IHO for "purposes of supplementing the evidentiary record as to (1) whether [the student] is receiving vision services at [iBrain], and (2) the similarity between the parent counseling and training services and assistive technology services [the student] now receives with the services he received at [iHope]" (id.). The District Court further ordered that the IHO determine whether the two programs were substantially similar (id.).

As a result of the District Court's decision, the parties continued with the impartial hearing on January 10, 2019 and concluded the pendency portion of the hearing on January 17, 2019 (Tr. pp. 35-209). The IHO issued a third interim decision on pendency on January 23, 2019 (IHO Decision at p. 6). The IHO found that iHope and iBrain were substantially similar with respect to "parent counseling and training, assistive technology, and hearing education services" (id.). The IHO found that the affidavit and testimony of the special education director at iBrain regarding those services "credibly documents the substantial similarity of the services and the fact they have been implemented" at iBrain (id.). The IHO ordered that pendency "shall be effective as of the date of the request for hearing, July 10, 2018 and shall continue until this matter is resolved" (id.).[3]

IV. Appeal for State-Level Review

On appeal, the district asserts that the January 23, 2019 interim decision included an inadvertent mistake and should be amended to reflect that vision services, rather than hearing services, are substantially similar between the programs at iHope and iBrain. In addition, the district argues that, in contravention of the SRO decision in Application of a Student with a Disability, Appeal No. 18-116, the IHO ordered pendency at iBrain retroactive to the date of the filing of the due process complaint notice on July 9, 2018. The district maintains that it is undisputed that iBrain did not provide the student with vision education services until September 14, 2018; as a result, the district claims pendency at iBrain should have been effective as of September 14, 2018 and the IHO decision should be modified for the district to only provide "direct payments retroactive to September 14, 2018."

In an answer, the parent agrees with the district that the IHO incorrectly referred to hearing services instead of vision services, and that the error should be corrected to reflect vision services.[4]

[2] The parent did not challenge SRO Appeal No. 18-116 in court.

[3] The due process complaint notice was dated July 9, 2018 rather than July 10, 2018 (Parent Ex. A at p. 1).

[4] Although, generally, an IHO may not alter a decision after a final decision is issued, correction of a typographical error, that both parties agree to, is not necessarily impermissible (see Application of the Dep't of Educ., Appeal No, 17-009 [clarifying that the change in the decision was not a typographical mistake to which the parties agreed and noting that the "issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray"]). Based upon the hearing record, including testimony from the director of special education at iBrain, the director's affidavit, and discussions between the parties and the IHO during the hearing, the IHO's reference to hearing services rather than vision

The parent also claims that the district incorrectly argues that the program at iBrain became substantially similar to the program at iHope as of September 14, 2018 rather than on July 9, 2018. The parent contends that educational programs need only be substantially similar, not identical, and maintains that at the start of the school year the similarities between the two programs were already "numerous and quite substantial."[5] The parent also argues that even if the programs only became substantially similar on September 14, 2018, the student is entitled to pendency at iBrain for the period between July and September 2018 because the "doctrine of operative placement would apply and would constitute a basis for pendency at [iBrain]" during that time. The parent also maintains that the district never secured the pendency placement at iHope nor was the district able to demonstrate that iHope could continue to provide the student's current program; therefore, the parent maintains that iHope could not be the student's pendency placement.

In a reply, the district argues that the parent's claims with respect to the district's failure to secure a placement at iHope and the appropriateness of iBrain are beyond the scope of the remand and should not be reviewed. Furthermore, the district argues that the SRO previously found that iHope was "unquestioningly a valid stay-put placement," and contemplated the possibility of a time where the two programs were not substantially similar in which case the parent would bear the financial burden for that period of time.

V. Discussion

A. Pendency

As discussed above, the IHO found that iHope and iBrain were substantially similar but did not explicitly identify the date upon which the programs became substantially similar and, in making his determination, it is unclear whether the IHO accounted for iBrain's failure to deliver vision education services until September 2018 (see IHO Decision at pp. 5-6).[6] Initially, as neither party appeals from the IHO's determination that iBrain is the student's placement during the pendency of this proceeding, that determination is final and binding (34 CFR 300.514 [a]; 8 NYCRR 200.5 [j][5][v]). The only issue in contention is whether pendency at iBrain should be from, the date of the due process complaint notice on July 9, 2018 as directed by the IHO, or as of when the student began receiving vision education services on September 14, 2018. The district argues that the IHO erred in awarding pendency at iBrain retroactive to the filing of the due process complaint notice and asserts that because the student did not receive vision education services until September 14, 2018, pendency should have only been awarded effective September 14, 2018, "the date at which the programs appear[] to have become substantially similar" (Req. for Rev. ¶18).

services in the interim decision on pendency was in error, and any further discussion in this decision will refer to the student's receipt of vision education services (see Tr. pp. 41-43, 86-87, 94, 96; Parent Ex. I at pp. 1-2).

[5] According to the special education director at iBrain, the student began attending iBrain on July 9, 2018, the same day that the due process complaint notice was filed (Tr. p. 95; Parent Ex. A at p. 1).

[6] "[I]n the event that iBrain was unable to implement all of the student's programming at the beginning of the school year but became able to at some point thereafter (i.e., vision services became available at some later date), the IHO [was directed to] determine the date at which the two programs became substantially similar and issue a directive awarding reimbursement from the date that the two programs became substantially similar" (Application of a Student with a Disability, Appeal No. 18-116).

The parent, on the other hand, asserts that the programs were substantially similar from the beginning of the school year. However, neither party nor the IHO provides an analysis of the substantial similarities of the two programs based on the standards outlined in Application of a Student with a Disability, Appeal No. 18-116, and more specifically, neither party identifies whether a failure to provide vision education services to this student from July through September 2018, effected a change to the student's educational placement such that the two programs were not substantially similar until the student began receiving vision education services.

To briefly restate the legal standard applicable to substantial similarities as described in Application of a Student with a Disability, Appeal No. 18-116, in order to qualify as a change in educational placement, one district court has held that the change "must affect the child's learning experience in some significant way" Brookline Sch. Comm. v. Golden, 628 F. Supp. 113, 116 [D. Mass. 1986], citing Concerned Parents, 629 F.2d at 751; N.M. v. Cent. Bucks Sch. Dist., 992 F. Supp. 2d 452, 464 [E.D. Pa. 2014]) and similarly, the District of Columbia Circuit has described it as "at a minimum, a fundamental change in, or elimination of a basic element of the education program" (Lunceford v. Dist. of Columbia Bd. of Educ., 745 F.2d 1577, 1582 [D.C. Cir. 1984]). The United States Department of Education's Office of Special Education Programs has identified a number of factors that must be considered in determining whether a move from one location to another constitutes a change in educational placement, including: whether the educational program in the student's IEP has been revised; whether the student will be educated with nondisabled peers to the same extent; whether the student will have the same opportunities to participate in nonacademic and extracurricular services; and whether the new placement is the same option on the continuum of alternative placements (Letter to Fisher, 21 IDELR 992 [OSEP 1994]). According to the standard outlined in Application of a Student with a Disability, Appeal No. 18-116, "a change in the student's programing must not change the child's learning experience in a significant way" and "the private programing that [the parents] select[ed] [must] remain[] substantially similar to the private programing that was endorsed in the ruling granting the parents tuition reimbursement."

Both the program provided to the student at iBrain for the 2018-19 school year and the program provided to the student at iHope during the 2017-18 school year included placement in a 6:1+1 special class, along with related services including: five 60-minute sessions of individual PT per week, five 60-minute sessions of individual OT per week, five 60-minute sessions of speech-language therapy per week,[7] two individual sessions of assistive technology services per week, and one 60-minute session per month of parent counseling and training (Parent Ex. I at p. 2). Additionally, while both programs eventually provided for two 60-minute sessions of individual vision education services, iBrain was not able to provide the student with vision education services until September 14, 2018 (Tr. p. 94; Parent Ex. I at p. 2).[8] Therefore, I now

[7] According to the affidavit of the iBrain director of special education, all five speech-language therapy sessions were provided on an individual basis at iBrain, while at iHope four sessions were provided on an individual basis and one was provided as a group (Parent Ex. I at p. 2).

[8] Additionally, the director testified that parent counseling and training began on August 1, 2018 and assistive technology services began at some point in July 2018 (see Tr. pp. 94, 98). Furthermore, the affidavit noted that

address whether the evidence included in the hearing record with respect to the student's need for vision education services supports finding that the program provided at iBrain was substantially similar to the program provided at iHope for the period that iBrain did not provide vision education services to the student.

In general, the hearing record shows that the student has received several diagnoses including those of seizure disorder, cerebral palsy, acquired brain injury, spastic quadriplegia, asthma, and scoliosis (Parent Ex. I at pp. 3; Dist. Ex.1 at p. 2).[9] With respect to the student's visual deficits, the hearing record also shows that the student has been diagnosed with a cortical visual impairment (Parent Ex. I at p. 7; see Dist. Ex. 13).

A March 14, 2017 Functional Vision Assessment indicated that the student required vision education services in order to "learn specialized strategies that will help him enhance his visual skills which will in turn improve his ability to communicate" (Dist. Ex. 13 at p. 1). Furthermore, the evaluator noted that the student's traumatic brain injury (TBI) adversely impacted his visual functioning and that developing strategies in this area would "enhance his communication skills, motor skills and academic skills" (id.). The evaluator noted that the student's attention was impacted by the "visual field" in which material was presented and the student's ability to perceive objects at a distance was "impacted by his visual perception deficits" (Dist. Ex. 13 at pp. 2-3). The evaluator also indicated that the student "require[d] a high level of visual adaptations to access visual material," and recommended that the student continue to receive vision services two times per week for 60-minute sessions (id. at p. 3). Moreover, the evaluator noted that since the student was non-verbal, vision was "a main sensory area that he should be able to utilize for learning," and that the more his vision was "utilized and developed with specialized techniques and modifications. . . the greater his access to information w[ould] be," as well as his ability to communicate and use his assistive technology device effectively (id. at p. 4).

The March 17, 2017 proposed iHope IEP indicated that vision education services were an important part of the student's program during the 2017-18 school year (see Parent Ex. I at pp. 44-49). In its discussion of the student's vision needs and services, the iHope IEP recited, almost verbatim, the findings of the March 2017 vision evaluation, including the recommendation for two 60-minute sessions of vision services per week and that the student "require[d] a high level of visual adaptations in order to access visual material," and that since the student was non-verbal, vision was a "main sensory area" that he needed in order to learn and communicate (compare Parent Ex. I at pp. 44-47, with Dist. Ex. 13). The March 2017 iHope IEP also indicated that the student would benefit from push-in and pull-out services in vision education and included several management needs related to the student's vision (Parent Ex. I at pp. 49, 54-55). The March 2017

parent counseling and training began in August 2018, and that the "one missed session from July 2018 has already been made up" (Parent Ex. I at p. 2).

[9] Parent Exhibit I is listed as a single exhibit but contains several distinct documents in addition to the affidavit of the director of special education at iBrain (Parent Ex. I at pp. 1-2). Specifically, Parent Exhibit I also includes the recommended 2018-19 iBrain IEP, the proposed 2017-18 iHope IEP, a program description of iHope for the 2017-18 school year, and a program description of iBrain for the 2018-19 school year (see Parent Ex. I at pp. 3, 39, 77, 87).

iHope IEP also included two vision education goals; the first goal stated that the student would visually locate items for academic learning, and the second goal stated that the student would improve his ability to visually locate items presented "in his right, left and lower fields with increased background noise" (id. at p. 62).

The March 26, 2018 recommended iBrain IEP similarly identified the importance of vision education services for the student during the 2018-19 school year (see Parent Ex. I at pp.).[10] The IEP indicated that the student had a TBI and was diagnosed with a cortical visual impairment (id. at p. 7). The iBrain IEP noted that "increases in functional vision w[ould] support [the student's] ability to gather both quality and quantity of information about people, environments, and material" (id.). The iBrain IEP further noted that since the student was nonverbal, vision was a "main sensory area that he should utilize for learning as his visual processing skills improve" and that "[t]he more his vision [wa]s utilized and developed with specialized techniques and modifications, the greater [his] access to information w[ould] be" (id. at pp. 8-9). Moreover, according to the iBrain IEP improving the student's visual skills would ultimately help him increase his ability "to communicate and interact with his environment" (id. at p. 9). The iBrain IEP acknowledged that the student required "consistent push-in and pull out vision services," and included several "vision management needs,"[11] as well as vision education goals (id. at pp. 10, 17, 23). The student's vision education goals included the following: the student would visually locate a familiar object presented against increasingly complex backgrounds and the student would visually identify familiar landmarks in school in order to decide which rooms to visit during his free time (id. at p. 23). Finally, the iBrain IEP recommended vision education services twice per week for 60-minute sessions (Parent Ex. I at p. 36).[12]

The iBrain IEP indicated that the student "had made significant progress toward both of his vision goals for the 2017-2018 school year;" specifically noting, the student was able to visually

[10] The recommended iBrain IEP indicates a "Date of Report" as March 26, 2018 (prior to the student's attendance at iBrain) and a "Date of Report Review/Update" as January 3, 2019 (Parent Ex. I at p. 3). Additionally, the recommended iBrain IEP includes some of the same contributors as the March 2017 proposed iHope IEP, including the student's special education teacher (compare Parent Ex. I at p. 38, with Parent Ex. I at p. 76). Accordingly, it is difficult to discern what information is provided by iBrain as opposed to from the student's attendance at iHope during the 2017-18 school year.

[11] The student's vision management needs included use of bright colors to highlight new symbols, movement to initiate the student's visual attention, ensuring that items are not presented in the student's "upper field," and ensuring that academic materials and people are within three to four feet of the student and activities greater than 10 feet should be verbally described (Parent Ex. I at p. 17).

[12] The district also developed an IEP for the 2018-19 school year on May 11, 2018 (Dist. Exs. 1 at p. 14; 2 at p. 1). The May 2018 IEP indicated that the student was visually impaired, and that he had mild delays in the areas of "need for movement, visually complexity and distance viewing" (Dist. Ex. 1 at p. 2). Furthermore, the student had moderate delays in the areas of visual latency, visual fields, and light gazing (id. at p. 2). The IEP noted that the student had severe challenges in communication and language, academics, and adaptive living skills, but he was able to express himself through head movements, eye gaze, and use of "a symbol through eye gaze" (id.). The May 2018 IEP included annual goals for improving the student's ability to visually locate a familiar object or image presented against complex backgrounds and to visually identify familiar landmarks at the school (id. at pp. 5-6). However, the IEP did not specifically recommend vision education services for the student (see id. at pp. 9-10).

locate items such as books and instruments when "light enhancers and moderate verbal prompting [were] provided, within 20-25 seconds, with 80% accuracy," and it was predicted that the student would achieve all benchmarks for this goal by the end of the 2017-18 school year (Parent Ex. I at p. 7). With respect to the student's second vision goal, the student was able to visually locate familiar items used in daily routines with moderate background noise, with 80% accuracy, and it was predicted that the student would achieve all benchmarks for the goal by the end of the 2017-18 school year (id. at p. 8). For the 2018-19 school year, the iBrain IEP included goals directed at having the student locate a familiar object or image presented against complex backgrounds and identify familiar landmarks at the school (id. at p. 23).

Based on the above, the hearing record documents the importance of vision education services on a consistent basis in the student's respective programs. Furthermore, although there is no dispute that the student did not receive vision education services until September 14, 2018, the parent does not provide an explanation as to how iBrain could be considered substantially similar to iHope where iBrain did not provide a service that was an integral part of the student's program. The director of special education at iBrain testified that iBrain was "implementing the recommendations of the previous vision providers as they were laid out [] in their proposed '18/'19 IEP" (Tr. p. 96). She further testified that staff at iBrain presented materials to the student that he would be able to access visually, which helped maintain and support his vision goals (id.). However, there is no indication in the hearing record that staff at iBrain worked on the student's vision goals during the first eight weeks of the school year. Additionally, while the iBrain IEP indicated that it was reviewed in January 2019, there is no indication as to whether the vision section had been updated with information provided by staff at iBrain, as it appears to be based on the student's progress during the 2017-18 school year, explicitly stating that the student was expected to complete his goals for the 2017-18 school year (see Parent Ex. I at pp. 5-6). Further, while the affidavit of the iBrain director of special education indicated that any vision education services missed at the start of the school year would be made up during the 2018-19 school year, the affidavit was executed in January 2019 and there is no indication that the student had begun receiving make-up services (id. at pp. 1-2). Finally, the hearing record generally lacks information as to how missed services might have impacted the student's educational opportunity, or whether the provision of missed services at a later date would adequately make up for the services missed.

Given that the hearing record supports finding that vision services were an important component of the student's program at iHope, and there is insufficient information included in the hearing record that iBrain provided supports to offset the failure to provide vision education services, the hearing record supports finding that the lack of vision education services affected the student's learning experience in a significant way such that the program was not substantially similar to the program provided at iHope until September 14, 2018, when the student first began receiving vision education services.

The parent alternatively argues that even if iBrain was not substantially similar to iHope until September 14, 2018, the student is still entitled to pendency at iBrain during that time because iBrain was the student's "operative placement" at the time of the filing of the due process complaint notice. Initially, the parent's argument runs against the concept that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk" (Sch. Comm. Of Burlington v. Dep't of Educ., 471 US 359, 374 [1985]). Additionally, in Application of a Student with a

Disability, Appeal No. 18-116 the SRO determined that if the two programs were substantially similar, the district would be obligated to fund iBrain as the student's pendency placement; however, the SRO also found that "public funds should not be used to maintain stay-put [at iBrain] if, in fact, there are points in time when the programming being provided to the student is not substantially similar and thus not the same educational placement" as the program provided at iHope during the 2017-18 school year and that under those circumstances "any lapse in services [would be] attributable to the parent, not the district" (Application of a Student with a Disability, Appeal No. 18-116). As the decision in Application of a Student with a Disability, Appeal No. 18-116 is the law of the case for this matter and the issues raised by the parent were previously addressed in that decision, those arguments will not be addressed again.[13]

VI. Conclusion

Based upon the evidence in the hearing record and for the reasons noted above, the program at iBrain was not substantially similar to the program provided to the student at iHope during the 2017-18 school year, until September 14, 2018, the date the student first began receiving vision education services, and the district must fund the student's placement at iBrain from September 14, 2018 through the pendency of this proceeding.

I have considered the parties' remaining contentions and find that they are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's interim order on pendency dated January 23, 2019, is modified to the extent that the program provided at iBrain from the start of the school year through September 14, 2018 was not substantially similar to the program provided to the student at iHope during the 2017-18 school year; and

IT IS FURTHER ORDERED that the district shall fund the student's placement at iBrain from September 14, 2018 through the pendency of this proceeding.

Dated: **Albany, New York**
April 5, 2019

STEVEN KROLAK
STATE REVIEW OFFICER

[13] The doctrine of the law of the case is intended to avoid retrial of issues that have already been determined within the same proceeding (People v. Evans, 94 N.Y.2d 499, 502-04 [2000] [noting that law of the case has been described as "'a kind of intra-action res judicata'"]; see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]).