The University of the State of New York

The State Education Department
State Review Officer
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No. 24-009

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 New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioner, by Zack Zylstra, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 the decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year. The appeal must be sustained in part and the matter remanded to the IHO for further proceedings.

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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here in detail. In addition, the student was the subject of a prior State-level appeal involving a unilateral placement at iBrain for the 2022-23 school year; accordingly, the parties' familiarity with the student's educational history leading up to that prior matter is also presumed (Application of a Student with a Disability, Appeal No. 22-165).[1]

[1] The Commissioner of Education has not approved iBrain as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

Briefly, the student moved to the United States and then to the district toward the end of the 2021-22 school year, and the parent referred the student for an initial evaluation to determine his eligibility for special education (see Dist. Exs. 5; 8 at pp. 26-28). A CSE convened on October 7, 2022 to conduct the student's initial review and formulated an IEP for the student with an implementation date of October 17, 2022 and a projected annual review date of October 7, 2023 (see generally Dist. Ex. 1).[2] Finding the student eligible for special education as a student with a traumatic brain injury, the October 2022 CSE recommended that he attend a 6:1+1 special class in a district specialized school for 35 periods per week (Dist. Ex. 1 at pp. 52, 54).[3] In addition, the October 2022 CSE recommended that the student receive the following related services on a weekly basis: five 60-minute sessions of individual occupational therapy (OT), five 60-minute sessions of individual physical therapy (PT), four 60-minute sessions of individual speech-language therapy, and one 60-minute session of group speech-language therapy (id. at pp. 52-53). The CSE also recommended the support of individual daily, full-time health paraprofessional services to assist the student with feeding, ambulation, and safety (id. at p. 53). In addition, the CSE recommended one 60-minute session per month of parent counseling and training in a group (id. at p. 53). The CSE further recommended one 60-minute session of individual assistive technology services per week (id. at p. 53). Further, the CSE recommended 12-month services, noting that the student would receive the same special education program and services for July and August (id. at p. 54).

The parent disagreed with the recommendations contained in the October 2022 IEP, as well as with the particular public school site to which the district assigned the student to attend for the 2023-24 school year, and, as a result, in a letter dated June 20, 2023, she notified the district of her intent to unilaterally place the student at iBrain and seek public funding (Parent Ex. E; see Dist. Ex. 12).

On June 25, 2023 the parent executed an enrollment contract for the student's attendance at iBrain for the 2023-24 school year (Parent Ex. H).[4]

In a due process complaint notice dated July 5, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year and requested pendency and relief in the form of direct payment to iBrain for the student's tuition costs for the 2023-24 school year in addition to the costs of related services and a 1:1 paraprofessional; direct funding for the student's special education transportation; and an independent educational evaluation (IEE) at public expense (see Parent Ex. A). In particular, the parent asserted that the district failed to conduct sufficient evaluations of the student, that the recommendation for a district specialized school was not appropriate, and that the October 2022 CSE failed to recommend vision education services, music therapy services, or an assistive

[2] Two copies of the October 2022 IEP were entered into evidence (compare Parent Ex. C, with Dist. Ex. 1). For purposes of this decision only the district's exhibit will be cited.

[3] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

[4] According to the hearing record, the parent also executed an agreement for transportation of the student to and from iBrain for the 2023-24 school year with Sisters Travel and Transportation Services, LLC (Sisters Travel); however, the agreement was not dated (see Parent Ex. I).

technology device, and recommended insufficient special transportation services and accommodations (id. at pp. 4-5, 7-8). In addition, the parent set forth concerns about the assigned public school site (id. at pp. 4-6).

An impartial hearing convened on September 26, 2023 and concluded on November 6, 2023 after four days of proceedings (Tr. pp. 12-299).[5] In a decision dated December 2, 2023 the IHO made discrete findings of fact regarding among other things, the special class setting, the need for music therapy, and the assigned public school and then determined that the district offered the student a FAPE for the 2023-24 school year and denied the parent her requested relief (IHO Decision at pp. 6-20).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision, and argues that the IHO erred in determining that the district met its burden to prove that it offered the student a FAPE for the 2023-24 school year and, more particularly, asserts that the recommendations of the CSE that the student attend a district specialized school were not appropriate to meet the student's needs and the assigned public school site did not have the capacity to implement the IEP. Regarding the October 2022 CSE and resultant IEP, the parent argues that the district conducted insufficient evaluations that the student required vision education services, music therapy, and additional transportation accommodations to receive a FAPE. The parent also requests findings: (1) that iBrain is an appropriate unilateral placement for the student; (2) that equitable considerations favor the parent's claim for district funding of tuition, related services and transportation for the 2023-24 school year; and (3) that the parent is entitled to the requested relief via direct payment.[6] In the alternative, the parent requests that the matter be remanded for the IHO to address the appropriateness of the unilateral placement at iBrain and the equitable considerations.

In its answer, the district argues that the IHO's determination that the district offered the student a FAPE for the 2023-24 school year should be upheld. The district also asserts that the

[5] The parties also convened for a prehearing conference on August 10, 2023 and a status conference on September 13, 2023 (Tr. pp. 1-11).

[6] In the request for review, the parent also alleges that the district was required to review the student's IEP in October 2023, that the October 2022 IEP had "expired" by the time the impartial hearing in this matter convened, and that the IHO should have determined the district denied the student a FAPE for the 2023-24 school year on this basis alone. In its answer, the district asserts the parent did not raise an allegation relating to the expiration of the October 2022 IEP in her July 2023 due process complaint notice. Generally, the party requesting an impartial hearing has the first opportunity to identify the range of issues to be addressed at the hearing (Application of a Student with a Disability, Appeal No. 09-141; Application of the Dep't of Educ., Appeal No. 08-056). The IDEA provides that a party requesting a due process hearing "shall not be allowed to raise issues at the due process hearing that were not raised in the notice . . . unless the other party agrees" (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). As the projected date for the CSE's annual review of the student's special education programing came to pass after the parent filed the July 2023 due process complaint notice, the parent could not have raised a claim alleging that the district failed to conduct the student's annual review in October 2023 (see Parent Ex. A). Nor did the parent seek to amend the due process complaint notice during the impartial hearing to add the claim. Additionally, there is no dispute that the October 2022 IEP was the operative IEP in place at the time the parent's placement decision for the 2023-24 school year (see Bd. of Educ. of Yorktown Cent. Sch. Dist. v. C.S., 990 F.3d 152, 173 [2d Cir. 2021]; R.E., 694 F.3d at 187-88). Therefore, I will not further address the allegation about the student's annual review in October 2023.

parent's request for review should be dismissed for failure to comply with practice regulations governing appeals before the Office of State Review.[7]

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]).

[7] The parent prepared and served a reply to the answer on the district on February 2, 2024 (see Parent Reply Aff. of Serv.). However, the parent did not file the reply with the Office of State Review until February 21, 2024. State regulation provides that a reply must be filed with the Office of State Review "within two days after service of the reply is complete" (8 NYCRR 279.6[b]). As such, the parent's reply fails to comply with the practice regulations and will not be considered.

A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[8]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should

[8] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matters

The district correctly asserts that the parent's request for review does not comply with the 10-page limitation (8 NYCRR 279.8[b]). State regulation provides that a "request for review, answer, answer with cross-appeal, answer to cross-appeal, or reply shall not exceed 10 pages in length" (8 NYCRR 279.8[b]). In general, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents (8 NYCRR 279.8[a]-[b]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 440-41 [W.D.N.Y. 2012] [upholding dismissal of a petition for review that was untimely and exceeded page limitations]). However, "judgments rendered solely on the basis of easily corrected procedural errors or 'mere technicalities,' are generally disfavored" (J.E. v. Chappaqua Cent. Sch. Dist., 2015 WL 4934535, at *4-*6 [S.D.N.Y. Aug. 17, 2015], quoting Foman v. Davis, 371 U.S. 178 [1962]).

Here, the parent's request for review is 11 pages, and viewing the request for review as a whole, it appears that the page limitations violation could have been avoided had the parent's attorney continued the formatting used on page 1 of the pleading (i.e., double spaced with just the first line of each paragraph indented), rather than switching to indent the entirety of each numbered paragraph (compare Req. for Rev. at p. 1, with Req. for Rev. at ¶¶ 1-35). In addition, the parent's attorney could have submitted a 30-page memorandum of law and used it to further argue the relevant facts in the hearing record and cite legal authority to support the contentions raised in the request for review (8 NYCRR 279.4[g]; 279.8[b], [d]), but elected not to do so. Nevertheless, I decline to exercise my discretion to reject the parent's pleading due to this irregularity in this instance (see 8 NYCRR 279.8[a]) given that the district was able to respond to the allegations raised in the request for review in an answer and there is no indication that the district suffered any prejudice as a result. In particular I note that the parent's attorney is newer to practice in this forum.

However, the parent's attorney is cautioned that, while a singular failure to comply with the practice requirements of Part 279 may not warrant an SRO exercising his or her discretion to reject a request for review, an SRO may be more inclined to do so after a party or an attorney's repeated failure to comply with the practice requirements (see Application of a Student with a Disability, Appeal No. 21-102; Application of a Student with a Disability, Appeal No. 18-010; Application of a Student with a Disability, Appeal No. 17-101; Application of a Student with a Disability, Appeal No. 16-060; see also Application of a Student with a Disability, Appeal No. 17-015; Application of a Student with a Disability, Appeal No. 16-040). Furthermore, while the attorney has appeared here for only a number of months, he has appeared in over 20 proceedings thus far which indicates that he is making this a substantial component of his practice and I have little patience left for continued noncompliance with the requirements of Part 279. Thus, he should review the requirements of Part 279 carefully and ensure that his future filings are compliant because upon a rejection of noncompliant filings I am unlikely to allow late filings that have the

effect of providing an end run around the timeliness requirements absent good cause and the noncompliance itself will not suffice.

B. October 2022 IEP

Initially, after a thorough review of the hearing record, I agree with the IHO's determinations that: (1) the CSE's recommendation for a 6:1+1 special class in a district specialized school was appropriate and constituted the LRE for the student; (2) the assigned public school site could have implemented the student's October 2022 IEP and any claims regarding the school's capacity to do so, the safety of the school, or the handicap accessibility, elevator capacity, and air conditioning at the school were speculative; and (3) the student did not require music therapy to be provided a FAPE (IHO Decision at pp. 6-20). However, the evidence in the hearing record shows that the student had unique vision needs that were not properly supported or addressed by the October 2022 IEP and this denied the student a FAPE for the 2023-24 school year. Accordingly, while I agree with much of the IHO's decision, I disagree with certain aspects of it for the reasons described below.

A district is required to ensure that a student is assessed in all areas related to suspected disability, including, where appropriate, in the area of vision (34 CFR 300.304[c][4]; 8 NYCRR 200.4[b][6][vii]). In addition, generally, an IEP must include a statement of the related services recommended for a student based on such student's specific needs (8 NYCRR 200.6[e]; see 20 U.S.C. § 1414[d][1][A][i][IV]; 34 CFR 300.320[a][4]). "Related services" is defined by the IDEA as "such developmental, corrective, and other supportive services . . . as may be required to assist a child with a disability to benefit from special education" (20 U.S.C. § 1401[26][A]; see 34 CFR 300.34[a]; 8 NYCRR 200.1[qq]). The October 2022 IEP did not include a recommendation for vision education services; however, the hearing record shows that there was information available and before the CSE that indicated the student required vision education services to benefit from special education.

A review of the hearing record indicates that that the October 2022 CSE relied on district evaluations in addition to evaluation results and progress reports generated by iBrain to determine the student's needs. More specifically, the CSE considered an August 2022 social history, an August 2022 psychoeducational assessment, a September 2022 classroom observation, an October 2022 teacher report, an October 2022 iBrain "intake IEP" (iBrain plan) as well as an IEP from a prior program that the student attended outside of the United States, and reports from the student's iBrain providers including assessment results, parent and provider input, and input from the iBrain special education coordinator (see Dist. Exs. 1 at pp. 1-31; 4 at pp. 4-5; 11 at p. 2; 23 ¶ 7).

With regard to the student's visual needs, the October 2022 CSE adopted the iBrain description of the student's visual functioning and reflected it in the IEP present levels of performance of the October 2022 IEP (compare Dist. Ex. 1 at pp. 24-26, with Parent Ex. D at pp. 26-28). The October 2022 iBrain plan indicated that, according to the student's medical records, the student had an "official diagnosis" of cortical visual impairment (CVI) (Parent Ex. D at p. 1).[9] With regard to visual acuity, the district IEP indicated that the student attempted to localize sound

[9] The hearing record does not include the student's medical records or identify the primary source for this diagnosis.

presented in his distance viewing range (functional distance) and demonstrated latency and inconsistent eye-to-object contact with presented materials (functional near) (Dist. Ex. 1 at p. 25). Next, the IEP described the student's eye movement/visual skills in terms of appearance, awareness and localization, fixation, eye preference, saccades, light sensitivity, color vision, need or preference for movement, latency, light gazing, non-purposeful gazing, impacted distance vision, ability to view novel materials, and visually guided reach (id. at pp. 25-26). More specifically, the IEP noted that the student engaged in non-purposeful gazing; primarily localized sounds; demonstrated limited fixation but fixated to accommodate visual materials presented on an iPad; did not demonstrate a distinct eye preference; was unable to shift his gaze between two objects; did not demonstrate light sensitivity; attended to highly contrasted visual materials with a possible preference for yellow; benefitted from viewing materials that had movement; demonstrated latency, with some change in duration with accommodated materials; demonstrated some purposeful use of vision; and required accommodation of materials to be able to attend to novel items (id.). According to the IEP, although light gazing was not observed during the evaluation of the student, the student's mother reported that he looked toward lights and ceiling fans (id.). The student's distance vision was also "impacted" (id. at p. 27).

The October 2022 IEP further stated that the student was "unable to attend tactilely using a visually guided reach" (Dist. Ex. 1 at p. 26). In addition, the student "demonstrate[d] an impacted lower visual field and as a result" needed to be provided with "opportunities for viewing presented materials in his central visual field" and the materials needed to be positioned near the student's hands for tactile exploration (id.). The October IEP recommended the use of audiobooks and a multisensory approach to instruction that included the use of real objects and tactile representations (id.). The IEP stated that learning materials needed to be highly contrasted and noted that backlighting and spotlighting techniques helped to support the student's access to visual information (id.). The IEP reflected information gleaned from the student's vision education sessions at iBrain, specifically that he had attended to visual materials with backlighting and no movement, required extended time to view presented materials, and benefitted from viewing materials with one or two colors (id. at p. 24). Based on the iBrain vision education sessions the IEP also noted that the student's visual functioning was impacted by the complexity of presented materials, that he often exhibited non-purposeful gazing in the classroom and when provided with visual materials that were not modified (id.).

The October 2022 iBrain plan shows that iBrain recommended that the student receive three 60-minute sessions per week of vision education services due to the student's visual impairment related to cortical visual impairment (Dist. Ex. D at p. 39). The plan noted that such frequency of vision education services was needed in order to allow time for reinforcement of visual access and concept development, repetitive practice of skills, extended time for visually processing all visual information, and support for learning compensatory strategies for vision loss (id.). However, the district declined to recommended vision education services for the student.

A review of the October 2022 CSE meeting transcript reveals that the lead teacher for the visually impaired at iBrain indicated that the student demonstrated visual functioning consistent with cortical visional impairment (Dist. Ex. 4 at p. 9). At the CSE meeting, the iBrain vision teacher reiterated much of the information detailed in the October 2022 iBrain plan, and reflected in the present levels of performance in the October 2022 IEP (compare Dist. Ex. 4 at pp. 4-5, with Parent Ex. D at pp. 21, 26-28 and Dist. Ex. 1 at pp. 24-26). The iBrain vision teacher indicated that based on the student's needs he would be working toward increasing functional use of his

vision skills, such as tracking and using his vision with purpose, in addition to working toward accessing novel objects, materials, and activities (Dist. Ex. 4 at p. 10).

Following the iBrain vision teacher's report to the CSE, the district representative asked the parent if she had any information, such as an updated vision report from an ophthalmologist, that included information on the student's visual acuity levels (Dist. Ex. 4 at p. 11). The parent indicated that the student had been working with scientists that checked his contrast sensitivity and his ability to move his eyes (id.). She indicated that she would have to find a way to get the district the information, as it was research and not the standard way of measuring vision (id.). She explained that the scientists had developed tracking programs on the computer in which they could personalize objects and voices and move them around on the screen and reward the student when he tracked them (id.). The district representative explained to the parent that in order to initiate vision education services the district needed "some type of medical documentation from an eye doctor specifically" (id. at p. 12). She indicated that she had provided the parent with "the eye report" typically used by the district and advised the parent that if that was not what her doctors' were using she could "submit whatever [the parent] c[ould] get to [her] and let the vision specialists review it" (id. at p. 13). The parent indicated that the student had been diagnosed with "CVI" (id.). Later in the CSE meeting, the district representative stated that although iBrain recommended and the parent requested vision education services the district would not be recommending them without review of the aforementioned forms by the vision team and noted the district would be requesting a reevaluation to conduct an assistive technology and vision evaluation (Dist. Ex. 4 at pp. 52, 58).

According to the October 2022 CSE transcript, when the district representative allowed each of the student's providers from iBrain to voice their concerns regarding the program recommended by the district, the iBrain vision teacher stated that the student required vision education services due to his cortical visual impairment diagnosis and that it was imperative that "Strategy 3" be implemented right away (Dist. Ex. 4 at p. 53).

Based on the foregoing, the hearing record shows that both parties agreed to a certain extent that the student required vision education services. At the October 2022 CSE meeting the district representative stated "we're not denying that the vision therapy would be helpful" but that the district was "just . . . requesting . . . the paperwork" (Dist. Ex. 4 at p. 53). During the impartial hearing, the district representative confirmed that the October 2022 CSE was aware of the student's diagnosis related to vision, and that the school and the parent were seeking vision education services, but that vision education services were "not recommended because additional documentation that [wa]s required for the provision of that service had not been received" (Tr. pp. 72-74; Dist. Ex. 23 ¶ 9).

During the impartial hearing, when asked by the parent's representative if the CSE had the ability to make a vision education service recommendation independent to any eye report being submitted to the district, the district representative answered:

> I can't speak to that other than to say my understanding of the practice is that in order to recommend vision education services, because of the medical nature of that recommendation, a form is required that documents the student's visual acuity in order to ensure

> that the service would be medically appropriate to be provided as an educational service

(Tr. pp. 75-76). The district representative also confirmed that the CSE could share the reports provided to support a student's vision education needs to "the proper office" in order to make a recommendation (Tr. p. 76).

Based on the above, the hearing record shows that the CSE was aware that the student had specific visual weaknesses that needed to be addressed in order for him to receive a FAPE (see generally Dist. Ex. 1 at pp. 24-27). With regard to vision services, the district members of the committee seemed open to recommending the services but placed additional conditions on the parent before proceeding with the recommendation. The district would not place the services on the IEP without the parent submitting certain forms to be reviewed by a separate team and/or without a district vision evaluation. The district representative testified that, from her understanding of the October 2022 CSE meeting, the parent would provide the updated "eye report" from the student's "eye specialist" (Tr. p. 75). However, even assuming that the parent did not submit the specific paperwork requested by the district,[10] the district presented no evidence that, in the eight months after the October 2022 CSE leading up to the 2023-24 school year, it either conducted a vision evaluation or reconvened the CSE with members of the district's "vision team" to review the information available.

In requiring the parent to provide the district with specific paperwork which the district would examine at another time through a separate "vision team," and then, perhaps, decide if the student's IEP would be amended to include vision services is a scenario that bears considerable similarity to litigation that was brought against the district which complained of systemic "policies that never required [the Office of School Health] or [Office of Pupil Transportation]—agencies critical to providing the services at issue in this action—to appear for IEP meetings. . . . Accordingly, Plaintiffs were required to contact OSH and OPT separately after the IEP meeting. This policy created a disjointed bureaucracy in which OSH and OPT acted in isolation without coordinating—much less knowing—the services each was required to provide" (J.L. on behalf of J.P. v. New York City Dep't of Educ., 324 F. Supp. 3d 455, 464-65 [S.D.N.Y. 2018]).

Similarly, the CSE, although acknowledging a likely area of disability for the student, essentially tried to delay the service until a necessary medical assessment of the student was conducted or produced by the parent and then submitted to the district's vision team. This is not the process called for under IDEA because it is the CSE that is required to make the determination of which services should be placed on a student's IEP and it is the district's responsibility to ensure that the CSE has sufficient information about the student's needs and that individuals who can make appropriate decisions are part of the CSE process. Placing the onus on the parent, rather than the district, to obtain the required medical forms is problematic since the district may not delegate its responsibilities to the student under IDEA to the parents (see 8 NYCRR 200.4[b][3]). The district members of the CSE in this case failed to appreciate that they were the individuals responsible to determine whether the student needed vision services in order to receive a FAPE. A district is authorized to conduct necessary medical assessments in order to provide appropriate

[10] I do not express any opinion at this juncture regarding the parent's cooperativeness with the information request of the CSE.

special education programming to a student with a disability (see Shelby S v. Conroe Indep. Sch. Dist., 454 F.3d 450, 454 [5th Cir. 2006]).[11]

This case is unusual insofar as it is routine for most parents across the State to routinely obtain and provide physical and medical documentation from their children's personal physicians at the request of evaluating district personnel in a cooperative fashion rather than subject their child to assessment by private clinicians then later, duplicative physical or medical assessment procedures by the district. Similarly, the district personnel across the State routinely conduct appropriate consultations with district medical directors, school nurses and student's private health care providers so that upon meeting the CSEs are prepared to complete an appropriate IEP for each student with a disability. Here, the IHO erred in accepting the district's explanation that vision services could not be placed on the IEP by the CSE without further documentation, especially as the district presented no evidence that it took further action after the October 2022 CSE meeting to obtain additional information from the parents or the student's private clinicians.

Additionally, the district argues on appeal that the October IEP contained detailed information regarding the student's vision needs and modifications, and further that the vision education goals created by iBrain overlapped with the district's speech language therapy goals and assistive technology goals; however, I am not convinced that this argument is supported by the evidence in the hearing record. The October 2022 CSE recommended four annual goals for speech and language that addressed the student's needs related to receptive language, expressive language, pragmatics, and oral motor/feeding (Dist. Ex. 1 at pp. 37-40). The receptive language goal targeted the student's ability to increase receptive language by using total communication skills to discriminate between core words, respond to basic "'wh'" questions, and identify objects/people with modeling and moderate support (id. at p. 37). The IEP included corresponding short term objectives, which required the student to discriminate between picture symbols and identify appropriate responses using eye gaze (id.). The expressive language goal targeted the student's ability to use total communication to initiate/terminate an activity, make appropriate requests and greet familiar peers and adults with modeling and moderate support (id. at p. 38). The corresponding objectives required the student to scan materials and activate his AAC device (id.). The district's assistive technology goal targeted the student's ability to successfully use an AAC device, and at least one corresponding short-term objective called for the student to main his gaze for 1-3 seconds in order to activate icons or targets (id. at p. 47). However, requiring the student to use his visual skills to master IEP goals in other domains is not the same as addressing the student's visual deficits.

In contrast, the October 2022 iBrain plan included three annual goals for vision, related to the student's ability to: establish eye-to-object contact with an accommodated object or picture with increasing frequency; show visual curiosity (fixation) in most new environments when presented with novel objects, materials, and activities; and visually track an accommodated object (Parent Ex. D at pp. 37-38). Here, it appears that the iBrain plan addressed the student's need to

[11] This does not mean that medical assessments must always be conducted by a district under all circumstances to provide the parent with free medical diagnoses whenever they seek it. The thrust of the requirement is to ensure compliance with the educational objectives of the IDEA and "[i]f alternative assessment methods meet the evaluation criteria [required under Part B], then these methods may be used in lieu of a medical assessment" (Letter to Williams, 21 IDELR 73 [OSEP 1994]).

develop the underlying visual skills such as focusing and fixating on an object and visually tracking an object that would be necessary for the student to attempt annual goals in other areas. Further, the district did not elicit any testimony during the impartial hearing from a witness regarding the degree to which the speech-language and assistive technology annual goals included in the IEP would address the student's vision needs.

Overall, despite the IHO's finding that the district representative conducted a thorough CSE meeting on October 7, 2022, a review of the district's October 2022 IEP reveals that it did not provide supports to adequately address the student's vision needs. As such, the IHO decision shall be modified by reversing that portion that found the district provided a FAPE to the student for the 2023-24 school year.

C. Remand

Having found that the district failed to offer the student a FAPE, the next issue to be discussed is whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year. As the IHO determined that the district offered the student a FAPE for the 2023-24 school year, he declined to address the appropriateness of iBrain as a unilateral placement (IHO Decision at p. 20). When an IHO has not addressed claims set forth in a due process complaint notice, an SRO may consider whether the case should be remanded to the IHO for a determination of the claims that the IHO did not address (8 NYCRR 279.10[c]; see Educ. Law § 4404[2]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 589 [S.D.N.Y. 2013] [indicating that the SRO may remand matters to the IHO to address claims set forth in the due process complaint notice that were unaddressed by the IHO], citing J.F. v. New York City Dep't of Educ., 2012 WL 5984915, at *9 n.4 [S.D.N.Y. Nov. 27, 2012]; see also D.N. v. New York City Dep't of Educ., 2013 WL 245780, at *3 [S.D.N.Y. Jan. 22, 2013]). Here, as the IHO has not yet ruled on whether the parent met her burden to prove that the unilateral placement was appropriate or whether equitable considerations would support the parent's request for relief, I will remand the matter to the IHO to address these issues in the first instance.

The IHO upon remand should ensure that an adequate record is developed upon which to base the necessary findings of fact and of law relative to the parent's requested relief. I note that at this juncture the 2023-24 school year is much further along compared to when the impartial hearing took place between September and November 2023, and I will leave it to the IHO's sound discretion regarding adequate development of the hearing record on those topics and whether to provide the parent an opportunity to present additional evidence regarding the student's programming and progress at iBrain and a concomitant opportunity for the district to respond. Additionally, the IHO may find it appropriate to schedule a prehearing conference with the parties to, among other things, simplify and clarify the issues left to be resolved at the hearing (see 8 NYCRR 200.5[j][3][xi][a]).

VII. Conclusion

Having found that, contrary to the IHO's decision, the district failed to offer the student a FAPE for the 2023-24 school year, and, as the IHO did not address the appropriateness of the parent's unilateral placement or equitable considerations, this matter is remanded to the IHO to make determinations on these issues.

I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated December 2, 2023, is modified by reversing that portion which found that the district offered a FAPE to the student for the 2023-24 school year; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO to determine whether the services unilaterally obtained by the parent were appropriate for the student for the 2023-24 school year and whether equitable considerations weigh in favor of granting funding for the costs of tuition or transportation.

Dated: **Albany, New York**
March 1, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER