The University of the State of New York

The State Education Department
State Review Officer
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No. 24-530

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:
Liberty & Freedom Legal Group, Ltd., attorneys for petitioner, by Richa Raghute, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, 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 denied her request to be reimbursed for her son's tuition at the International Academy for the Brain (iBrain) for the 2024-25 school year.[1] 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

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

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 began attending iBrain for the 2018-19 school year and has been the subject of several prior State-level review proceedings that have addressed claims related to the student's unilateral placement at iBrain (see Parent Ex. K ¶ 10; Application of a Student with a Disability, Appeal No. 24-343; Application of a Student with a Disability, Appeal No. 23-262; Application of the Dep't of Educ., Appeal No. 21-082; Application of a Student with a Disability, Appeal No. 20-198; Application of a Student with a Disability, Appeal No. 20-068; Application of the Dep't

of Educ., Appeal No. 18-127).[2] At the time of the impartial hearing, the student was 19 years old and presented with delays across all domains, including that he was non-ambulatory and nonverbal (Parent Exs. E; L ¶¶ 2-3). He has "a history of Bilateral Sturge Weber syndrome," which has resulted in an acquired brain injury from seizures, and he has received diagnoses of cortical visual impairment, glaucoma, and retinal detachment affecting both eyes, and a hemangioma in his left middle ear and tympanic membrane which may contribute to hearing loss (Parent Exs. E at pp. 1, 40; L ¶ 2).

A CSE convened on February 6, 2024, determined the student was eligible for special education as a student with a traumatic brain injury, and developed an IEP for the student with an implementation date of February 26, 2024 (Parent Ex. C at pp. 1, 54-55, 61).[3] The February 2024 CSE recommended that the student receive 12-month services consisting of a 12:1+(3:1) special class in a specialized school for 35 periods per week, three periods per week of adapted physical education, five 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, five 60-minute sessions per week of individual vision education services, and individual school nurse services as needed (id. at pp. 54-55, 56, 61-62). The February 2024 CSE further recommended individual, full time, daily paraprofessional services for health, ambulation, safety and feeding, assistive technology services and devices, and special transportation (id. at pp. 55, 60-61). Additionally, the CSE recommended one 60-minute session per month of parent counseling and training in a group (id. at p. 54).

By prior written notice dated June 11, 2024, the district summarized the recommendations of the February 6, 2024 CSE (Dist. Ex. 2 at pp. 1-7). The district also notified the parent of the school location to which the student had been assigned in correspondence dated June 11, 2024 (Parent Ex. D at pp. 1-3).

By letter dated June 17, 2024, the parent rejected the district's recommended program, "continue[d] to request [i]ndependent [e]ducation [e]valuations (IEEs) of the [s]tudent," and advised the district of her intention to unilaterally enroll the student at iBrain for the 2024-25 school year and seek public funding (Parent Ex. A-A at pp. 1-2).

On June 24, 2024, the parent signed an enrollment agreement with iBrain for the student's attendance during the 2024-25 school year (Parent Ex. A-E at pp. 1-7). On June 25, 2024, the parent signed an agreement with Sisters Travel and Transportation Services, LLC (Sisters) for the student's transportation to and from iBrain for the 2024-25 school year (Parent Ex. A-F at pp. 1-7).

[2] The SRO decision in Application of a Student with a Disability, Appeal No. 23-262 was admitted as an exhibit during the impartial hearing (see Parent Ex. A-C at pp. 1-13).

[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]).

A. Due Process Complaint Notice

In a due process complaint notice dated July 2, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2024-25 school year (Parent Ex. A at p. 1). The parent invoked pendency and requested an immediate pendency hearing and interim order on pendency (id. at p. 2).[4] The parent next alleged that the district failed to timely provide the parent with prior written notice and a school location letter, failed to recommend an appropriate class size, predetermined the student's program recommendation, failed to recommend an appropriate public school site, failed to recommend appropriate related services and supports, specifically noting music therapy and hearing education services, failed to conduct necessary evaluations, and failed to recommend appropriate special transportation services (id. at pp. 4, 6-7). With respect to the parent's request for an independent educational evaluation (IEE), the parent disagreed with the district's evaluations and asserted that the district failed to conduct evaluations in connection with a nonpublic school placement and failed to conduct an audiological examination (id. at p. 7).

The parent also asserted that iBrain was an appropriate unilateral placement and that equitable considerations warranted full funding for the cost of the student's attendance at iBrain for the 2024-25 extended school year (Parent Ex. A at p. 5). As relief, the parent requested a declaration that the student was denied a FAPE for the 2024-25 extended school year and a determination that iBrain was an appropriate unilateral placement for the student (id. at p. 8). In addition, the parent requested direct funding for the full cost of tuition, related services, and a 1:1 health paraprofessional, as well as direct funding for the cost of the student's private transportation services consisting of a 1:1 transportation nurse, air conditioning, a lift bus, a regular-sized wheelchair, and limited travel time (id.). The parent further requested a CSE meeting "to address changes if necessary," and an order directing the district to fund an independent comprehensive neuropsychological evaluation of the student (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 4, 2024 (Tr. pp. 13-132).[5]

In an interim decision dated September 15, 2024, the IHO found that the student's placement during the pendency of this matter, retroactive to the filing of the due process complaint notice on July 2, 2024, consisted of direct funding of the costs of the student's tuition at iBrain, related services, and daily round trip special transportation services (Interim IHO Decision at p. 4).

[4] The parent asserted that the student's pendency placement was based on the January 12, 2024 SRO decision in Application of a Student with a Disability, Appeal No. 23-262 (Parent Exs. A at p. 2; A-C).

[5] A prehearing conference was held on August 5, 2024 (Tr. pp. 1-12). On August 19, 2024, the district moved to dismiss the matter due to the parent's failure to appear at a resolution session; the parent submitted a response dated August 21, 2024; and, on August 27, 2024, the IHO issued an interim decision denying the district's motion (Aug. 27, 2024 Interim IHO Decision; Dist. Mot. to Dismiss; Parent Response to Mot. to Dismiss).

In a decision dated October 11, 2024, the IHO found that the district offered the student a FAPE for the 2024-25 school year (IHO Decision at pp. 4, 6-7). The IHO found that the district's school psychologist "detailed the [s]tudent's unique needs and thoroughly explained how the [s]tudent's program and the placement offered by the [d]istrict were able to meet the [s]tudent's needs" (id. at p. 6). The IHO further determined that the student did not require music therapy to make educational progress and that the district demonstrated that the student's "deficits that [we]re addressed with music therapy c[ould] also be addressed with other related services" (id.). Overall, the IHO found that the student's present levels of performance identified in the February 2024 IEP provided a clear understanding of the student's functional levels, the annual goals and management needs were specific and would have enabled the student to make progress, and the district provided a cogent and responsive explanation for its decisions (id.). The IHO noted that the district school psychologist described the other options considered by the CSE (id.). Lastly, the IHO determined that the parent was provided with a school location letter on February 16, 2024 (id.).

Turning to the parent's request for an independent neuropsychological evaluation, the IHO determined that the parent, in her testimony, did not disagree with any district evaluation of the student and did not request a neuropsychological evaluation (IHO Decision at p. 7). For those reasons, the IHO determined that the parent was not entitled to an independent neuropsychological evaluation (id. at p. 8). The IHO then denied the parent's requested relief and dismissed the due process complaint notice with prejudice (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the district offered the student a FAPE for the 2024-25 school year and erred in denying the parent's request for an independent neuropsychological evaluation. The parent further asserts that the IHO erred in declining to consider that the parent's unilateral placement of the student at iBrain was appropriate and in declining to consider whether equitable considerations supported an award of funding. With respect to FAPE, the parent argues that the district failed to defend its recommendation of a 12:1+(3:1) special class, that the substance of the February 2024 IEP, including the recommendations, was based entirely on the iBrain education plan, that the district IEP contained an internal inconsistency in that it mandated the student receive instruction in a 6:1+1 special class but recommended a 12:1+(3:1) special class for the student, and that the 12:1+(3:1) special class recommendation was contradictory to State regulation. Next, the parent alleges that the district failed to defend its refusal to recommend hearing education services and music therapy. The parent also asserts that the district predetermined its refusal to recommend music therapy. The parent further alleges that the district's assigned public school site was not appropriate and that the district's IEP could not be implemented as written without an extended school day.

The parent also contends that iBrain was an appropriate unilateral placement for the student and that equitable considerations warrant an award of the cost of the student's attendance at iBrain, including transportation. Lastly, the parent asserts that the IHO erred in finding that she did not disagree with a district evaluation and erred in finding that she did not request an independent neuropsychological evaluation. As relief, the parent requests direct funding for the total cost of the student's attendance at iBrain for the 2024-25 extended school year, and funding for an independent neuropsychological evaluation.

In an answer, the district asserts that the IHO correctly determined that the student was offered a FAPE for the 2024-25 extended school year and that the IHO correctly denied the parent's request for an independent neuropsychological evaluation.[6]

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

[6] The parent interposed a reply to the district's answer, largely reiterating the arguments raised in the request for review. A reply is authorized when it addresses "claims raised for review by the answer or answer with cross-appeal that were not addressed in the request for review, to any procedural defenses interposed in an answer, answer with cross-appeal or answer to a cross-appeal, or to any additional documentary evidence served with the answer or answer with cross-appeal" (NYCRR 279.6 [a]). Accordingly, the parent's reply is not a proper and will not be considered.

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]). 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]).[7]

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-

[7] 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).

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 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

The IHO found that the district offered the student a FAPE for the 2024-25 school year. The IHO found in general terms that the February 2024 IEP was appropriate, and specifically credited the testimony of the district's school psychologist in support of her findings (IHO Decision at p. 6). Among the parent's claims, on appeal, is the assertion that the February 2024 IEP contained an internal inconsistency that "mandate[d] that [the student] receive academic instruction in a 6:1:1 classroom setting" while also recommending a 12:1+(3:1) special class. Review of the February 2024 IEP shows that in the coordinated set of transition activities shows that they do indicate that the student "will continue to receive instruction in literacy and academics in a 6:1:1 classroom setting with the support of a paraprofessional"; however, the only other area where the IEP references a 6:1+1 special class is in the parent concerns section of the IEP (Parent Ex. C at pp. 58, 64-65). Accordingly, it is not clear whether the reference in the coordinated set of transition activities was the result of copying and pasting from some other source or was in fact envisioned by the CSE as a conflicting recommendation, because the district did not address the internal inconsistency during the impartial hearing or in its answer on appeal. In addition, the IHO did not address the internal inconsistency or the appropriateness of the 12:1+(3:1) special class recommendation in her decision. All of this is not entirely surprising as, while the parent did express disagreement with the 12:1+(3:1) special class recommendation in her due process complaint notice, she did not make any allegations regarding the February 2024 CSE making a contradictory recommendation for a 6:1+1 special class (see Parent Ex. A). Nevertheless, even if this issue is properly within the scope of the hearing, it is unnecessary to address it because the IHO failed to grapple with the evidence related to the student's need for hearing education services, which, in this instance, is determinative.

A. FAPE - February 2024 IEP

The parent correctly argues that the district's failure to recommend hearing education services denied the student a FAPE for the 2024-25 school year and correctly asserts that the IHO erred in failing to address her claim.

1. Hearing Education Services

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 hearing (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 February 2024 IEP did not include a recommendation for hearing education services; however, the hearing record shows that there was information available to the CSE that indicated the student required hearing education services to benefit from special education.

A review of the hearing record indicates that the February 2024 CSE considered vocational assessment data obtained from the parent and the student, but primarily relied on evaluative information provided by iBrain to determine the student's needs (Parent Ex. C at p. 1; Dist. Exs. 7; 8). With regard to the student's hearing needs, the February 2024 CSE adopted the iBrain description of the student's hearing function and reflected it in the present levels of performance in the February 2024 IEP (compare Parent Ex. C at pp. 6-7, 9, 12, with Dist. Ex. 6 at pp. 41-42).

The February 2024 IEP reflected that the student had a hemangioma in his left middle ear and tympanic membrane, and that hearing loss could not be ruled out (Parent Ex. C at p. 6). The February 2024 IEP also indicated that, due to irritation of the tympanic membrane and ear canal, the student's providers "anticipate[d]" that the student had a conductive loss which was generated by difficulty engaging the three middle ear bones that send auditory information through the ear to the sensory neural receptors in the inner ear (id.). It was further noted that bone conduction was a bilateral process so, with normal hearing in his right ear, the student "should have adequate access to speech sounds" (id.). According to the February 2024 IEP, the student did not use any devices but had a "pe tube" placed in his ear canal (id.). The student's last checkup confirmed his tympanic membrane was healed, and based on teacher observations, notes from the previous hearing provider, notes from other providers, and personal observations, the student "demonstrate[d] more response to engaging his left ear" (id. at pp. 6-7). The February 2024 IEP also indicated that "it [wa]s possible" the student's hearing had changed over time and fluctuated due to irritation in his ear canal/middle ear (id. at p. 7). It was expected that the student's middle ear would continue to be affected by conductive loss due to his diagnosis of Sturge-Weber syndrome (id.). The student reportedly responded best to multimodal forms of instruction and communication and the February 2024 IEP stated that "[h]earing services w[ould] support [the student]'s receptive and expressive vocabulary multimodally and develop his auditory skills" (id.). The student's then-present vocabulary had "a combination of tactile signs, ASL signs, and familiar signs" (id.). The student was "receiving several sensory inputs during each session and learning auditory skills to build his ability to use a device for communication" (id.).

With regard to the student's then-current hearing and auditory skills, the February 2024 IEP stated that the student used a modified sign for "more," "music," "toilet/diaper," "bottle," and "rest" (Parent Ex. C at p. 9). The student "require[d] minimal to moderate verbal prompting to use the sign" and his use of the sign was "inconsistent during sessions" (id.). According to the IEP, the student often preferred to use his switch buttons to express "yes" and "no," and "more" or "all done," and could "scan to answer open ended questions in a closed set of up to [six] options" (id.). The student was able to "reach for his wobble to scan options and use his switch to confirm" when given auditory input and a tactile cue by placing the two switches on his left knee (id.). The student "need[ed] prompting to continue to scan but w[ould] make a selection with prompting" (id.).

The February 2024 IEP noted that the student's previous hearing and auditory performance annual goals were centered around introducing his new device and switch controls (wobble and switch) (Parent Ex. C at p. 12). The student was reportedly able to achieve both his hearing goals which were to increase accuracy during use of his augmentative and alternative communication (AAC) device to select his choices and preferences using a wobble and switch as well as increase his working vocabulary as demonstrated by his ability to communicate his needs and emotions via his AAC device, sign, picture symbols, or through gesturing or reaching (id.). The student had been increasing his ability to communicate multimodally in response to auditory-only questions (id.). According to the February 2024 IEP, the student would continue working on his active listening skills by answering open ended, unfamiliar questions on his device, or by signing with prompts, which were to be faded over time (id.).

The February 2024 IEP included an annual goal for hearing education services, wherein the student would increase his working vocabulary and active listening skills in the presence of multiple speakers and background noise by answering an unfamiliar open-ended question with sign or his device with fading teacher prompting for 80 percent of the time in four out of five trials (Parent Ex. C at p. 38). The student's annual goal included short-term objectives of answering a familiar question with his device, signing, reaching, or use of picture symbols in three out of five trials in a closed set of three; answering a familiar question with his device, signing, reaching, or use of picture symbols in three out of five trials; answering a nonfamiliar question with his device, signing, reaching out, or use of picture symbols in three out of five trials with minimal prompting and cueing (id.).

The February 2024 IEP noted that the CSE discussed the student's "hearing needs and consultation with the [district] [h]earing [d]ep[artmen]t indicated there may be sufficient evidence for [hearing education services]; however, updated audiogram to confirm medical information was needed; school provided a 2020 version, but indicated student had appointment in March and they would provide updated documentation following that meeting" (Parent Ex. C at p. 64).[8] The IEP further stated that the CSE "c[ould] re[-]review that information to make an informed decision about hearing needs and eligibility for [hearing education] services" (id.).

The district school psychologist testified that the February 2024 CSE was aware that the student had reported hearing loss and that the parent had presented information about the student's hearing levels (Tr. pp. 47, 57-58). The district school psychologist also testified that "there was data that was inconclusive based on the audiological information that [the CSE] received" (Tr. p. 58). According to the district school psychologist, the CSE informed the parent that the CSE needed additional information, and she testified to her belief that the district did not conduct a specific evaluation of the student (id.). The district school psychologist stated that hearing education services were not recommended by the February 2024 CSE due to "a lack of updated information" and that the CSE "had requested it from the parent and from the school" but the CSE "didn't have the information at the time of the meeting" (id.).

[8] State regulations do not contain a definition for hearing education services and the parties do not define it; however, the district defines hearing education services under related services as helping "students who are deaf or hard of hearing improve their communication skills" (https://www.schools.nyc.gov/learning/special-education/supports-and-services/related-services).

The parent testified that the student had a scheduled "hearing appointment" that occurred after the February 2024 CSE meeting (Tr. p. 92). The parent further testified that she requested a hearing evaluation and provided the district school psychologist with the updated audiology report, but the district never responded to the evaluation requests in her due process complaint notice (Tr. pp. 92-93). The parent also testified that she emailed the updated audiology report to the district school psychologist, who confirmed receipt, however the parent conceded that none of the emails were offered into evidence at the impartial hearing (Tr. p. 93).

In a prior written notice, dated June 11, 2024, the district summarized the recommendations of the February 2024 CSE and reiterated that the CSE discussed the student's "hearing needs and consultation with the [district] [h]earing [d]ep[artmen]t indicated there may be sufficient evidence for [hearing education services]; however, updated audiogram to confirm medical information was needed; school provided a 2020 version, but indicated student had appointment in March and they would provide updated documentation following that meeting" and that the CSE could "re[-]review that information to make an informed decision about hearing needs and eligibility for [hearing education services]" (Dist. Ex. 2 at pp. 1, 4).

As discussed above, the June 11, 2024 prior written notice includes the same language from the February 2024 IEP verbatim, and did not acknowledge that the parent sent the district an updated audiology report or otherwise demonstrate that it had obtained updated hearing information about the student, nor had the district evaluated the student's need for hearing education services in the four months between the CSE meeting and the prior written notice (compare Parent Ex. C at p. 64, with Dist. Ex. 2 at pp. 1, 4).

In requiring the parent to provide the district with specific paperwork which the district would examine at another time through a separate "[h]earing [d]ep[artmen]t," and then, perhaps, decide if the student's IEP would be amended to include hearing education 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 hearing department. This is not the process called for under the 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 hearing education

services in order to receive a FAPE. A district is authorized to conduct necessary medical assessments in order to provide appropriate 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]).[9]

The February 2024 IEP included information related to the student's hearing loss, described the hearing education services the student was receiving to improve his auditory skills, and also included a hearing education services annual goal, without recommending hearing education services on the February 2024 IEP (see Parent Ex. C). Further, the district offered no evidence of how other supports or related services would have addressed the student's hearing needs. Thus, I am constrained to find that the district failed to offer the student a FAPE for the 2024-25 school year.

B. Independent Neuropsychological Evaluation

The parent argues that the IHO erroneously found that she had not advised the CSE of her disagreement with the district's evaluations in a timely manner. The parent asserts that the IHO ignored the parent's 10-day notice letter, wherein she requested an IEE at public expense. The district seeks to uphold the IHO's determination.

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]).[10]

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

[9] 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]).

[10] 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]; see Letter to Carroll, 68 IDELR 279 [OSEP 2016]).

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]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

In her 10-day notice letter dated June 17, 2024, the parent, through her attorneys, stated that she continued to request IEEs of the student to be conducted at public expense, in order to appropriately assess the student in all areas related to his suspected disabilities, including, but not limited to neuropsychological, PT, OT, speech-language therapy, special education, and assistive technology assessments due to the lack of proper assessments conducted by the district prior to the development of the most recent IEP (Parent Ex. A-A at pp. 1-2).

In the July 2, 2024 due process complaint notice, the parent stated that she disagreed with the district's evaluations, or lack thereof, and formally requested district funding for an independent neuropsychological evaluation to be conducted by a qualified provider of the parent's choosing at a reasonable market rate (Parent Ex. A at pp. 7, 8).

The IHO determined that there was "no testimony in the hearing record regarding the [p]arent's disagreement with the [d]istrict's evaluation of the [s]tudent. The [p]arent's testimonial affidavit does not express any disagreement with the [d]istrict's evaluation of the [s]tudent and does not include a request for a neuropsychological evaluation" (IHO Decision at p. 7). The IHO further found that "[g]iven the lack of evidence in the hearing record to support th[e] request," the parent was not entitled to an independent neuropsychological evaluation (id. at pp. 7-8).

While the IHO did not address the parent's requests for IEEs in the 10-day notice letter and the due process complaint notice, recently, the District Court of the Southern District of New York found that a parent may commence an impartial hearing and request a district-funded IEE in a due process complaint notice in the first instance and need not communicate with the school district or the CSE prior to seeking an impartial hearing regarding their request for such an IEE (Moonsammy v. Banks, 2024 WL 4277521, at *15-*17 [S.D.N.Y. Sept. 23, 2024]).[11]

[11] Under 34 CFR 300.502(b)(2), it would appear that the district has only one option to forestall litigation on the issue, and that is to grant the IEE at public expense before the presentation of evidence begins in the due process hearing that was commenced by the parent. This is of little consequence so long as the district is in agreement with the parent to grant the IEE. However, with the burden of production and persuasion placed on school districts under State law, there is little incentive for a parent to use the resolution meeting with a school district. Strategically, it would almost always be more effective from a parent's perspective to force a district into defending itself in an impartial hearing as soon as possible on this issue. The district's second option under the regulation—to commence its own due process hearing "without unnecessary delay"—is illusory in cases where the parent has already initiated the proceeding by making the initial request for an IEE in their own due process complaint notice.

Notwithstanding the district court's view in Moonsammy, the hearing record indicates that the district did not conduct any evaluations beyond obtaining a Level I vocational assessment prior to the February 2024 CSE meeting (Dist. Exs. 7; 8).[12] In addition, the evaluative information provided by iBrain, which the district primarily relied on in developing the February 2024 IEP did not include any independent evaluations (Parent Ex. C at p. 1; Dist. Ex. 6 at pp. 2-4).

In Application of a Student with a Disability, Appeal No. 23-262, the undersigned upheld an IHO's award of an IEE "'in areas not assessed by the district or with which the family disagrees, at reasonable market prices'" (Parent Ex. A-C at p. 12). The IHO in that matter further "directed that 'prior to the 2023-24 annual review the district shall ensure the student has been fully evaluated in all areas of actual o[r] suspected disability'," which was also upheld by the undersigned (id.).

Review of the hearing record reflects that the parent has not obtained the previously awarded IEE in areas not assessed by the district, which would include the parent's current request for an independent neuropsychological evaluation. As indicated above and pursuant to the regulations, the parent is only entitled to one IEE at a public expense each time the district conducts an evaluation with which the parent disagrees (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g]). Accordingly, as the parent has already received an award of an IEE for the last district evaluation of the student, it would be inappropriate to award additional funding for the parent's requested neuropsychological evaluation in this matter.

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 2024-25 school year. As the IHO determined that the district offered the student a FAPE for the 2024-25 school year, she declined to address the appropriateness of iBrain as a unilateral placement (IHO Decision at p. 7). 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.

[12] Although the District Court in Moonsammy found that a parent may request an IEE in the due process complaint notice in the first instance (2024 WL 4277521, at *15-*17), the Court indicated that parents should endeavor whenever possible to "[s]eparat[e] the IEE process from the formal dispute resolution process" as the Second Circuit Court of Appeals has explained that this "serves to reinforce the focus on collaboration and communication among an IEP Team" and "provides an additional opportunity for discussion and cooperation between parent and school before the parties feel that they need to resort to formal procedures" (Trumbull, 975 F.3d at 170).

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 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

In summary, the district failed to demonstrate how the student's hearing needs would be addressed by the February 2024 IEP. Review of the hearing record does not support the IHO's determination that the district offered the student a FAPE for the 2024-25 school year. 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 October 11, 2024, is modified by reversing that portion which found that the district offered the student a FAPE for the 2024-25 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 2024-25 school year and whether equitable considerations weigh in favor of granting funding for the costs of tuition or related expenses.

Dated: **Albany, New York**
April 7, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER