The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

Nos. 21-247 & 21-248

Applications of a STUDENT WITH A DISABILITY, by her parents, for review of determinations of hearing officers relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by Peter G. Albert, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Nathaniel R. Luken, Esq.

DECISION

I. Introduction

These proceedings arise under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. With respect to Appeal No. 21-247, petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO I) which denied their request to be reimbursed for their daughter's tuition costs at the International Institute for the Brain (iBrain) for a portion of the 2019-20 school year and for the 2020-21 school year. Respondent (the district) cross-appeals from IHO I's determination that it failed to demonstrate that it had offered to provide an appropriate educational program to the student for a portion of the 2019-20 school year. With respect to Appeal No. 21-248, the parents appeal from the decision of an IHO (IHO II) which dismissed their due process complaint notice relating to the 2021-22 school year. As Appeal Nos. 21-247 and 21-248 involve the same student and overlapping issues, they will be decided together. The appeal in 21-247 must be dismissed. The cross-appeal in 21-247 must be sustained. The appeal in 21-248 must be sustained in part and remanded to IHO II for further administrative 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

Prior to the 2019-20 school year, the student lived in another country, where, according to the parents, she received occupational therapy (OT) and speech-language therapy services (Dist.

Ex. 27 at p. 1; see Parent Ex. E at p. 1).[1, 2] When living outside the country, the student received instruction and services pursuant to an "individualized educational plan," which set forth goals and a "behaviour system" (Dist. Ex. 4). After being forced to evacuate their home in the aftermath of a hurricane, the student and her family relocated to the district in or around December 2019 (Dist. Ex. 27 at p. 2).

On January 3, 2020, the district provided the parents with a prior written notice reflecting that the district had formulated a "Comparable Service Plan" in which it recommended that the student attend a 12:1+(3:1) special class placement in a district specialized school and receive weekly related services, including two 30-minute sessions of individual OT, two 30-minute sessions of individual physical therapy (PT), and two 30-minute sessions of individual speech-language therapy, as well as assistive technology (communication board) and special transportation services (Parent Ex. I).[3] According to the prior written notice, the comparable services plan would be in place until a CSE convened to develop an IEP (id. at p. 1). In a school location letter dated January 3, 2020, the district notified the parents of the particular public school site to which it assigned the student to attend to receive the program and services recommended in the comparable service plan (Parent Ex. P).

In an email dated January 16, 2020, the student's mother notified the district that she visited the "proposed interim" public school site but found it would not be appropriate for the student "given the lack of 1:1 adult support during the school day and during transit to/from school, the duration of related services, and wide range of needs of the students in the proposed classroom" (Dist. Ex. 3).[4] Therefore, the mother notified the district that she would not enroll the student at the assigned public school site but stated her anticipation of the "IEP evaluation process" and the identification of "an appropriate permanent placement" (id.).

In a letter dated February 12, 2020, the parents indicated that "to date, the [district] program or placement offered c[ould not] appropriately address [the student's] educational needs" and provided the district with notice of their intent to unilaterally place the student at iBrain for the

[1] The student's aunt and uncle are the student's legal guardians; therefore, consistent with State regulation, they will be referred to as the "parents" throughout this decision (see Parent Ex. E at p. 1; Dist. Ex. 14 at p. 2; see also 8 NYCRR 200.1[ii][1]).

[2] As no exhibits were entered into evidence in the proceedings underlying Appeal No. 21-248, all citations to exhibits are to documents that were entered into evidence in the proceedings underlying Appeal No. 21-247.

[3] The hearing record in Appeal No. 21-247 contains multiple duplicative exhibits (compare Parent Exs. C, I, K, P, with Dist. Exs. 1, 2, 7, 26). For purposes of this decision and unless otherwise indicated, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content.

[4] During the impartial hearing, both the district and the parents offered exhibits into evidence that were described as a January 16, 2020 email from the parents to the district and, more specifically, described parent exhibit L as an email about the parents' visit to the assigned public school site (see Tr. I pp. 12, 16, 18, 79, 101, 113; Parent Ex. L; Dist. Ex. 3). The copy of parent exhibit L that was filed with the hearing record on appeal includes text characters that are not decipherable (Parent Ex. L). According to clarifications from the parties submitted in response to inquiry from the undersigned, it appears that the copy before IHO I was similarly garbled. It is likely, based on the description of the exhibits, that parent exhibit L included the same content as district exhibit 3. For purposes of this decision, district exhibit 3 will be relied on.

remainder of the 2019-20 school year and seek public funding for the costs thereof (Parent Ex. Q).[5] The parents requested that a "Full Committee," including a district physician in person, "reconvene" to develop an IEP for the student and stated that the student's then-current "IEP" did not include a full-time paraprofessional or transportation accommodations (id.).

On February 21, 2020, the parents executed an enrollment contract with iBrain for the student's attendance for a portion of the 2019-20 school year beginning on February 25, 2020 (Parent Ex. D).[6]

A. March 2020 Due Process Complaint Notice and Subsequent Events

On March 24, 2020, the parents filed a due process complaint notice alleging that the district failed to offer the student a FAPE for the 2019-20 school year (Parent Ex. A). Specifically, the parents alleged that the district failed to timely and sufficiently evaluate the student in all areas of suspected need; failed to develop measurable, specific, and appropriate goals; failed to recommend an appropriate placement to address the student's highly intensive management needs; and failed to recommend the appropriate, type, amount, and duration of related services required to address the student's needs (id. at pp. 3-4). For relief, the parents sought an order from an IHO directing the district to conduct OT, PT, speech-language, and neuropsychological evaluations, and fund the student's program at iBrain for the 2019-20 school year as well as door-to-door non-public transportation, including a travel paraprofessional, in an air-conditioned vehicle (id. at pp. 4-5).

On or around March 28, 2020, for reasons that the parents explained were related to the COVID-19 pandemic, the family left the country, and informed the district that they were "not sure" when or if they would be returning to the district (see Dist. Exs. 16 at p. 1; 21 at pp. 2-3). After leaving the country, the student received remote instruction from iBrain for the remainder of the 2019-20 school year (Tr. I pp. 305-06, 370-71, 405, 408-09).[7]

A CSE convened on June 9, 2020, to conduct the student's initial review and developed an IEP with a projected implementation date of June 24, 2020 (Parent Ex. C). Having found the student eligible for special education as a student with a traumatic brain injury, the CSE recommended she attend a 12-month school year program in a 6:1+1 special class in a district specialized school, along with full-time 1:1 paraprofessional services, assistive technology, one 60-minute session of group parent counseling and training per month, supports for school personnel, and the following related services on a weekly basis: five 60-minute sessions of individual OT, three 45-minute sessions of individual PT, and four 60-minute sessions of

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

[6] In addition, on February 12, 2020, the parents executed a contract with Sisters Travel and Transportation Services, LLC, for the transportation of the student to and from school for the remainder of the 2019-20 school year (Parent Ex. W).

[7] There is inconsistent evidence in the hearing record regarding whether the student received related services from iBrain remotely (compare Tr. I pp. 305-06, 370-71, 405; Parent Ex. V ¶ 14, with Tr. I pp. 153-54; Parent Ex. C at p. 6).

individual speech-language therapy (id. at pp. 1, 14, 21-23, 27). The June 2020 CSE also recommended several supports to address the student's management needs, 13 annual goals with corresponding short-term objectives, special transportation (a lift bus with air conditioning that could accommodate the student's regular sized wheelchair, limited travel time and curb pick-up, and 1:1 paraprofessional services), and a transition plan including post-secondary goals and transition activities (id. at pp. 13, 15-21, 24, 26-27).

On June 24, 2020, the parents executed a contract for the student's attendance at iBrain for the 12-month 2020-21 school year (Parent Ex. J).

By letter dated June 26, 2020, the parents informed the district that they did not believe that the district's "program and placement" could address the student's educational needs and notified the district of their intent to unilaterally place the student at iBrain for the 2020-21 school year and seek public funding for the costs thereof (Parent Ex. H). According to iBrain's director of special education, the student continued to receive remote instruction from iBrain during the 2020-21 school year (Tr. I pp. 371, 405, 407-08; Parent Ex. V ¶ 18).

B. July 2020 Due Process Complaint Notice and Subsequent Events

On July 6, 2020, the parents filed a due process complaint notice alleging that the district failed to offer the student a FAPE for the 2020-21 school year (Parent Ex. K). The parents alleged that the June 2020 CSE recommended an inappropriate 6:1+1 special class in a district specialized school, failed to recommend sufficient related services and supports, and refused to provide assistive technology devices or services (id. at pp. 3-5). In addition, the parents asserted that the district failed to timely identify a public school site at which the student could receive the program and services recommended in the June 2020 IEP and that, based on the parents' investigation, it did not appear that the program recommended was available in the district for the extended school year (id. at p. 3). For relief, the parents requested that the district be required to fund the costs of the student's attendance at iBrain for the 2020-21 school year, including related services and a 1:1 paraprofessional, as well as the costs of the student's special transportation (id. at p. 6). In addition, the parents requested that the district be required to provide the student with assistive technology devices and services (id.). The parents requested that the March and July 2020 due process complaint notices be consolidated (id. at pp. 1-2).

In a prior written notice and school location letter dated July 7, 2020, the district summarized the recommendations of the June 2020 CSE and notified the parents of the particular public school site to which the district assigned the student to attend for the 2020-21 school year (Dist. Ex. 29).

In the administrative proceeding to address the 2019-20 and 2020-21 school years (proceeding I), a prehearing conference was held before IHO I on September 11, 2020, at which point, the parties discussed the potential for consolidating both underlying due process proceedings and set a date for a status conference (Tr. I pp. 1-5).[8] On September 23, 2020, the parties participated in a status conference at which a hearing date to address pendency was scheduled (Tr. I pp. 6-10). An October 19, 2020, hearing date was devoted to discussing the parties' positions

[8] Citations to the transcript of the impartial hearing that was held in proceeding I shall be cited as "Tr. I."

regarding the student's pendency placement (Tr. I pp. 11-38). In an interim decision dated October 22, 2020, IHO I granted the request to consolidate the 2019-20 and 2020-21 school year due process proceedings (Oct. 22, 2020 IHO Order on Consolidation). In an interim decision dated November 9, 2020, IHO I denied the parents request for a finding that iBrain was the student's stay-put placement during the pendency of the proceedings (Nov. 9, 2020 Interim IHO Decision at p. 3).[9]

While proceeding I was ongoing, the parents and district communicated regarding the family's plans. According to emails exchanged between the parents and the district in October 2020, the student's sibling was attending a school outside of the country (Dist. Ex. 20). According to an email from the parents dated November 12, 2020, the family was still out of the country and had not yet decided whether they would be returning to the district (Dist. Ex. 21 at p. 1).

A hearing date was held in proceeding I on December 2, 2020, during which it was discussed that a "threshold legal issue" relating to the student's residency may need to be addressed (Tr. I pp. 39-47).

The district reached out to iBrain on December 9, 2020, requesting confirmation of the student's enrollment at iBrain and "attendance to date" (Dist. Ex. 22). In addition, the district contacted the parents by email dated December 10, 2020, to begin planning for the student's annual review meeting and indicated that, if the student was still attending school outside of the country, the district could "discharge her" and, if the family decided to return to the district, the district could "easily reopen her case" (Dist. Ex. 23). The hearing record does not include responses to the district's December 2020 correspondences.

In a prior written notice dated January 4, 2021, the district notified the parents of the district's determination that, effective March 26, 2020, the student was "not eligible or entitled to attend [district] schools" for the 2020-21 school year "because [she] was not a resident of the district" (Dist. Ex. 24 at p. 1).

In proceeding I, the district submitted a motion on January 15, 2021, alleging that the parents and student had never been residents of the district and, therefore, requesting that IHO I dismiss the parents' March and July 2020 due process complaint notices (Jan. 15, 2021 Dist. Mot. to Dismiss). A January 22, 2021, hearing date was devoted to discussing a "briefing schedule" for the parents to respond to the district's motion and for the district to thereafter reply (Tr. I pp. 48-52). The parents submitted an opposition to the district's motion dated February 12, 2021 (Feb. 12, 2021 Parent Opp. to Mot. to Dismiss).[10] In an interim decision dated March 2, 2020, IHO I determined that the district's motion to dismiss would be held "in abeyance" while the potential for the parents to file an appeal to the Commissioner of Education regarding the student's residency was explored (Mar. 2, 2020 Interim IHO Decision at p. 2). On March 17, 2021 and April 28, 2021,

[9] The parents appealed IHO I's interim decision on pendency and, in a decision dated February 10, 2021, an SRO affirmed IHO I's decision on different grounds (Application of a Student with a Disability, Appeal No. 20-199).

[10] The district did not submit a reply to the parent's opposition (see Mar. 2, 2020 Interim IHO Decision at p. 1).

the parties participated in status conferences before IHO I, at which time, the parents' appeal to the Commissioner of Education was discussed (Tr. I pp. 53-69).

On April 21, 2021, iBrain entered into a residential lease agreement for an apartment to be occupied by the parents with a lease term beginning April 14, 2021 and ending July 15, 2021 (Dist. Ex. 28).

On April 27, 2021, the parents filed a petition with the Commissioner of Education for review of the district's residency determination (Parent Ex. M; see Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047 [2021], available at http://www.counsel.nysed.gov/Decisions/volume61/d18047). Relating thereto, on May 10, 2021, the Commissioner granted a stay of the district's residency determination and, therefore, ordered that the district be deemed the student's district of residence while the petition was pending, which would include "responsibility for offering and providing a [FAPE] to the student" (Parent Ex. N).

According to the parents, a CSE convened on May 27, 2021, and developed an IEP for the student for the 2021-22 school year (July 2021 Due Process Compl. Notice at p. 3).[11]

In proceeding I, the parties participated in a status conference on June 1, 2021, during which the dates for the substantive hearing were scheduled (Tr. I pp. 70-76). The substantive portion of the impartial hearing in proceeding I was conducted over five days between June 18, 2021 and August 9, 2021 (Tr. I pp. 77-420).

C. July 2021 Due Process Complaint Notice and Subsequent Events

While proceeding I was pending, the parents filed a due process complaint notice, dated July 6, 2021, alleging that the district failed to offer the student a FAPE for the 2021-22 school year (July 2021 Due Process Compl. Notice). The parents alleged that the district failed to conduct sufficient evaluations of the student and that the May 2021 IEP included inappropriate management needs, an inappropriate recommendation for a 12:1+(3:1) special class, and insufficient related services and supports (id. at pp. 3-5). In addition, the parents asserted that the particular public school to which the district assigned the student to attend would not have been able to implement the student's program and placement (id. at p. 5). For relief, the parents requested that the district be required to fund the costs of the student's attendance at iBrain for the 2021-22 school year, including related services and a 1:1 paraprofessional, as well as the costs of the student's special transportation (id. at p. 6). In addition, the parents requested that the district be required to provide the student with assistive technology devices and services and/or reimburse the parents for costs associated with the student's assistive technology device (id. at pp. 6-7). The parents also requested district funding of an independent educational evaluation (IEE) and a "transition evaluation" of the student (id. at p. 7). The parents requested that the July 2021 due process complaint notice be consolidated with proceeding I (id. at pp. 1-2).

In an interim decision dated July 13, 2021, IHO I denied the parents' request for consolidation of the July 2021 due process complaint notice with proceeding I (July 13, 2021 IHO

[11] A copy of the May 2021 IEP was not included in either of the hearing records on appeal.

Order on Consolidation). A different IHO (IHO II) was assigned to preside over proceedings arising from the parents' July 2020 due process complaint notice (proceeding II) (see Tr. II p. 2).[12]

An impartial hearing convened in proceeding II and on July 26, 2021, August 19, 2020, and October 25, 2021, the parties and IHO II discussed the history of proceeding I and the appeal before the Commissioner of Education, as well as preliminary matters relating to the impartial hearing process (Tr. II pp. 1-70).

On September 13, 2021, the Commissioner of Education issued a decision finding that the parents' petition that challenged the district's residency determination was untimely (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047). The Commissioner further indicated that, "[w]hile petitioners have not submitted any evidence reflecting their physical presence within respondent's district, they retain the right to reapply for admission, on the student's behalf, if and when they submit sufficient proof thereof" (id.).

As part of proceeding II, the district submitted a motion dated October 4, 2021, alleging that the parents and student were not residents of the district and, therefore, requested that IHO II dismiss the parents' July 2021 due process complaint notice (Oct. 4, 2021 Dist. Mot. to Dismiss). The parents submitted an opposition to the district's motion dated October 18, 2021, to which the district replied on October 27, 2021 (Oct. 18, 2021 Parent Opp. to Mot. to Dismiss; Oct. 27, 2021 Dist. Reply in Support of Mot. to Dismiss).

D. Impartial Hearing Officer Decisions

In a decision dated November 5, 2021, IHO I found that, given the Commissioner's decision dismissing the parents' appeal of the district's residency determination, he was "constrained to find that the [s]tudent was not eligible to attend [d]istrict schools or to receive any special education services therefrom, from March 26, 2020 through the 2020-2021 school year" (IHO I Decision at p. 6). Therefore, IHO I focused the remainder of his decision on reviewing whether the district offered the student a FAPE from February 25, 2020, when the student was first enrolled at iBrain, through March 25, 2020 (id. at p. 7). In this regard, IHO I found that the district's January 2020 comparable service plan failed to offer the student a FAPE (id. at p. 8). In particular, IHO I found that the proposed 12:1+(3:1) special class "was clearly inadequate" given the student's severe impairments and need for a highly individualized curriculum (id.). Next, IHO I found that the parents had met their burden to demonstrate that iBrain was an appropriate unilateral placement during the 2019-20 school year, noting that the school offered a special education program for students with brain injuries with small classes, related services, and 1:1 paraprofessionals, and that iBrain addressed the student's specific deficits resulting in the student making progress in her academics and related services (id. at pp. 9-10). Finally, IHO I found no equitable considerations that would warrant a reduction or denial of tuition reimbursement, noting that the parents provided the district with timely notice of their intent to unilaterally place the student and cooperated with the CSE process (id. at p. 11). Therefore, IHO I ordered the district to directly fund the costs of the student's tuition at iBrain for the limited period of February 25, 2020 through March 25, 2020 (id. at pp. 11-12). IHO I denied the parents' request for the costs of the student's transportation

[12] Citations to the transcript of the impartial hearing that was held in proceeding II shall be cited as "Tr. II."

given evidence in the hearing record that the student walked with the parents to the school (id. at p. 11).

As for proceeding II, IHO II issued a decision dated November 10, 2021, granting the district's motion to dismiss the parents' July 2020 due process complaint notice (IHO II Decision at p. 3).[13] First, the IHO noted that the parties were in agreement that an IHO does not have authority to resolve a residency dispute (id. at p. 2). IHO II found that the September 2021 decision of the Commissioner of Education left the district's residency determination intact and was the "law of the case as it pertains to this student" (id.). Further IHO II found that statements by the parents' counsel during the impartial hearing amounted to an admission that the student had not reapplied for admission to the district for the 2021-22 school year (id.). Therefore, IHO II found that the district's residency determination stood and applied to the 2021-22 school year as well (id.). IHO II also opined that a decision to the contrary would offend the doctrine of res judicata (id. at pp. 2-3). Finally, IHO II rejected the parents' argument that the litigation concerning the student's residency was incomplete and, therefore, declined to hold the district's motion in abeyance (id. at p. 3).

IV. Appeal for State-Level Review

The parents appeal from IHO I and IHO II's decisions, arguing that IHO I and IHO II erred in finding that the student was not eligible to attend school in the district or receive special education from the district after March 25, 2020, including for the entirety of the 2020-21 and 2021-22 school years, due to her residency status. The parents contend that, because the parents have filed an application to reopen the Commissioner of Education's September 2021 decision, as well as an Article 78 proceeding in New York State Supreme Court challenging the Commissioner's decision, the district's residency determination is not final and may not be relied on to find that the doctrines of law of the case or res judicata precluded the parents' claims.[14, 15] Moreover, the parents note that the Commissioner's decision did not address the merits of the parents' appeal, instead finding that the petition was untimely. The parents also allege that the stay issued by the Commissioner on May 10, 2021, afforded the student the status of a resident student from February 2020 through the date of the Commissioner's September 2021 decision and that their Article 78 proceeding requests reinstatement of the stay. Therefore, the parents argue that IHO I and IHO II erred in relying on the Commissioner's decision to find that the student was not eligible for special education after March 25, 2020.

[13] IHO II's decision is not paginated; for the purposes of this decision, the pages will be cited by reference to their consecutive pagination with the cover page as page one (see IHO II Decision at pp. 1-3).

[14] On December 16, 2021, the Commissioner of Education denied the parents' application to reopen the September 2021 decision (see Application to reopen the Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,061 [2021], available at http://www.counsel.nysed.gov/Decisions/volume61/d18061).

[15] With the parents' requests for review in both matters, they submit identical copies of their order to show cause, Article 78 petition, and affidavit with exhibits in support thereof. For purposes of this decision, the documents will collectively be cited as "Reqs. for Rev. Ex. A" with the consecutive page number.

In addition, for Appeal No. 21-247, the parents argue that, but for IHO I's failure to find that the district was required to provide the student a FAPE after March 25, 2020, he correctly determined that the district's comparable service plan did not offer the student a FAPE for the 2019-20 school year. Concerning the 2020-21 school year, the parents allege that IHO I failed to address the parents' claim that the district failed to give the parents timely notice of the particular public school site to which it assigned the student to attend. In addition, the parents argue that IHO I erred in failing to order the district to fund the costs of transportation.

For appeal No. 21-248, the parents assert that IHO II erred by not addressing their claims relating to the 2021-22 school year and, in particular, allege that the district failed to evaluate the student in all areas of disability, the May 2021 CSE inappropriately recommended that the student attend a 12:1+4 special class, and there was "no evidence" the assigned public school site could implement the student's IEP.

In the respective appeals, the parents request findings that the district failed to offer the student a FAPE for the portion of the 2019-20 school year after February 2020 and the entirety of the 2020-21 and 2021-22 school years, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weigh in favor of the parents' requests for district funding of the costs of the student's tuition. Alternatively, the parents request that the matters be held in abeyance until the special proceeding concludes or remanded to the respective IHOs to address the parents' remaining claims for the time periods at issue.[16]

In answers to the respective appeals, the district responds to the parents' allegations. In addition, in Appeal No. 21-247, the district interposes a cross-appeal alleging that IHO I erred in finding that the district failed to offer the student a FAPE for the period of February 25, 2020 through March 25, 2020, that iBrain was an appropriate unilateral placement, and that equitable considerations weighed in favor of an award of tuition funding. The district argues that IHO I erred in finding that a 12:1+4 special class was insufficiently supportive. The district further argues that, because the student transferred to the district in the middle of the school year, the CSE correctly developed a comparable services plan to implement until the district could conduct its own evaluations of the student. Regarding the unilateral placement, the district argues that the parents did not meet their burden to prove that iBrain provided the student with a program specially designed to meet her unique needs. Next, the district argues that IHO I did not "address the paramount equities issue" concerning iBrain's recruitment of the student to move to the district on a temporary basis to attend iBrain and asserts that the parents never intended to enroll the student in a district program.

[16] In Appeal No. 21-247, the parents also purport to appeal IHO I's pendency determination, but as that decision was previously appealed, the State-level administrative decision is the law of the case (see Application of a Student with a Disability, Appeal No. 20-199), and I cannot revisit the issue (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 94 [2d Cir. 2005]; Cone v. Randolph Co. Schs. Bd. of Educ., 657 F. Supp. 2d 667, 674-75 [M.D.N.C. 2009]; see generally Application of a Child with a Disability, Appeal No. 98-73 [noting that a pendency determination by an SRO would not be reopened during the proceeding once it was decided]). Accordingly, the student's pendency placement will not be further discussed.

In a reply and answer to the district's answer with cross-appeal in Appeal No. 21-247 and in a reply to the district's answer in Appeal No. 21-248, the parents respond to the district's allegations and arguments.

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. __, 137 S. Ct. 988, 999 [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]). 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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [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]).[17]

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 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).

[17] 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., 137 S. Ct. at 1000).

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. Effect of the District's Residency Determination

The responsibility for offering a FAPE to a student rests with the school district in which the student resides (N.Y. Educ. Law §§ 3202[1]; 4401-a; 4402[1][b][2]). State regulation provides that a board of education or its designee shall determine whether a child is entitled to attend a school district's schools (8 NYCRR 100.2[y][4]).

Here, on January 4, 2021, the district provided the parents with notice of its determination that, effective March 26, 2020, the student was "not eligible or entitled to attend [district] schools" for the 2020-21 school year "because [she] was not a resident of the district" (Dist. Ex. 24 at p. 1).

Typically challenges to district determinations on residency are resolved by the Commissioner of Education (see Educ. Law § 310; 8 NYCRR 100.2[y][6]; see, e.g., Appeal of Students with Disabilities, Decision No. 17,687 [July 9, 2019], available at http://www.counsel.nysed.gov/Decisions/volume59/d17687; Appeal of a Student with a Disability, Decision No. 16,552 [Sept. 16, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16552.pdf; Appeal of a Student with a Disability, Decision No. 16,533 [Aug. 28, 2013], available at http://www.counsel.nysed.gov/Decisions/volume53/documents/d16533.pdf), and the IDEA does not clearly set forth procedures that must be employed by a State to resolve residency disputes involving students with disabilities.

In the present matter, the Commissioner of Education has dismissed the parents' petition appealing the district's January 2021 residency determination because it was not timely filed (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047).

I now turn to consider whether the IHOs correctly relied on the Commissioner of Education's September 2021 determination to conclude that the student was not eligible to attend the schools of the district after March 2020, and, therefore, was not eligible for a FAPE.

It is well-established that the doctrine of res judicata and the related doctrine of collateral estoppel apply to administrative proceedings when the agency acts in a judicial capacity (see K.C. v. Chappaqua Cent. Sch. Dist., 2017 WL 2417019, at *6 [S.D.N.Y. June 2, 2017]; K.B. v. Pearl River Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012]; Schreiber v. E. Ramapo Cent. Sch. Dist., 700 F. Supp. 2d 529, 554-55 [S.D.N.Y. 2010]; Grenon v. Taconic Hills Cent. Sch. Dist., 2006 WL 3751450, at *6 [N.D.N.Y. Dec. 19. 2006]). The doctrine of res judicata (or claim preclusion) "precludes parties from relitigating issues that were or could have been raised in a prior proceeding" (K.B., 2012 WL 234392, at *4; see Perez v. Danbury Hosp., 347 F.3d 419, 426 [2d Cir. 2003]; Murphy v. Gallagher, 761 F.2d 878, 879 [2d Cir. 1985]; Grenon, 2006 WL 3751450, at *6). Res judicata applies when: (1) the prior proceeding involved an adjudication on the merits; (2) the prior proceeding involved the same parties or those in privity with the parties;

and (3) the claims alleged in the subsequent action were, or could have been, raised in the prior proceeding (see K.B., 2012 WL 234392, at *4; Grenon, 2006 WL 3751450, at *6).

In addition to res judicata, parties are also limited by the doctrine of collateral estoppel (or issue preclusion), which "precludes parties from litigating 'a legal or factual issue already decided in an earlier proceeding'" (Grenon, 2006 WL 3751450, at *6, quoting Perez, 347 F.3d at 426). To establish that a claim is collaterally estopped, a party must show that:

> (1) the identical issue was raised in a previous proceeding; (2) the issue was actually litigated and decided in the previous proceeding; (3) the party had a full and fair opportunity to litigate the issue; and (4) the resolution of the issue was necessary to support a valid and final judgment on the merits.

(Grenon, 2006 WL 3751450, at *6 [internal quotations omitted]).

Here, regardless of the merits of the district's January 2021 determination that the student was not a resident of the district as of March 2020, the parents cannot collaterally attack that decision in these proceedings as the parents' appeal of that decision was litigated and decided by the Commissioner of Education.[18]

In arguing that the IHOs erred in relying on the Commissioner of Education's September 2021 decision dismissing the parents' petition, the parents allege that the decision was not final given that the parents filed an article 78 proceeding challenging the determination.[19] This contention is without merit, as a pending appeal does not deprive a challenged judgment of its res judicata effect (see, e.g., Petrella v. Siegel, 843 F.2d 87, 90 [2d Cir. 1988]; Antonious v. Muhammad, 873 F. Supp. 817, 824 [S.D.N.Y. 1995], aff'd, 8 Fed. App'x 78 [2d Cir. May 1, 2001]).

In addition, the parents argue that, because the Commissioner of Education's September 2021 decision did not address the merits of the parents' appeal and instead found their petition untimely, it should not be accorded preclusive effect. However, in New York a dismissal based

[18] With respect to the parents' challenge to the merits of the district's January 2021 determination, the Commissioner noted that "[a]lthough the appeal must be dismissed, the process followed by respondent here was deficient" for the same reasons as cited in another decision regarding the same district and a different student (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047; see Appeal of A.L. and E.A.-L. 61 Ed Dept Rep, Decision No. 18,041). In the cited decision, the Commissioner noted that a district cannot make residency determinations with retroactive effect and that the district must provide parents with the "opportunity to submit information concerning the child's right to attend school in the district" (Appeal of A.L. and E.A.-L. 61 Ed Dept Rep, Decision No. 18,041).

[19] The parents also contended the decision was nonfinal based on their petition to the Commissioner of Education to reopen the decision; however, as noted above, that petition was denied on December 16, 2021, and accordingly, the parents' argument in this regard is without merit and will not be further discussed (see Application to reopen the Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,061).

on untimeliness operates as an adjudication on the merits (see, e.g., Palmer-Williams v United States, 699 Fed. App'x 1, 3 [2d Cir. June 21, 2017]).[20]

Accordingly, the parents' allegations that the IHOs erred in relying on the district's January 2021 residency determination are without merit.

Notwithstanding the preclusive effect of the district's residency determination, the parents argue that the stay issued by the Commissioner of Education gave the student the status of a resident student for the period of time from February 2020 through September 13, 2021, when the Commissioner issued a decision.[21]

The Commissioner has the power to determine whether an appeal shall stay proceedings (N.Y. Educ. Law § 311[2]; 8 NYCRR 276.1). As noted above, on May 10, 2021, the Commissioner granted the stay requested by the parents and directed the district "to admit" the student to the schools of the district and offer and provide her a FAPE until the Commissioner issued a decision (Parent Ex. N). The Commissioner issued a decision denying the parents' petition on September 13, 2021 (Appeal of R.A. and D.A., 61 Ed. Dep't Rep., Decision No. 18,047).

Although the parents argue as though it is a foregone conclusion that the Commissioner's May 2021 stay would retroactively apply to cover the entirety of the time period during which the district found the student was not a resident of the district, the plain language of the stay order does not support such a conclusion. Rather, the Commissioner's decision is worded to prospectively require the district "to admit [the student] to the schools of the district tuition free, pending an ultimate determination of the appeal" (Parent Ex. N). Thus, from May 10, 2021 through September 13, 2021, the district was responsible to offer the student a FAPE, and the district's efforts in this regard are the subject of proceeding II in this matter and, as discussed below, must be remanded to IHO II to address the parents' claims.

Based on the foregoing, the student was entitled to attend the schools of the district as a resident student from approximately early January 2020 (shortly after the student moved to the district) through March 26, 2020 (the date on which the district retroactively determined the student was not a resident of the district), as well as from May 10, 2021 (the date of the stay order)

[20] During proceeding II, the parents also took the position that the student had been a resident of the district without interruption and that, therefore, the parents were not required to reapply for the student's admission to the district schools for the 2021-22 school year upon their purported return to the district (see Tr. p. 73). Based on the representations of parents' counsel, IHO II found that the student had not reapplied for admission to the district for the 2021-22 school year and that, therefore, the district's January 2021 residency determination remained in effect (IHO II Decision at p. 2). In Appeal No. 21-248, the parents have not alleged that IHO II erred in this reasoning. Accordingly, I find that the IHO's finding that the parents had not reenrolled the student in the district and that, therefore, the district's residency determination remained in effect for the 2021-22 school year is not challenged by the parents and is, therefore, final and binding, and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[21] The parents' request for a stay attendant to their request that the Commissioner reopen their appeal was denied (see Oct. 27, 2021 Dist. Reply in Support of Mot. to Dismiss Ex. 5).

through September 13, 2021 (the date of the Commissioner of Education's decision dismissing the parents' petition).

B. January 2020 Comparable Services Plan

Regarding the period of December 2019 through March 2020, the district cross-appeals the IHO's determination that the January 2020 comparable services plan did not offer the student a FAPE.

The rules governing transfers of students from a public agency within the State or from a public agency in another state in which the IDEA applies do not address the situation when a student newly arrives in the district from a foreign nation where the IDEA did not apply. The use of a comparable services plan tends to arise when a CSE or IEP team of a public agency has met, evaluated the student, and the student has already been found eligible for services in accordance with the IDEA's procedures. For example, when a student with a disability has an IEP in effect in a public agency in one state and then transfers to another public agency in the different state and enrolls in the new school within the same school year, the new public agency must provide "comparable services" to those services described in the student's IEP from the prior public agency. Those comparable services must be provided until the new public agency conducts an evaluation and develops, adopts, and implements a new IEP, if appropriate (34 CFR 300.323[f][1], [2]; 8 NYCRR 200.4[e][8][ii]). "Comparable services" means services that are "'similar'" or "'equivalent'" to those described in the student's IEP from the previous public agency (IEPs for Children Who Transfer Public Agencies in the Same State, 71 Fed. Reg. 46681 [Aug. 14, 2006]).

Here, the district learned from the parents what the student received when attending school outside of the country and developed a comparable services plan (Tr. I pp. 121-31; Dist. Ex. 1). However, as the country in which the student previously resided was not subject to the IDEA, the student did not have an IEP in place when she relocated to the district, and the district was not required to develop a comparable services plan.[22]

If a student enters a school district without an IEP in place from another district or state and the district has reason to believe that the student is a student with a disability, the district must conduct an initial evaluation and determination of eligibility. Once a referral is received by the CSE chairperson, the chairperson must immediately provide the parents with prior written notice, including a description of the proposed evaluation or reevaluation and the uses to be made of the information (8 NYCRR 200.4[a][6]; 200.5[a][5]). In addition, the district must, within 10 days of receipt of the referral, request the parent's consent to initiate the evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]).[23] After parental consent has been

[22] There is federal and State guidance that addresses situations similar to the present matter where a student is relocated to a district as a result of a hurricane (see Letter to Neeley, 45 IDELR 63 [OSEP 2005]; "Students Displaced by Recent Hurricanes," NYSED Mem. [Oct. 2017], available at http://www.nysed.gov/common/nysed/files/students-displaced-by-recent-hurricanes.pdf). However, the guidance documents do not indicate that a district would be required to develop a comparable services plan or immediately implement a special program and services for a student relocating from a country outside the United States.

[23] State regulation also provides that, upon receiving a referral, a building administrator may request a meeting

obtained by a district, the "initial evaluation shall be completed within 60 days of receipt of consent" (8 NYCRR 200.4[b]; see also 8 NYCRR 200.4[b][7]). "Within 60 school days of the receipt of consent to evaluate for a student not previously identified as having a disability . . . the board of education shall arrange for appropriate special programs and services" (8 NYCRR 200.4[e][1]).[24]

The hearing record is not entirely developed regarding the steps the district took to evaluate the student and make an initial eligibility determination. According to a social history conducted on January 3, 2020, the parents "consented to this evaluation process" (Dist. Ex. 27 at p. 1); however, it is unclear if the consent was specific to the parents' participation in the social history or applied to the entire evaluation process. The district school psychologist testified that, at the time of the social history, the district did not get the parents' written consent to conduct evaluations and that, in March 2020, she emailed the parents to ask her to send a signed consent form for evaluations but that the consent was never submitted to the district (Tr. I p. 148; Dist. Ex. 21 at p. 3).[25]

In any event, even considering January 3, 2020, as the date of consent, the district had 60 days to complete evaluations and 60 school days to arrange for appropriate special programs and services for the student (8 NYCRR 200.4[b][7]; [e][1]), which would mean that the district had at least until approximately early April 2020 to have a special education program for the student in place, which was after the March 26, 2020 date by which the district determined the student was no longer a resident of the district (see Dist. Ex. 24 at p. 1).[26] Thus, although the district may have made some procedural missteps in the process of engaging in educational planning for the student, any procedural violations did not impede the student's right to a FAPE, significantly impede the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or cause 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]). In essence, although the comparable services plan was not appropriately based on an IEP developed by another school district subject to the IDEA, it offered the student a program and services that represented more than the student was entitled to under the applicable provisions of the IDEA and State regulations.

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with the parent and the student (if appropriate) to determine whether the student would benefit from additional general education support services as an alternative to special education, including speech-language services, AIS, and any other services designed to address the learning needs of the student (see 8 NYCRR 200.4[a][9]). Any such meeting must be conducted within 10 school days of the building administrator's receipt of the referral and must not impede the CSE from continuing its duties and functions (see 8 NYCRR 200.4[a][9][iii][a]-[b]).

[24] A "school day" is defined as "any day, including a partial day, that students are in attendance at school for instructional purposes" (8 NYCRR 200.1[n][1]).

[25] The school psychologist testified that, in such instances, the district would obtain "passive consent," whereby the district documents "two outreaches" to the parents; the school psychologist indicated that this occurred with the parents (Tr. I p. 148).

[26] While the hearing record does not include a district calendar, between early January and early April, in addition to weekends, public schools are generally closed for Dr. Martin Luther King Jr. Day and midwinter recess.

Based on the foregoing, IHO I erred in finding that the comparable services plan was inappropriate to meet the student's needs and that, as a result, the district denied the student a FAPE for the period of February 25, 2020, when the student was first enrolled at iBrain, through March 25, 2020 (see IHO Decision I at pp. 7-8).

C. May 2021 IEP—Remand

After the Commissioner's May 10, 2021, issuance of a stay of the district's residency determination (Parent Ex. N), a CSE reportedly convened on May 27, 2021 (see July 2021 Due Process Compl. Notice at p. 3). In their July 2021 due process complaint notice, the parents set forth claims alleging that the May 2021 CSE process and resultant IEP denied the student a FAPE (see id. at pp. 3-7). In dismissing the due process complaint notice based on the student's residency, IHO II did not address the effect of the stay (see IHO II Decision at pp. 2-3). Moreover, as IHO II dismissed the due process complaint notice before receiving evidence, there is no hearing record on which to base a determination regarding the district's offer of a FAPE. Thus, in light of the stay, which specifically provided that the district would be responsible to offer and provide the student a FAPE during the pendency of the residency appeal (Parent Ex. N), IHO II erred in dismissing the parents' claims in their entirety.

When an IHO has not addressed claims set forth in the 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]). Accordingly, the parents' claims relating to the May 2021 CSE and IEP, as set forth in their July 2021 due process complaint notice, must be remanded to IHO II to develop the hearing record and render a determination regarding that period of time from May 10, 2021 through the date of the Commissioner's decision, September 13, 2021.[27]

VII. Conclusion

For the period of time after the student moved to the district on or around December 2019 until the date on which the district deemed the student to no longer reside in the district (March 25, 2020), the district did not deny the student a FAPE, and IHO I erred in finding otherwise. Given the district's residency determination, after March 25, 2020, the student was not eligible to attend the schools of the district and, therefore, was not eligible for a FAPE, except for the period of time when the stay issued by the Commissioner was in effect (i.e., from May 10, 2021 through September 13, 2021). For the period when the stay was in effect, the matter must be remanded to IHO II to develop the hearing record and issue a decision regarding the parents' claims that the May 2021 IEP did not offer the student a FAPE.

[27] To the extent there is a period of time between the effective date of the stay and the anticipated implementation date of the May 2021 IEP, I leave to IHO II's discretion to determine if there are issues remaining with respect to the district's offer of a FAPE for that period of time; however, it would make little sense to remand proceeding I to IHO I at this juncture to address such a limited period of time.

THE APPEAL IN NO. 21-247 IS DISMISSED.

THE CROSS-APPEAL IN NO. 21-247 IS SUSTAINED.

THE APPEAL IN 21-248 IS SUSTAINED IN PART.

IT IS ORDERED that IHO I's decision dated November 5, 2021, is modified by reversing that portion which found that the district failed to offer the student a FAPE and ordered the district to directly fund the costs of the student's tuition at iBrain for the period of February 25, 2020 through March 25, 2020; and

IT IS FURTHER ORDERED that the matter is remanded to IHO II to reconvene the impartial hearing and issue a determination regarding whether the district offered the student a FAPE for the period of May 10, 2021 through September 13, 2021.

Dated: **Albany, New York**
February 28, 2022

STEVEN KROLAK
STATE REVIEW OFFICER