



The University of the State of New York

The State Education Department

State Review Officer

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No. 22-165

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:

Brain Injury Rights Group, Ltd., attorneys for petitioner, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Gail M. Eckstein, 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 for direct payment of the costs of her son's attendance at the International Academy for the Brain (iBrain) from September 19, 2022 through October 12, 2022.¹ The appeal must be dismissed.

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.

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

§§ 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 experienced a brain injury resulting in severe impairments in the student's cognition, language, memory, attention, reasoning, abstract thinking, judgment, problem-solving, sensory, perceptual and motor abilities, psycho-social behavior, physical functions, information processing, and speech (Parent Ex. H at p. 28). After an accident that occurred when the student was three years of age, he received a diagnosis of cerebral palsy (Parent Exs. B at p. 1; C at p. 1; H at pp. 1-2). The student is also non-verbal and non-ambulatory and has received diagnoses of

hypoxic ischemic encephalopathy, spastic/dystonic quadriplegia, cortical visual impairment, and developmental delays (Parent Exs. H at p. 1; I at p. 1).

According to the hearing record, the student lived in a large city outside the United States, where he received special education and related services in a specialized school from April 2012 to March 2022 (Parent Exs. B at p. 1; C at p. 1; I at pp. 1-2). In March 2022, the student moved into Westchester, New York and subsequently moved to the district in June 2022 (Tr. pp. 82, 96; Parent Ex. I at p. 2). The parent testified that she tried to register the student for public school when she resided in Westchester but she found that the "system" was "inadequate" for the student (Tr. pp. 98-99).

According to the parent, on June 17, 2022, she went to the CSE "Family Welcome Center" and provided the placement officer with educational plans from the student's out of country specialized school to register the student in the school district (Tr. pp. 99-100; Parent Ex. I at p. 2; see Parent Exs. K; L).

According to the parent, "[d]uring the summers, [the student] attended an educational program at Blythesdale Children's Hospital in Westchester" (Parent Ex. I at pp. 1-2).²

On August 15, 2022, the parent brought the student to the district for evaluations and the district conducted a psychoeducational evaluation of the student (Parent Ex. I at pp. 2-3).³

In a letter dated August 25, 2022, the parent provided the district with notice that the parent visited the CSE in June 2022 and the district failed schedule a CSE meeting or recommend a school for the student (Parent Ex. D at p. 1). Because the district failed to timely evaluate and develop an IEP for the student, the parent indicated her intention to place the student at iBrain (id. At pp. 1-2).

On September 9, 2022, the parent executed an enrollment contract for the student's attendance at iBrain for the 2022-23 school year (Parent Ex. E at p. 6). On September 19, 2022, the parent executed an agreement for the provision of transportation of the student to and from iBrain for the 2022-23 school year (Parent Ex. G). The student began attending iBrain on September 19, 2022 in a 6:1+1 special class with related services. (Parent Exs. E at p. 1; I at p. 1).

² There appears to be a mistake in the parent's testimony by affidavit, which indicates that a CSE meeting was held for the student in March 2022 (Parent Ex. I at p. 2). The IHO indicated in a footnote that this statement, Paragraph 11 in the parent's affidavit, Exhibit J, was stricken from the record at the parent's request; however, the hearing record indicates that the parent's affidavit is Exhibit I (IHO Decision at p. 3 n.1; Tr. p. 86; Parent Ex. I at p. 2). Consistent with the IHO's decision, but correcting the exhibit letter, Paragraph 11 in the parent's affidavit, Exhibit I, will be stricken from the record.

³ The August 15, 2022 psychoeducational evaluation conducted by the district was not entered into the hearing record. According to the parent, the district's August 15, 2022 psychoeducational evaluation was not conducted in an appropriate testing environment and did not include the use of appropriate testing measures for the student (Parent Ex. I at p. 3).

A. Due Process Complaint Notice

By due process complaint notice dated August 29, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 4). Initially, the parent asserted that the student was entitled to placement at iBrain for the pendency of the proceeding because the student's prior placement was unavailable and iBrain was the student's operative placement for the 2022-23 school year (id. at p. 2).

Turning to the parent's assertion that the district denied the student a FAPE for the 2022-23 school year, the parent argued that the district failed to timely convene a CSE meeting and develop an IEP for the student (id.). In addition, the parent argued that the district failed to develop a comparable service plan for the student (id.). The parent then asserted that the district failed to evaluate the student in all areas of suspected disability (id.). Next, the parent alleged that the district conducted a flawed psychological evaluation and social history update (id.). The parent indicated that the student required an independent neuropsychological evaluation to determine his needs and abilities (id.). The parent also alleged that the district failed to conduct updated evaluations in occupational therapy (OT), physical therapy (PT), speech-language therapy, assistive technology, and music therapy (id.). Additionally, the parent alleged that the district failed to recommend a school location for the student (id.).

For relief, the parent requested a finding that the district failed to offer the student a FAPE for the 2022-23 school year; a finding that iBrain was an appropriate unilateral placement for the student for the 2022-23 school year; an order directing the district to fund the costs of the student's tuition at iBrain for the 2022-23 school year in addition to the costs of related services, 1:1 private nursing services, and 1:1 paraprofessional services; direct funding for the student's special education transportation; an order directing the district to reconvene and develop a new IEP; an order directing the district to conduct new evaluations; and an order directing the district to fund an independent educational evaluation (IEE) of the student, including a neuropsychological evaluation (Parent Ex. A at p. 5).

B. Impartial Hearing Officer Decision

After a prehearing conference was held on September 30, 2022, an impartial hearing convened on October 18, 2022, and concluded on November 16, 2022, after a total of two days of proceedings (Tr. pp. 1-143).⁴

At the outset of the October 18, 2022 hearing, the attorney for the district indicated that the district would not be presenting a case or submitting evidence into the hearing record and would only cross-examine the parent's witnesses and present a closing statement (Tr. pp. 18-19). The matter then proceeded with the presentation of the parent's evidence and witnesses, followed by the district's and parent's closing statements (Tr. pp. 25-114). As part of the parent's closing statement, counsel for the parent noted that the district did not have an IEP in place for the student when more than 60 school days had passed from the parent presenting the student to the district on June 17, 2022 (Tr. p. 108). Picking up on counsel for the parent's reference of the 60-school-

⁴ A representative for the district did not attend the September 30, 2022 prehearing conference (Tr. pp. 1-12).

day timeline, the IHO asked the parties to draft a one-page letter explaining the computation for when the 60-school-day timeline ended (Tr. pp. 114-15).

At the next hearing date, held on November 16, 2022, the parties clarified that a CSE meeting was held for the student in October 2022 and the student was found eligible for special education (Tr. pp. 122-25). The district then submitted a closing statement into the hearing record and the parent submitted a reply to the district's closing statement (Tr. pp. 125-31; Parent Ex. M; Dist. Ex. 1). The parties' briefs included differing computations as to the end date for when an IEP was required to be in place for the student after the June 17, 2022 referral for an initial evaluation (see Parent Ex. M at pp. 1-2; Dist. Ex. 1 at p. 3).

In a decision dated December 11, 2022, the IHO found that the district failed to offer the student a FAPE for the 2022-23 school year because it did not present testimony or documentary evidence during the impartial hearing (IHO Decision at p. 14). As a result, the IHO found that the district did not carry its burden of proof and therefore could not "prevail on the first 'prong' of the Burlington/Carter test" (*id.*).

Relevant to this appeal, with respect to when the district was required to offer a FAPE to the student, the IHO found that the district was not responsible for offering a FAPE to the student until October 12, 2022 (IHO Decision at pp. 14-16). The IHO explained that when the parent went to the CSE on June 17, 2022, she was registering the student for special education and thus the district had ten school days to request parental consent for an initial evaluation of the student (*id.* at p. 15). The IHO noted that although there was no evidence of the date of the parent's consent in the hearing record, the parent formally consented at some point because the evidence showed that district commenced an evaluation (*id.*). The IHO also noted ten school days from June 17, 2022 was July 7, 2022; and therefore, the district had 60 days from July 7, 2022 to evaluate the student and 60 school days to determine the student's eligibility for special education, develop an IEP, and arrange for appropriate special education programs and services (*id.* at pp. 15-16). The IHO found that 60 school days from July 7, 2022 was October 12, 2022 (*id.* at p. 16).

Additionally, with respect to the parent's argument that the district failed to develop a "comparable services plan" for the student, the IHO found that the argument was "inapposite" because the case involved an "initial" referral for special education under the IDEA (*id.* at p. 17).

Next, the IHO found that iBrain was an appropriate unilateral placement for the student because it addressed the student's "significant special education needs" and the student made progress in light of his "unique set of challenges and circumstances" (IHO Decision at p. 18). With respect to the district's argument that the parent did not meet her burden of proof in establishing that iBrain was an appropriate unilateral placement for the student because she did not offer evidence of the student's iBrain schedule or the credentials of the iBrain teachers or related services providers, the IHO found that testimony from the iBrain director and iBrain documents were sufficient in describing the programming at iBrain and the hearing record was sufficient to indicate that the iBrain providers were appropriately qualified (*id.* at pp. 18-19). Lastly, the IHO found that equitable considerations weighed in favor of the parent's request for tuition reimbursement because the parent cooperated with the CSE, provided the CSE with the student's information, and assisted the district in conducting the student's evaluation (*id.* at p. 19). With respect to the district's contention that the parent never intended to place the student at the district public school, the IHO

found that even if it were true, such a finding would not be grounds for denying the parent tuition reimbursement (id.).

As relief, the IHO awarded reimbursement for the cost of the student's tuition and related services at iBrain from October 12, 2022 through the end of the 2022-23 school year along with the cost of specialized transportation (IHO Decision at p. 21). The IHO found that although the parent sought direct payment to iBrain and to the transportation company, the parent did not demonstrate her inability to pay the costs of tuition at iBrain, related services, and transportation (id. at p. 20). The IHO also dismissed the parent's request for an independent neuropsychological evaluation, finding that the parent abandoned her request because she did not "adduce evidence" about it (id.).

IV. Appeal for State-Level Review

The parent appeals from that portion of the IHO's decision regarding relief. Initially, the parent argues that the IHO erred in ordering tuition reimbursement, rather than ordering direct payment for the student's attendance at iBrain for the 2022-23 school year. Specifically, the parent argues that the IHO's justification for ordering tuition reimbursement went "against the ideals of the IDEA" and that it was irrelevant whether the parent would be able to afford the student's tuition at iBrain for the 2022-23 school year. Next, the parent argues that the IHO erred in treating the student's case as if it were a referral for an initial evaluation and in finding that the district was not required to provide the student with a comparable services plan. The parent also argues that the IHO erred by adding ten school days from when the student first registered for school on June 17, 2022 and finding that the student was not entitled to a FAPE until October 12, 2022. Lastly, the parent argues that the IHO erred in failing to award district funding of an independent neuropsychological evaluation.

In an answer, the district argues that the request for review should be dismissed because the IHO properly found that the district conceded that it failed to offer the student a FAPE from October 12, 2022 to the end of the school year, iBrain was an appropriate unilateral placement for the student and that equities favored the parent's request for tuition reimbursement for the student's 2022-23 school year at iBrain. The district also concedes that the IHO's order should be modified to indicate that the district directly fund the student's tuition at iBrain for the 2022-23 school year and that the district be directed to fund an independent neuropsychological evaluation of the student.

In a reply, the parent responds to the district's allegations and generally repeats arguments made in the request for review.

V. Discussion - Relief

A. Scope of Review

State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review,

answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]).

In this instance, neither party has appealed the portion of the IHO's findings which held that the district failed to offer the student a FAPE after October 12, 2022 during the 2022-23 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations favor the parent. As such, those determinations have become final and binding on both parties and they will not be reviewed on appeal (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]).

Additionally, as noted above, in its answer, the district agrees to direct payment for the costs of the student's tuition at iBrain for the 2022-23 school year and transportation. The district also agrees to public funding of an independent neuropsychological evaluation for the student. In light of the district's agreement, I will order direct payment for the costs of the student's attendance at iBrain and transportation along with public funding for an independent neuropsychological evaluation. I now turn to the crux of the appeal which is related to whether the district became obligated to offer the student a FAPE for a time period prior to October 12, 2022.

B. Initial Evaluation

The parent argues that the IHO erred in treating the parent's attempt to register the student for school in the district in June 2022 as a referral for an initial evaluation and in finding that, based on the timelines for initiating special education after an initial referral, the student was not entitled to a FAPE until October 12, 2022.

More specifically, the IHO found that the parent's visit to the CSE on June 17, 2022, registering the student in the district, triggered the district's obligation to conduct an initial evaluation, while the parent argues that the student's case does not involve an initial evaluation; but rather, that the district was required to develop a "comparable services plan" for the student and have services in place for the student as of the July 1, 2022 start of the 12-month school year because she transferred the student to the school district with IEPs from the student's nonpublic special education school located in another country.

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.⁵ The use of a comparable services plan tends to arise when a CSE or IEP team of a public agency has already met, evaluated the student, and found the student eligible for special education 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 a different state and enrolls in a new school within the same school year, the new public agency must provide

⁵ One instance when it is possible for a student to be eligible for a FAPE while living abroad involves children who are dependents of U.S. Department of Defense personnel that are eligible for a FAPE, but there is no evidence or allegations in this case that would support the application of those rules to the student in this case (see 32 CFR 57.6).

"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]).

In this matter, the student attended a special education school outside of the United States and received special education instruction and related services under an educational program developed by the school (Parent Ex. I at pp. 1-2; see Parent Exs. K; L). According to the parent's testimony by affidavit, on June 17, 2022, she went to the CSE to register the student for school and brought the student's educational programs developed in the country the family was arriving from as well as proof of her residency in the district (*id.* at p. 2). The parent argues that when she submitted the out of country educational programs to the district, this triggered the district's obligation to create a comparable services plan for the student under IDEA. However, as noted above, comparable services are available for students transferring into a district from another state or school district when the student had "an IEP that was in effect in a previous public agency" (34 CFR 300.323[f][1], [2]; 8 NYCRR 200.4[e][8][ii]). Although the documents provided by the parent may have provided valuable information regarding the student's needs, an educational program developed by a special education school outside of the United States is not required to address all of the components as an IEP developed under the IDEA. For example, even a brief review of the educational program developed by the student's out-of-country special education school shows that the program included a number of detailed short-term annual goals, as well as a brief description of the student's interests, needs, strengths, and weaknesses; however, it does not address a number of subjects that are required under the IDEA, which include but are not limited to an IEP being based on evaluations obtained in all areas of the student's disability or suspected disability, an IEP identifying the student's present levels of performance and indicating the individual needs of the student according to academic achievement, functional performance and learning characteristics, social development, physical development, and management needs, an IEP addressing special factors, identifying postsecondary goals and transition needs, recommending the special education program and services the student will need, determining eligibility for 12-month services, determining testing accommodations, identifying the extent to which the student will not participate in regular classes and extracurricular activities with nondisabled peers, determining transportation needs, and determining placement (Parent Exs. K; L). Because there is no evidence the student was eligible for services under the IDEA while living abroad, and, furthermore, the student did not have an IEP that was in effect in a previous public agency when he moved to the district, I find the district was not required to develop a comparable services plan for the student. Accordingly, the evidence in the hearing record does not provide a basis to overturn the IHO's determination that the parent's registration of the student with the district and provision of the student's special education plan from outside of the United States triggered the IDEA's procedures to conduct an initial evaluation of the student to determine, among other things, his eligibility for services under IDEA and, as a result, it was not necessary to provide comparable services to the student.

After determining that the district was required to conduct an initial evaluation of the student, the next inquiry is to determine by what date the district was required to offer the student a FAPE under IDEA.

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 school days of receipt of a request for a referral, request the parent's consent to initiate an evaluation of the student (see 8 NYCRR 200.4[a][2][iv][a]; see also 34 CFR 300.300[a]).⁶ After parental consent has been 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]).

Here, the IHO found that the district was not required to offer the student a FAPE until October 12, 2022. First, the IHO determined that the district had ten "school days" from June 17, 2022 (the date the parent registered the student in the district) to obtain consent from the parent to evaluate the student, which she determined was July 7, 2022 (IHO Decision at p. 15). The IHO further found that the district had 60 days from receiving parental consent to evaluate the student and 60 school days to determine the student's eligibility, develop an IEP, and arrange for special education for the student (id. at pp. 15-16). Ultimately, the IHO found that 60 school days from July 7, 2012 was October 12, 2022, and as a result the district was not required to offer the student a FAPE until October 12, 2022 (id. at p. 16).

Initially, as noted by the IHO, State regulation defines a school day as "any day, including a partial day, that students are in attendance at school for instructional purposes. The term school day has the same meaning for all students in school including students with disabilities and students without disabilities, except that, during the months of July and August, school day means every day except Saturday, Sunday and legal holidays" (8 NYCRR 200.1[n][1]; see IHO Decision at p 15).

Initially, in its closing brief, the district attempted to provide its own calculation of when it was required to provide the student with a FAPE and arrived at a November 16, 2022 date (Dist. Ex. 1 at p. 3). However, the district did not provide specific information as to the days the student's school was open nor did it enter a district calendar into evidence during the impartial hearing. Therefore, without any further explanation, the district's calculation remains unclear and will not be considered.

The IHO took judicial notice of the district's school calendar for the 2021-22 and 2022-23 school years as published on the district's website (see IHO Decision at p. 15 n.9, citing to

⁶ State regulation also provides that, upon receiving a referral, a building administrator may request a meeting 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]).

<https://www.schools.nyc.gov/about-us/news/2022-2023-school-year-calendar>). Additionally, in reviewing the parent's post hearing submission with the district's calendar, it appears as though the parent correctly identified what days the district considered as holidays where school was closed (see Parent Ex. M at pp. 1-2). Using the parent's calculation from her post-hearing submission, the IHO correctly determined that 10 school days from the parent's referral of the student on June 17, 2022 was July 12, 2022 (see IHO Decision at p. 15; Parent Ex. M at pp. 1-2). Next, the parent's calculation counted up to the last day of the summer session on August 12, 2022; however, pursuant to State regulation school days include every day except Saturdays, Sundays and legal holidays in August (see Parent Ex. M at p. 2). Accordingly, the IHO appears to have correctly included those days as school days in her calculation (see IHO Decision at p. 15). Turning to September, the parent identified the first day of school as September 8, 2022 (Parent Ex. M at p. 2). Using the days identified by the parent in September and October as school days, 60 school days from July 12, 2022 would have fallen on October 14, 2022 (see Parent Ex. M at p. 2). Although this result is not consistent with either the parent's overall calculation identifying October 18, 2022 as being 60 school days from June 17, 2022 or the IHO's calculation identifying October 12, 2022 as being 70 school days from June 17, 2022, it takes into account the State regulation identifying all weekdays in August as school days and the other days identified by the parent in September and October as not being school days that appear to have been counted as school days by the IHO.

Although the above calculation identifies 60 school days from the initial referral as October 14, 2022, the IHO found that the district was not required to provide the student a FAPE until October 12, 2022. However, the parent will not be penalized for the IHO's error as the district failed to cross-appeal from the IHO's decision reflecting an October 12, 2022 date. In light of the foregoing, there is no reason to overturn the IHO's finding that the district was not required to offer the student a FAPE until October 12, 2022.

VI. Conclusion

Having determined that there is insufficient reason to overturn the IHO's determination that the parent's June 17, 2022 visit to register the student in the district should have been treated as a referral of the student for an initial evaluation and that the district failed to offer the student a FAPE from October 12, 2022 until the end of the 2022-23 school year, the necessary inquiry is at an end.

As set forth above, the student is entitled to direct payment of the student's costs for iBrain from October 12, 2022 through the end of the 2022-23 school year along with the costs of specialized transportation. The student is also entitled to an independent neuropsychological evaluation funded by the district.

THE APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision, dated December 11, 2022, is hereby modified to award the parent direct payment of the costs of the student's attendance at iBrain from October 12, 2022 through the end of the 2022-23 school year along with the cost of specialized transportation for the student; and

IT IS FURTHER ORDERED that the IHO decision, dated December 11, 2022, is further modified by reversing that portion which denied reimbursement for an independent neuropsychological evaluation and the district is directed to fund the requested independent neuropsychological evaluation.

Dated: **Albany, New York**
 March 1, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER