The University of the State of New York

The State Education Department
State Review Officer
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No. 24-618

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Gil Auslander, 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 that respondent (the district) fund the costs of her son's tuition at the International Institute for the Brain (iBrain) for the 2019-20 and 2023-24 school years. 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. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student has received diagnoses of cerebral palsy, asthma, and a developmental disability (Dist. Ex. 1 at p. 4). The student is non-verbal and non-ambulatory (id.). For the 2018-19 school year (ninth grade), the student was attending a 12:1+4 special class in a district specialized school (see id. at pp. 2, 5).

A CSE convened on October 2, 2018 and found the student eligible for special education as a student with multiple disabilities (see Dist. Ex. 1).[1] The CSE recommended that the student

[1] Although the student's eligibility for special education is not in dispute, the parent alleged that the classification

attend a 12:1+(3:1) special class for math, English-language arts (ELA), social studies, sciences, art, and health in a district specialized school (id. at pp. 12, 15). Additionally, the CSE recommended that the student receive related services of three 30-minute sessions of individual occupational therapy (OT) per week, three 30-minute sessions of individual physical therapy (PT) per week, and three 30-minute sessions of individual speech-language therapy per week, as well as the support of a full-time individual paraprofessional for health/medical concerns (id. at pp. 12-13). The CSE also recommended extended school year services and special transportation services (id. at pp. 13, 15).

A CSE convened on November 6, 2019 and found the student eligible for services as a student with multiple disabilities (see Dist. Ex. 8).[2] The CSE recommended that the student attend a 12:1+(3:1) special class for math, ELA, social studies, sciences, and health in a district specialized school (id. at pp. 16, 20). In addition, the CSE recommended that the student receive related services of three 30-minute sessions of individual OT per week, three 30-minute sessions of individual PT per week (two in a separate location and one in the classroom), two 30-minute sessions of individual speech-language therapy per week, and one 30-minute session of group speech-language therapy per week, as well as the support of a full-time individual paraprofessional for health/medical concerns (id. at pp. 16-17).[3] The CSE also recommended extended school year services and special transportation services (id. at pp. 17, 20).

The district issued prior written notices for the October 2018 and November 2019 CSE meetings on November 27, 2019 (see Dist. Exs. 4; 10).

The district's special education student information system (SESIS) events log indicated that, during spring 2020 when school buildings were closed due to the COVID-19 pandemic, the parent and district finalized a remote learning plan, but, for summer 2020, the parent discontinued teletherapy services and, in fall 2020, waived a triennial reevaluation of the student (Dist. Ex. 15 at pp. 2-4; see Dist. Ex. 13). According to the district's SESIS log, on September 29, 2020, the student was "[d]ischarge[d]" because the family moved out of the district and the student was enrolled in school in another state (Dist. Ex. 15 at p. 2).

At some later point, the student and his family moved from out of state back into the district; however, as discussed further below, the exact timing of such move, as well as the timing of the parent's communication to the district that the student was again residing in the district is a matter in dispute.

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of the student as a student with multiple disabilities was not the most appropriate (see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

[2] The hearing record contains multiple duplicative exhibits. For purposes of this decision, only one version of a document is cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

[3] Individual 50-minute sessions of parent counseling and training were recommended as needed (Dist. Ex. 8 at p. 16).

The parent electronically signed a transportation contract on January 30, 2024 with Sisters Travel and Transportation Services, LLC for transportation of the student to and from iBrain for the 2023-24 school year, and the agreement indicated that it covered the period from September 11, 2023 through June 30, 2024 (see Parent Ex. N). The parent signed a nursing agreement with B&H Health Care Services, Inc. for the 2023-24 school year on March 18, 2024 (see Parent Ex. O). That agreement indicated that it was effective from March 18, 2024 through June 21, 2024 (id. at p. 1). Finally, the parent signed an enrollment contract with iBrain on March 19, 2024 (see Parent Ex. M).[4] The iBrain contract indicated that the 2023-24 school year ran from September 11, 2023 through June 21, 2024 (id. at p. 1).

In a letter to the district, dated March 25, 2024, the parent, through her attorney, asserted that the parent disagreed with evaluations conducted with the district and "with the components of the CSE's recommendations including, but not limited to, the disability classification, class size, related services, and the recommendation to attend a District [specialized] school" and that she was concerned that a district public school could not "implement the recommended program" (Parent Ex. B at pp. 1-2). The parent indicated that, due to the foregoing, she had "no choice" but to enroll the student at iBrain for the 2023-24 school year (see id. at p. 2).

In an email from iBrain to the district dated June 21, 2024, iBrain inquired whether there had been a CSE meeting for the student (Dist. Ex. 17 at p. 1). On June 24, 2024, a district school psychologist responded that the district did not have records of "a student listed with that name as attending [iBrain]" and requested the student's information and start date at iBrain (id.). In an email sent on June 24, 2024, iBrain provided the district the student's information stating that the student started attending iBrain on September 11, 2023, and requested that the district convene a CSE (Dist. Ex. 16 at p. 1). The district school psychologist responded that a meeting would be scheduled (id.; see Dist. Ex. 15 at pp. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated June 25, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2019-20 and 2023-24 school years, "as well as for all of the previous years [the district] has been required to provide a FAPE to [the student], including throughout preschool" (see Parent Ex. A).[5] The parent alleged that the statute of limitations should not bar her claims related to the 2019-20 and earlier school years because she did not know, nor should she have known, about the denial of a FAPE until the student "was assessed and evaluated for a program that addressed his special education needs prior to his enrollment" at iBrain (id. at p. 1).

[4] The contract indicated that the iBrain representative signed the contract on September 11, 2023 (Parent Ex. M at p. 6).

[5] The parent also requested an interim order for pendency (Parent Ex. A at pp. 2-3). The parent asserted that, in the absence of an offer from the district to provide the student with pendency services or a showing of a last agreed upon placement, iBrain was the operative placement, along with the private transportation and nursing services obtained by the parent, and should be ordered as the student's pendency placement for the 2023-24 school year (id.).

The parent alleged numerous procedural and substantive FAPE violations "for all of the IEPs the [district] created for this Student" (Parent Ex. A at pp. 4-5). In particular, the parent alleged violations related to provision of procedural safeguards notices and other mandated notices; the timing of CSE meeting(s); CSE composition; parental participation and predetermination; eligibility classification; sufficiency of evaluations and development of appropriate present levels of performance and annual goals; sufficiency or appropriateness of management needs, supports to address assistive technology needs, related services including the description of services (i.e., location, frequency, and duration), special class ratio, placement in the least restrictive environment (LRE), special transportation services, and provision for training of staff (id. at pp. 4-9).

Specific to the 2019-20 school year, the parent argued that November 2019 IEP was procedurally and substantively inappropriate (Parent Ex. A at p. 5). The parent alleged, in particular, that the denial of a 1:1 nurse and 1:1 travel nurse made the IEP inappropriate (id.).

For the 2023-24 school year, the parent asserted that she returned to the district in August 2023 (Parent Ex. A at p. 5). The parent claimed that the district failed to convene a CSE, failed to provide a prior written notice, and failed to assign the student to attend a particular school location for the 2023-24 school year (id. at pp. 5-6). The parent contended that she remained willing to investigate a district program and placement, but that since she did not receive one, she had no choice but to enroll the student at iBrain for the 2023-24 school year (id.). The parent asserted that the student became attending iBrain "in 2023," that iBrain was an appropriate placement for the 2023-24 school year, and that equitable considerations favored a full award of tuition and related services at iBrain (id. at pp. 5, 9-10).

For relief, the parent requested an order for direct funding for the full cost of the student's tuition for the 2023-24 school year at iBrain, as well as the cost of special transportation and 1:1 nursing services (Parent Ex. A at p. 10). The parent also requested that the district be required to reevaluate the student, particularly in the area of assistive technology, and reconvene a CSE (id.). The parent requested district funding for an independent evaluation (id.). Finally, the parent requested that the student be granted "extended eligibility beyond 21 years of age for every year prior to 2023-2024 that [the district] denied [the student] a FAPE" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on July 26, 2024 and concluded on October 8, 2024 after four days of proceedings (see Tr. pp. 1-197). During the prehearing conference, in response to an inquiry from the IHO, the parent's attorney confirmed that the matter involved two school years, the 2019-20 and 2023-24 school years (Tr. pp. 13-14).[6] The IHO signed a witness subpoena directing the parent to appear and provide testimony in the matter (see IHO Ex. IV). The parent's attorney disclosed an affidavit from the parent in lieu of direct testimony; subsequently, however, the parent was not available to

[6] Although the parent had originally raised claims pertaining to school years before the 2019-20 school year (see Parent Ex. A), as the parent's attorney specifically agreed to limit the school years at issue during the impartial hearing, and as, on appeal, the parent does not pursue any allegations relating to any school year prior to the 2019-20 school year, the claims relating to other school years are deemed abandoned (see 8 NYCRR 279.8[c][4]).

testify so the affidavit was deemed withdrawn (see Tr. pp. 24-25, 39, 57).[7] The IHO indicated that, in light of the subpoena for the parent's appearance at the impartial hearing, the parent's absence would be taken into consideration in weighing the evidence (Tr. pp. 26, 29, 57-59).

In a decision dated November 7, 2024, the IHO found that the parent's claims relating to the 2019-20 school year were precluded as they were not filed within the statute of limitations and that, for the 2023-24 school year, the district had no obligation to offer the student a FAPE (IHO Decision at pp. 2, 4-7).

Specific to the 2019-20 school year, the IHO held that, although the parent argued that an exception to the statute of limitations should apply, the parent did not allege what misrepresentations were made by the district or what information was withheld by the district (IHO Decision at pp. 4-5). The IHO also rejected the parent's contention that she only realized she had the right to challenge the district in 2023 when she retained legal counsel, noting that the parent did not testify during the impartial hearing despite being under subpoena and despite the IHO's warning to the parent's attorney that the parent "would likely have probative information regarding the 2019-2020 claims and their ability to survive a [statute of limitations] challenge" (id. at p. 5). Putting aside the lack of testimony from the parent, the IHO found that the district had met its burden to prove that the parent's claims pertaining to the 2019-20 school year were time-barred (id.). The IHO found that the IEPs for the 2019-20 school year were developed on October 2, 2018 and November 6, 2019 and that the parent participated in both of those meetings and that prior written notices were sent in November 2019, which provided the parent with information on how to raise any disagreement with the IEPs (id.). The IHO further noted that the district's SESIS log noted multiple conversations between the parent and the district regarding the 2019-20 school year (id.). Based on this evidence, the IHO found that the parent's claims regarding the 2019-20 school year were time-barred by the two-year statute of limitations (id.).

Turning to the 2023-24 school year, the IHO noted evidence that the student moved out of the district in September 2020 but indicated that it was unclear when the student returned to the district (IHO Decision at pp. 5-6). The IHO noted that the parent signed the iBrain contract in March 2024, but the iBrain representative appeared to sign the contract in September 2023 (id. at p. 6). Further, the IHO noted that the parent did not sign the transportation contract until January 2024 and the nursing contract until March 2024 (id.).[8] The IHO found that the earliest communication between the parent and the district during the 2023-24 school year was the 10-day notice sent on March 25, 2024 (id.). The IHO also noted that the parent's contention that she

[7] State regulation provides that an IHO may take direct testimony by affidavit in lieu of in-hearing testimony, provided that the witness giving such testimony shall be made available for cross examination (8 NYCRR 200.5[j][3][vii][f]). Although the parent was not available for cross-examination and her affidavit was therefore withdrawn, he hearing record filed with the Office of State Review includes a copy of the parent's affidavit. The direct testimony by affidavit has not been considered.

[8] The IHO indicated that it was "plausible" that the student required nursing services beginning in March of 2024 due to the surgery the student underwent in January 2024; however, the IHO further noted the parent's claims included that the student was denied a FAPE during the 2019-20 school year for the lack of a 1:1 nurse and there was evidence in the hearing record that the student required a 1:1 nurse for the 2023-24 school year as early as September 8, 2023 which indicated that the student required constant medical oversight throughout the day (IHO Decision at p. 6).

attempted to reach out to the district when she moved back included no "cite to the record to support the contention" (id. at p. 7). Based on these facts, the IHO found that the district had no obligation to offer a FAPE to the student for the 2023-24 school year and that the district did not violate its child find obligation to the student (id.). The IHO dismissed the parent's claims and denied relief (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO was correct to hold that the district bears the burden of proof regarding the statute of limitations, but that the IHO erred in finding the district met this burden. The parent contends that the prior written notice relied upon by the district was not sufficient to demonstrate that she was informed of her due process rights. The parent asserts that she had no reason to know her due process rights until she hired her attorney during the 2023-24 school year. The parent further asserts that the district failed to present a witness to testify that the district explained to the parent her due process rights. Therefore, the parent argues that her claims are not time-barred by the statute of limitations and that the IHO erred by failing to find that the district denied the student a FAPE for the 2019-20 school year. The parent asserts that the district did not defend its IEP for the 2019-20 school year and that the recommendations made in the November 2019 IEP were not appropriate and the district did not provide the parent notice of an assigned school location for the student for the 2019-20 school year. The parent contends that equitable considerations weigh in favor of an award of one year of extended eligibility for the student to remedy the district's failure to provide the student a FAPE for the 2019-20 school year.[9]

Regarding the 2023-24 school year, the parent contends that the IHO erred in finding that the district did not owe the student a FAPE. The parent argues that the issue presented was whether the district violated its child find obligation to locate and find the student for the 2023-24 school year as he was a resident of the district. The parent asserts that she attempted to inform the district of her return and did so no later than March 25, 2024. As the district had reason to know of the student's return and status as a student with a disability, the parent argues that the district cannot deny that it had an obligation to provide the student with a FAPE for the 2023-24 school year. With respect to the offer of a FAPE, the parent asserts that the district failed to convene a CSE to develop an IEP and failed to provide notice of an assigned school location for the student. The parent further argues that the IHO should have found that iBrain was an appropriate unilateral placement for the 2023-24 school year and that equitable considerations weighed in favor of her request for funding of the student's tuition at iBrain for the 2023-24 school year.

In an answer, the district responds to the parent's allegations and argues that the IHO's decision should be upheld in its entirety. In a reply, the parent responds to the district's arguments and reiterates her allegations from the request for review.

[9] In the alternative, the parent requests that the issue of extended eligibility be remanded to the IHO. Even if the claims had been timely, the evidence shows that the district was already providing the student with an extensive array of special education services and accommodations (see Dist. Ex. 1), and extending student's eligibility for services beyond the statutory age limit would be excessive to the point of maximization, which is not required under IDEA.

V. Applicable Standards

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

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations

omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[10]

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).

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).

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

VI. Discussion

A. 2019-20 School Year – Statute of Limitations

The IDEA provides that a claim accrues on the date that a party knew or should have known of the alleged action that forms the basis of the complaint and requires that, unless a state establishes a different limitations period, the party must request a due process hearing within two years of that date (20 U.S.C. § 1415[f][3][C]; see also 20 U.S.C. § 1415[b][6][B]; Educ. Law § 4404[1][a]; 34 CFR 300.507[a][2], 300.511[e]; 8 NYCRR 200.5[j][1][i]; Somoza v. New York City Dep't of Educ., 538 F.3d 106, 114-15 & n.8 [2d Cir. 2008]; M.D. v. Southington Bd. of Educ., 334 F.3d 217, 221-22 [2d Cir. 2003]).[11] Because an IDEA claim accrues when the parent knew or should have known about the claim, "determining whether a particular claim is time-barred is necessarily a fact-specific inquiry" (K.H. v. New York City Dep't of Educ., 2014 WL 3866430, at *16 [E.D.N.Y. Aug. 6, 2014]; see K.C. v. Chappaqua Cent. Sch. Dist., 2018 WL 4757965, at *14 [S.D.N.Y. Sept. 30, 2018] [collecting cases representing different factual scenarios for when a parent may be found to have known or have had reason to know a student was denied a FAPE]). Further, two exceptions to the statute of limitations may apply to the timelines for requesting impartial hearings. The first exception applies if a parent was prevented from filing a due process complaint notice due to the district withholding information from the parent that the district was required to provide under the IDEA (20 U.S.C. § 1415[f][3][D][ii]; 34 CFR 300.511[f][2]; 8 NYCRR 200.5[j][1][i]). A second exception may apply if a parent was prevented from filing a due process complaint notice due to a "specific misrepresentation" by the district that it had resolved the issues forming the basis for the due process complaint notice (20 U.S.C. § 1415[f][3][D]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]).

Initially, although the parent claims that the date of accrual of her claims is at issue, the parent's argument focuses solely on when the parent learned about her right to pursue due process (see Reply ¶¶ 5 [arguing that, "[w]hile the two-year statute of limitations period to commence a claim for a denial of a FAPE may typically be triggered when the Parent receives the IEP, in the instant matter, [the district] failed to provide the Parent with an explanation of her due process rights at that time] [emphasis in the original]). However, the parent's claims accrued when she knew or should have known about the complained of action (i.e., when she participated in a CSE meeting that did not result in a recommendation for nursing services, etc.), not when the parent discovered that she could pursue a claim (see Keitt v. New York City, 882 F. Supp. 2d 412, 437 [S.D.N.Y. 2011] [explaining that plaintiff's "argument that his [IDEA] claims accrued at the time of 'discovery that [he had] grounds for such a suit' . . . must be rejected because accrual of the statute of limitations does not depend on plaintiffs knowledge of the law, but rather on a plaintiff's knowledge of the injury"] [alternations in the original]; see also J.P. v Enid Pub. Schools, 2009 WL 3104014, at *6 [W.D. Okla. Sept. 23, 2009]). The parent does not allege that the IHO erred in relying on the parent's attendance at the October 2018 and November 2019 IEPs and communications with the district regarding the 2019-20 school year to find that the parent knew

[11] New York State has not explicitly established a different limitations period; rather, it has affirmatively adopted the two-year period found in the IDEA (Educ. Law § 4404[1][a]; 8 NYCRR 200.5[j][1][i]).

or should have known about the inappropriateness of the CSE's recommendations for the student for the 2019-20 school year around the time of the CSE meetings (see IHO Decision at p. 5).[12]

The parent's arguments regarding her discovery in 2023 of her right to pursue due process, instead, relate to the withholding of information exception to the statute of limitations. The "withholding of information" exception to the timeline to request an impartial hearing applies "if the parent was prevented from filing a due process complaint notice due to . . . the [district's] withholding of information from the parent that was required . . . to be provided to the parent (20 U.S.C. § 1415[f][3][D]; Educ. Law 4404[1][a]; 34 CFR 300.511[f]; 8 NYCRR 200.5[j][1][i]). Case law interpreting the "withholding of information" exception to the limitations period has found that the exception almost always applies to the requirement that parents be provided with the written notice of procedural safeguards required under the IDEA (Bd. of Educ. of N. Rockland Cent. School Dist. v. C.M., 744 Fed. App'x 7, 11 [2d Cir. Aug. 1, 2018]; R.B. v. Dep't of Educ. of City of New York, 2011 WL 4375694, at *4, *6 [S.D.N.Y. Sept. 16, 2011]; see D.K. v. Abington Sch. Dist., 696 F.3d 233, 246 [3d Cir. 2012]; C.H. v. Nw. Indep. Sch. Dist., 815 F. Supp. 2d 977, 986 [E.D. Tex. 2011]; Tindell v. Evansville-Vanderburgh Sch. Corp., 805 F. Supp. 2d 630, 644-45 [S.D. Ind. 2011]; El Paso Indep. Sch. Dist. v. Richard R., 567 F. Supp. 2d 918, 943-45 [W.D. Tex. 2008]; Evan H. v. Unionville-Chadds Ford Sch. Dist., 2008 WL 4791634, at *7 [E.D. Penn. Nov. 4, 2008]). Such safeguards include the requirement to provide parents with prior written notices and procedural safeguards notices containing, among other things, information about requesting an impartial hearing (see 20 U.S.C. § 1415[b][3]; [d]; 34 CFR 300.503; 300.504; 8 NYCRR 200.5[a], [f]). Under the IDEA and federal and State regulations, a district must provide parents with a copy of a procedural safeguards notice annually (20 U.S.C. § 1415[d][1][A]; 34 CFR 300.504[a]; 8 NYCRR 200.5[f][3]). Additionally, State regulation provides that a district may place a copy of the procedural safeguards notice on its website (8 NYCRR 200.5[f][4]). If a parent is otherwise aware of his or her procedural due process rights, the district's failure to provide the procedural safeguards notice will not necessarily prevent the parent from requesting an impartial hearing (see D.K., 696 F.3d at 246-47; R.B., 2011 WL 4375694, at *7; Richard R., 567 F. Supp. 2d at 944-45).

The district sent the parent prior written notices on November 27, 2019 pertaining to the October 2018 and November 2019 CSE meetings (Dist. Exs. 4; 10). The November 27, 2019 prior written notices included information on how the parent could obtain a copy of the procedural safeguards notice, advising the parent that she could download a copy from the district's website or request a copy from a named individual for whom the notice provided a phone number (Dist. Exs. 4 at p. 3; 10 at p. 3). The notice provided a name and address for a district and an independent resource that the parent could contact "TO OBTAIN ASSISTANCE IN UNDERSTANDING THE SPECIAL EDUCATION PROCESS" (Dist. Exs. 4 at p. 3; 10 at pp. 3-4). The parent argues that the prior written notices did not include "sufficient instruction" on how the parent should go about filing a claim (see Req. for Rev. ¶ 15); however, the notices stated that the parent had the right to address the CSE in person or in writing regarding the appropriateness of the CSE's

[12] The parent does not appeal the IHO's finding that the parent did not allege any specific misrepresentation by the district that would toll the statute of limitations (IHO Decision at pp. 4-5). Accordingly, the IHO's finding about the application of the specific misrepresentation exception has become final and binding on the parties and 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]).

recommendations and that, if the parent did not agree with the CSE's recommendations, she had the right to request mediation or an impartial hearing (Dist. Exs. 4 at p. 4; 10 at p. 4). The notices indicated that, to request mediation or an impartial hearing, the parent should do so in writing and provided addresses for both purposes (Dist. Exs. 4 at p. 4; 10 at p. 4).

Although, the hearing record is not developed regarding whether the district provided a physical copy of a procedural safeguards notice during the 2019-20 school year or before, this does not support a finding that the parent did not know of her rights due to a failure on the part of the district to provide procedural safeguards notices (see N.J. v. NYC Dep't of Educ., 2021 WL 965323, at *12 [S.D.N.Y. Mar. 15, 2021] [finding that "[i]t is not sufficient for a parent to argue . . . 'that she did not receive every required procedural safeguards notice' because the exception is ultimately concerned with whether and when the '[p]arent knew of her rights'"], quoting C.M., 744 Fed. App'x at 11). As the IHO noted, "probative information" regarding this point would have come from the parent's testimony, yet the parent failed to appear in response to a subpoena to testify regarding a matter within her own knowledge (see IHO Decision at p. 5; Dist. Ex. 26).

Based on the foregoing, I find no basis to disturb the IHO's finding that the withholding of information exception does not apply in this matter to allow the parent's claims relating to the 2019-20 school year to proceed. Accordingly, the parent's claims related to the 2019-20 school year set forth in the June 25, 2024 due process complaint notice are time-barred as being raised more than two years after the date the claims accrued.

As a final matter, even if the parent's claims related to the 2019-20 school year were not barred by the statute of limitations, it is unlikely that she would be entitled to the remedy she seeks, i.e., a full year of tuition at iBrain. As one court recently observed, relief in the form of future private school tuition to remedy a past denial of FAPE tends to resemble monetary damages, which are not available under the IDEA, and are "untethered to compensatory educational services to bring the child up to the level the child should have obtained had a FAPE been provided" (Bird v. Banks, 2023 WL 8258026, at *6 [S.D.N.Y. Nov. 29, 2023]). Such relief would further circumvent the statutory process, pursuant to which the CSE is tasked with reviewing information about the student's progress under current educational programming and periodically assessing the student's needs (see Adams v. Dist. of Columbia, 285 F. Supp. 3d 381, 393, 396-97 [D.D.C. 2018] [noting with approval the hearing officer's finding "that the directives of IDEA would be best effectuated by ordering an IEP review and revision, rather than prospective placement in a private school"]; see also Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008] [noting that "services found to be appropriate for a student during one school year are not necessarily appropriate for the student during a subsequent school year"]).

B. 2023-24 School Year – Child Find

Turning to the 2023-24 school year, the IHO found that the district was not required to provide the student with a FAPE as the parent failed to notify the district of the student's return to the district (IHO Decision at pp. 5-7). The parent argues that this was an error as the district was required under child find to identify the student and provide him with a program.

The purpose of the "child find" provisions of the IDEA are to identify, locate, and evaluate students who are suspected of being a student with a disability and thereby may be in need of

special education and related services, but for whom no determination of eligibility as a student with a disability has been made (see Handberry v. Thompson, 446 F.3d 335, 347-48 [2d Cir. 2006]; E.T. v. Bd. of Educ. of Pine Bush Cent. Sch. Dist., 2012 WL 5936537, at *11 [S.D.N.Y. Nov. 26, 2012]; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 225 [D. Conn. 2008], aff'd, 370 Fed. App'x 202 [2d Cir. Mar. 23, 2010]; see also 20 U.S.C. § 1412[a][3][A]; 34 CFR 300.111; 8 NYCRR 200.2[a][1], [7]). The IDEA places an ongoing, affirmative duty on State and local educational agencies to identify, locate, and evaluate students with disabilities residing in the State "to ensure that they receive needed special education services" (20 U.S.C. § 1412[a][3]; 34 CFR 300.111[a][1][i]; Forest Grove, 557 U.S. at 245; K.B. v. Katonah Lewisboro Union Free Sch. Dist., 2019 WL 5553292, at *7 [S.D.N.Y. Oct. 28, 2019], aff'd, 2021 WL 745890 [2d Cir. Feb. 26, 2021]; E.T., 2012 WL 5936537, at *11; see 20 U.S.C. § 1412[a][10][A][ii]; see also 8 NYCRR 200.2[a][1], [7]; New Paltz Cent. Sch. Dist. v. St. Pierre, 307 F. Supp. 2d 394, 400 n.13 [N.D.N.Y. 2004]). The "child find" requirements apply to "children who are suspected of being a child with a disability . . . and in need of special education, even though they are advancing from grade to grade" (34 CFR 300.111[c][1]; see 8 NYCRR 200.2[a][1], [7]; D.K. v. Abington Sch. Dist., 696 F.3d 233, 249 [3d Cir. 2012]; J.S. v. Scarsdale Union Free Sch. Dist., 826 F. Supp. 2d 635, 660 [S.D.N.Y. Nov. 18, 2011]). To satisfy the requirements, a board of education must have procedures in place that will enable it to identify, locate, and evaluate such children (34 CFR 300.111[a][1]; 8 NYCRR 200.2[a][1], [7]).

Because the child find obligation is an affirmative one, the IDEA does not require parents to request that the district evaluate their child (see Reid v. District of Columbia, 401 F.3d 516, 518 [D.C. Cir. 2005] [noting that "[s]chool districts may not ignore disabled students' needs, nor may they await parental demands before providing special instruction"]; see also Application of the Bd. of Educ., Appeal No. 11-153; Application of a Student Suspected of Having a Disability, Appeal Nos. 11-092 & 11-094). A district's child find duty is triggered when there is "reason to suspect a disability and reason to suspect that special education services may be needed to address that disability" (J.S., 826 F. Supp. 2d at 660; New Paltz Cent. Sch. Dist., 307 F. Supp. 2d at 400 n.13, quoting Dep't of Educ., State of Hawaii v. Cari Rae S., 158 F. Supp. 2d 1190, 1194 [D. Haw. 2001]).

The Second Circuit Court of Appeals has provided substantial guidance in this area, stating that

> In accord with other Courts of Appeals, we consider a violation of the Child Find obligation a procedural violation of the IDEA. See D.K., 696 F.3d at 249; D.A. ex rel. Latasha A. v. Houston Indep. Sch. Dist., 629 F.3d 450, 453 (5th Cir. 2010); Bd. of Educ. of Fayette Cty. v. L.M., 478 F.3d 307, 313 (6th Cir. 2007); see also Handberry v. Thompson, 446 F.3d 335, 347 (2d Cir. 2006) (observing that the "Child Find provisions of the IDEA" require States to adopt certain "policies and procedures" (internal quotation marks omitted).
>
> To hold a school district liable for failing to identify a student who should be evaluated for purposes of receiving special education, a "claimant must show that school officials overlooked clear signs of disability and were negligent in failing to order testing, or that there was no rational justification for not deciding to evaluate." L.M., 478 F.3d at 313 (internal quotation marks omitted); see J.S., 826 F.Supp.2d

> at 661; Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. & Mrs. M., No. 07-cv-1484, 2009 WL 2514064, at *11 (D. Conn. Aug. 7, 2009). A school district must begin the evaluation process within a reasonable time after the district is on notice of a likely disability. See Dallas Indep. Sch. Dist. v. Woody, 865 F.3d 303, 320 (5th Cir. 2017) ("School districts must seek to evaluate students with suspected disabilities within a reasonable time after the school district is on notice of facts or behavior likely to indicate a disability."); D.K., 696 F.3d at 250 ("We have inferred a requirement that schools identify disabled children within a reasonable time after school officials are on notice of behavior that is likely to indicate a disability." (internal quotation marks and brackets omitted)

(Mr. P v. W. Hartford Bd. of Educ., 885 F.3d 735, 750 [2d Cir. 2018]). As one district court explained, "the IDEA is not an absolute liability statute and the 'Child Find' provision does not ensure that every child with a disability will be found" (A.P., 572 F. Supp. 2d at 225).

The issue presented, characterized by the parent as a child find dispute, is unusual in that, unlike most cases, this is not a student who had never been found eligible for special education that the district should have suspected had a disability. Instead, the dispute is whether the district should have known that the student, who had previously moved to another state, had returned and was residing in the district and/or attending a private school within the district. Many times, a district would be notified of a student's presence in the district by a parent enrolling the student in the public school, and to facilitate this, each district must make publicly available its enrollment forms, procedures, instructions and requirements for determinations of student residency and age (8 NYCRR 100.2[y][2]).[13] In addition, a school district is required to conduct "a census . . . to locate and identify all students with disabilities who reside in the district and . . . establish a register of such students who are entitled to attend the public schools of the district . . . during the next school year " (8 NCYRR 200.2[a][1]). The register of such students "shall be maintained and revised annually" by the district's CSE (id.). In terms of identifying students suspected of having a disability, the district might rely on referrals from educators or monitoring student progress under the district's response to intervention program (see 8 NYCRR 200.4[a]; see also 8 NYCRR 100.2[ii]).

If parents enroll their child in a private school, the district in which the school is located has a child find obligation (see 34 CFR 300.131; 8 NYCRR 200.2[a][7]).[14] Generally speaking, a

[13] Challenges to district determinations on residency are resolved by the Commissioner of Education (see Educ. Law § 310; 8 NYCRR 100.2[y][6]), and the IDEA does not clearly set forth procedures that must be employed by a State to resolve residency disputes involving students with disabilities.

[14] Moreover, the district of residence must not decline a parent's request to conduct an eligibility evaluation of the student (Letter to Eig, 52 IDELR 136 [OSEP 2009]; see Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *7-*8 [S.D.N.Y. Feb. 4, 2013]; Moorestown Tp. Bd. of Educ. v. S.D., 811 F. Supp. 2d 1057, 1068-70 [D.N.J. 2011]; Reg'l Sch. Dist. No. 9 Bd. of Educ. v. Mr. and Mrs. M., 2009 WL 2514064, at *10 [D.Conn. Aug. 7, 2009]; District of Columbia v. Abramson, 493 F. Supp. 2d 80, 84-85 [D.D.C. 2007] [rejecting the proposition that a district of residence did not have a child find obligation due to the fact that the student was parentally placed in a private school in another district and finding that both public school districts retained child find obligations]). Here, the district is both the district in which the student purportedly resided as well as the district in which iBrain is located.

district is required to locate, identify, and evaluate students with disabilities attending private schools located within the district in order to ensure equitable participation of parentally placed students with disabilities and to ensure an accurate count of those students (see 34 CFR 300.131[a]; [b][2]; 8 NYCRR 200.2[a][7]). In carrying out its child find obligations, a school district is required to "undertake activities similar to the activities undertaken for the agency's public school children" and in a "comparable" time period (34 CFR 300.131[c]; 8 NYCRR 200.2[a][7]; see Child Find for Parentally-Placed Private School Children With Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]). Such activities could include "widely distributing informational brochures, providing regular public service announcements, staffing exhibits at health fairs and other community activities, and creating direct liaisons with private schools" (Child Find for Parentally-Placed Private School Children With Disabilities, 71 Fed. Reg. 46,593 [Aug. 14, 2006]). In addition, "[t]he school district shall consult with representatives of private schools and representatives of parents of parentally placed private school students with disabilities on the child find process" (8 NYCRR 200.2[a][7]).

Even assuming the district would have identified the student as residing in the district by conducting the annual census (8 NCYRR 200.2[a][1]), if the family moved into the district after the census was conducted, some communication to the district would be needed in order to notify the district of the student's presence prior to the next annual census. The limited evidence tips in favor of the district on this point because when asked if a CSE meeting had been conducted for the student, the district employee explained that the student was not on her list of iBrain students (District Ex. 17 at p. 1). The child find requirements are no so intensive as to require a school district to go door-to-door searching for the presence of potential students with disabilities that may have recently moved to the district throughout a school year. This is a non-compulsory school age student (see Educ. Law § 3205[1][a]), who until well into the 2023-24 school year, the district had no reason to know had returned at some point to live within the confines of the district's boundaries.

These child find activities noted above targeting students attending private schools in the district are geared toward informing parents that special education may be available for their children and communicating with private schools, but, here, the parent was aware of such availability given that the student had previously been found eligible and received intensive special education placements and services in the district for many years (see, e.g., Dist. Exs. 1; 8; 15). Further, while the evidence indicates that the district communicated with iBrain regarding its students (see Dist. Ex. 17 at p. 1 [referring to the district's "record[s]" of students attending iBrain]), the evidence in the hearing record does not reflect any communication to the district that the student was attending iBrain prior to, at the earliest, the March 2024 from the parent's attorney or, at the latest, emails from iBrain staff in June 2024 (Parent Exs. B; Dist. Ex. 17). Likewise, while permissible, and no doubt knowledgeable about the special education process, there is no indication that the staff from iBrain referred the student to the district for an evaluation or to develop an IEP. For that matter, there is conflicting information in the hearing record regarding when the student began attending iBrain and no evidence as to when the family moved back to the district.[15]

[15] The iBrain administrator indicated that the student started in September 2023 but later testified it was "sometime

Although, as the IHO noted, the parent's attorney argued at the impartial hearing that the parent attempted to reach out to the district after the family moved back into the State (see IHO Decision at p. 7; IHO Ex. IX), the parent failed to testify in this matter and there is no documentary or testimonial evidence to rebut the district's position that it was unaware that the student had returned to the district for the majority of the 2023-24 school year.

The March 25, 2024 letter to the district from the parent's attorney was dated more than six months after the student allegedly began at iBrain (see Parent Ex. B). However, the district school psychologist who testified at the impartial hearing was not aware of the letter and the district's SESIS events log for the student did not reflect that the district received it (Tr. pp. 83-84; see Dist. Ex. 15 at p. 2).[16] Even if the district received the March 25, 2024 letter, its content was not sufficient to notify the district that the student had recently returned to the district or express to the district a desire for a CSE to convene to offer a public school placement to the student (see Parent Ex. B). Instead, the letter misleadingly referred to the parent's disagreement with evaluations conducted by the district and with components of the CSE's recommendations and the district's ability to "implement the recommended program" when, in fact, the district had not evaluated the student or developed an IEP for the student since prior to the student moving out of state in 2020 (see id.). If anything, the March 2024 letter issued by the parent's attorney invited delay with deliberate imprecision that included a lack of reference to the evaluation with which the parent disagreed and omission of the fact that the family had waived reevaluation, left the state, and then returned some years later.

Thereafter, emails from iBrain to the district in June 2024 effectively communicated that the student was attending iBrain and seeking an IEP from the district (see Dist. Exs. 16; 17). 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 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]). When the student transfers between school years, the new public agency should still "promptly" seek the student's records including IEP and supporting documents from the prior

in August 2023" (Tr. pp. 143-44, 181-82). Consistent with the start date that iBrain communicated to the district in June 2024, according to attendance records from iBrain, the student was marked "Y" for attendance for the 2023-24 school year beginning on September 11, 2023; however, the attendance record also indicated that a "Y" for attendance could reflect that a student was "PRESENT," or there was an "EXCUSED ABSENCE," or the student was receiving "HOME SERVICES" (Dist. Exs. 16 at p. 1; 30; see Tr. pp. 112-13). The iBrain administrator testified that the student sometimes received services from iBrain remotely during the 2023-24 school year, but it is unclear how often that was the case (see Tr. pp. 95, 158-61). Further confusing the matter, the iBrain enrollment contract was not signed by the parent until March 2024 (retroactive to September 2023), the nursing contract was not signed until March 2024 (effectively only as of March 18, 2024), and the transportation contract was not signed until January 2024 (retroactive to September 2023) (Parent Exs. M; N; O). Given the student's medical needs, the IHO questioned the student's attendance in the school program from September 2023 through March 2024 without a 1:1 nurse (IHO Decision at p. 6). These are inconsistencies in the hearing record that were never cleared through testimony of either the parent or the iBrain supervisor, who testified that he did not know about the contracts and those services (Tr. pp. 93, 96, 113-14, 159, 168, 182).

[16] The letter indicated that it was "Sent Via E-Mail"; however, the parent did not offer into evidence the email transmitting the letter (see Parent Ex. B at p. 1).

public agency in which the student was enrolled and, then, is permitted to evaluate the student if necessary and develop a new IEP if appropriate (34 CFR 300.323[f][1]-[2]; [g]; 8 NYCRR 200.4[e][8][iii]).

The June 2024 emails from iBrain triggered the district's obligation to seek out information from the school district the student attended before moving back to the district and, if necessary, evaluate the student. At this point, the school year had all but concluded and the district could not reasonably have developed an educational plan for the student before the end of the 2023-24 school year. Accordingly, I find no grounds to disturb the IHO's determination that the district did not violate its child find obligation or deny the student a FAPE for the 2023-24 school year.

Even if the district had failed in its child find obligations or in timely initiating the process of developing an educational plan for the student, the evidence described above regarding the lack of communication from the parent to the district prior to her decision to unilaterally place the student and the inaccurate information contained in the parent's March 2024 letter to the district would warrant a complete denial of relief for the 2023-24 school year upon a weighing of equitable considerations.[17]

VII. Conclusion

Having found that the IHO properly dismissed the parent's claims regarding the 2019-20 school year as time barred and found that, for the 2023-24 school year, the district did not violate its child find provision or deny the student a FAPE, the necessary inquiry is at an end, and there is no need to determine the issue of whether iBrain was an appropriate unilateral placement for the student for the 2023-24 school year (Burlington, 471 U.S. at 370).

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
April 10, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER

[17] Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).