The University of the State of New York

The State Education Department
State Review Officer
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No. 23-131

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 Angelo A. Lagman, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, 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 those portions of a decision of an impartial hearing officer (IHO) which declined to grant her direct funding for 1:1 nursing services or transportation for the 2022-23 school year. Respondent (the district) cross-appeals from the that portion of the IHO's determination finding that the 1:1 nursing services and transportation services obtained by the parent were appropriate for the student. The appeal must be dismissed. The cross-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

A CPSE convened on May 26, 2021 for the student's initial eligibility determination and found the student eligible for special education as a preschool student with a disability (Parent Ex. B at p. 1). The hearing record reflects that the student is non ambulatory and nonverbal, he is dependent on a gastronomy tube for feeding needs, and he has received diagnoses of including, among other things, a seizure disorder, cerebral palsy, cortical visual impairment, and global developmental delays (Parent Exs. H at p. 1; I at ¶10; J at ¶¶2-3; L at p. 5; M at p. 1). The CPSE recommended that beginning September 1, 2021, the student should be placed in a 12:1+2 special class for a full day, five days per week, and receive related services, including three 30-minute sessions of 1:1 speech-language therapy per week, three 30-minute sessions of 1:1 physical therapy

(PT) per week, and three 30-minute sessions of 1:1 occupational therapy (OT) per week (id. at p. 9).[1]

On May 24, 2022, the parent sent a letter to the district informing it that the parent was rejecting the district's program and placement for the 2021-22 extended school year, that the parent had concerns regarding the student's regression and lack of progress and the district's failure to implement aspects of the CPSE's May 2021 IEP, that the parent disagreed with the recommendations made in the May 2021 CPSE IEP including the lack of recommendation for special transportation, and that the parent was placing the student at iBrain (Parent Ex. C).

On June 14, 2022, the parent entered into an agreement with the International Academy for the Brain (iBrain) for the student's enrollment starting on July 6, 2022 and ending on June 23, 2023 (Parent Ex. D at pp. 8-13).[2]

On June 17, 2022, the parent notified the district that she had not received a program and placement for the student for the 2022-23 school year and that, at that time, she had "no choice other than to enroll [the student] at iBrain" (Parent Ex. E). The district responded to the parent's letter on July 21, 2022 indicating that the parent's request was "not appropriate for settlement" (Parent Ex. F).

On September 19, 2022, the parent entered into an agreement with Sisters Travel and Transportation Services, LLC (Sisters Travel) for the provision of school transportation services for the student to attend iBrain (Parent Ex. G).

A. Due Process Complaint Notice

In a due process complaint notice dated October 31, 2022, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 and 2022-23 extended school years (see Parent Ex. A).

Initially, the parent requested a pendency determination asserting that in the absence of the district showing the student's last agreed upon placement was available, the student's placement for pendency should consist of direct payment of tuition and transportation at iBrain as the student's "operative placement" for the 2022-23 school year (Parent Ex. A at p. 2).

With respect to the 2021-22 school year, the parent asserted that the student was not provided with services and was unable to attend school as a result (Parent Ex. A at p. 3). According to the parent, she enrolled the student at iBrain in June 2022 for the remainder of the 2021-22 school year (id.). Turning to the 2022-23 school year, the parent asserted that the district failed to

[1] The May 2021 IEP indicated that the student would receive the same recommended program over a 12-month school year, noting that the "student's disabilities [we]re so severe that they require[d] a structured learning environment of twelve months duration to prevent substantial regression" (Parent Ex. B at p. 10).

[2] The parent submitted two versions of the iBrain enrollment contract for the 2022-23 school year, one in Spanish and one in English (see Parent Ex. D). The English version of the contract is the one cited to in this decision and the documents indicate in the footer that the Spanish translation is a courtesy copy and that the English version of the document is binding (Parent Ex. D at pp. 8-13).

hold a CSE meeting or develop an IEP for the student or offer the student a school placement (id. at pp. 3-4). According to the parent, she re-enrolled the student at iBrain at the start of the 2022-23 school year (id. at p. 4).

More specifically, the parents asserted that the district failed to conduct appropriate and timely evaluations of the student, that the district denied the parent meaningful participation in the CSE process and predetermined the student's programming, that the class size recommendation was not sufficient for the 2021-22 school year, that the related services recommendations were not sufficient for the 2021-22 school year, that the district failed to hold a CSE meeting or develop an IEP for the student for the 2022-23 school year, and that the district failed to identify a school placement for the 2022-23 school year (Parent Ex A at pp. 4-5).

As relief, the parent requested a declaratory finding that the district denied the student a FAPE for the 2021-22 and 2022-23 school years and a determination that iBrain was an appropriate placement for the student (Parent Ex. A at p. 6). The parent sought an order requiring the district to directly fund the costs of the student's tuition at iBrain for the 2021-22 and 2022-23 school years including the costs for related services, 1:1 nursing services, and 1:1 paraprofessional services, as needed (id.). The parent also requested "funding of special education transportation with limited time travel, a 1:1 nurse and/or paraprofessional, air conditioning, a lift bus, and a regular-sized wheelchair" (id.). Finally, the parent requested an order directing that the CSE reconvene to develop a new IEP, an order directing the district to conduct any necessary evaluations, and an order for the district to fund an independent neuropsychological evaluation (id.).

B. Impartial Hearing Officer Decisions

Following a prehearing conference held on January 9, 2023, an impartial hearing was conducted on April 3, 2023, continuing on April 21, 2023, and concluding on May 26, 2023 (Tr. pp. 1-56).[3] The district did not appear on any of the scheduled hearing dates (id.). During the hearing, counsel for the parent explained that the student did not begin attending iBrain until the 2022-23 school year and limited their request to the 2022-23 school year; the parent withdrew her claims regarding the 2021-22 school year (Tr. pp. 24-28, 38-39).

In a decision dated May 26, 2023, the IHO determined that by failing to appear at the hearing, the district conceded that it denied the student a FAPE for the 2022-23 school year (IHO Decision at pp. 5, 11). The IHO further found that the parent submitted documentation showing iBrain was an appropriate placement for the student for the 2022-23 school year (id. at p. 6-7, 12-13). The IHO then addressed equitable considerations and found that the parent cooperated with the district and there was no reason not to grant the parent full relief (id. at pp. 14-15). The IHO directed the district to reimburse the parent or fund the costs for the student's placement at iBrain for the 2022-23 school year in the amount of $267,097.60 (id. at p. 15).

[3] At the January 9, 2023 prehearing conference, counsel for the parent requested that the IHO schedule a pendency hearing; however, when the IHO asked what the basis for pendency was at the time, counsel for the parent did not offer a response that the IHO found warranted a pendency hearing; however, the IHO gave the parent the opportunity to submit a written legal brief to argue their position (Tr. pp. 5-10). There is no indication in the hearing record that the parent submitted such a brief in this matter (Tr. pp. 1-56; Parent Exs. A-M).

IV. Appeal for State-Level Review

The parent appeals the IHO's decision to the extent that the amount ordered as relief did not include funding for 1:1 nursing services or special transportation. As for 1:1 nursing services, the parent argues that the student requires 1:1 nursing services "to closely monitor his needs, monitor seizures, and administer anticonvulsive medication while in transit and throughout the school day." According to the parent, the IHO inquired as to why the student needed 1:1 nursing services as well as 1:1 paraprofessional services and that it was addressed by an explanation as to the student's seizure history and that a home-based nurse accompanied the student at school and at home. In addition, the parent indicated the hearing record included a statement from the student's physician that the student required 1:1 nursing services. Overall, the parent asserts that the IHO overlooked evidence showing the student's need for 1:1 nursing services and erred in failing to order payment for those services. With respect to transportation, the parent asserts that the IHO erred in failing to award a flat rate of $233 per school day whether the student used the services or not. The parent asserts that the IHO did not address the issue of transportation at all and should have awarded the parent "the full benefit of her valid contract with the transportation provider." The parent requests an order affirming the IHO's determinations that the district denied the student a FAPE for the 2022-23 school year, that iBrain was an appropriate placement for the student, and that equitable considerations favor the parent's claims. The parent further requests an order directing the district to "fully and directly fund [the student's] placement at iBrain, including base tuition, supplemental tuition (related services), special transportation, and 1:1 nursing services."

The district answers the parent's request for review and cross-appeals from the IHO's determinations to the extent the decision could be read as finding 1:1 nursing services and special transportation were appropriate services to meet the student's special education needs. With respect to 1:1 nursing services, the district asserts that the IHO inquired of counsel for the parent's as to the total amount the parent was seeking and parent's counsel confirmed the parent was seeking a total of $267,097.60, that there was no contract for nursing services entered into evidence and little evidence of by whom or if the service was provided to the student during the 2022-23 school year, and that the hearing record did not include sufficient information regarding the 1:1 nursing services to support a finding it was an appropriate or necessary service for the student. With respect to transportation, the district asserts that the parent waived it by explicitly stating the total amount requested was $267,097.60, which is the total amount that was ordered by the IHO.

The parent submits a verified reply and answer to the district's cross-appeal responding to the district's assertions regarding 1:1 nursing and transportation.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. __, 137 S. Ct. 988, 999 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192).

The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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).

Turning to the analysis used regarding the parent's unilateral placement, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the

[4] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 137 S. Ct. at 1000).

parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

> No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

VI. Discussion - Relief

The parties have not appealed from the IHO's determination that the district failed to meet its burden to prove that it offered the student a FAPE for the 2022-23 school year. In addition, the parties do not argue as to whether the base program and related services provided to the student by iBrain was appropriate to meet the student's special education needs. Therefore, the IHO's findings regarding FAPE and the appropriateness of the awarded iBrain program have become final and binding on the parties (see 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]).

The sole issues in this matter relate to the relief granted by the IHO and whether the IHO erred in the relief granted under the circumstances.

The IHO awarded the parent the total sum of $267,097.60 for the student's program provided at iBrain during the 2022-23 school year (IHO Decision at p. 15). Review of the iBrain

contract shows that for the 2022-23 school year, the parent agreed to pay iBrain the sum of $175,000.00 in base tuition, which included the cost for an individual paraprofessional, and school nurse" (Parent Ex. D at p. 8). In addition, the parent agreed to pay for related services, identified as five 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, five 60-minute sessions of individual speech-language therapy per week, one 60-minute session of individual assistive technology services per week, two 60-minute sessions of individual music therapy per week, and one session of parent counseling and training per month (id. at pp. 8-9). iBrain charged the parent $112 per hour for individual services and $56 per hour for services in a group (id.) The total cost of related services for the 2022-23 school year was identified as $92,097.60, indicating that the total cost of the student's programming at iBrain for the 2022-23 school year was $267,097.60 as awarded by the IHO.

The parent asserts that the IHO erred in failing to award the parent the cost of individual nursing services and transportation during the 2022-23 school year. Initially, the parent did request funding for 1:1 nursing services and special transportation in the due process complaint notice (Parent Ex. A at p. 6). However, the hearing record shows that although nursing services were brought up as an issue during the hearing, in the multiple instances where counsel for the parent discussed what relief was being sought, counsel for the parent did not mention transportation (Tr. pp. 24-33, 54). In fact, on the final hearing date, counsel for the parent confirmed that the total amount of relief the parent sought was $267,097.60 (Tr. p. 54). The IHO then asked if there was "anything else" two times (Tr. p. 54). The second time, counsel for the parent responded, "Nothing from the Parent, Your Honor." (Tr. p. 55). Accordingly, any request for transportation fell out during the process of the hearing and there is no basis for finding that the IHO erred in not combing through the hearing record to conduct transportation calculations and then award the parent relief for which the parent did not make an affirmative request when specifically asked what total amount was being requested.[5]

Turning to the request for individual nursing services, this issue was addressed during the hearing. At the April 3, 2023 hearing date, counsel for the parent indicated that the stated tuition amount of $267,097.60 did not include costs for individual nursing services (Tr. pp. 30-31). When asked what the purpose of the individual nursing services was, counsel for the parent responded that the "nurse [wa]s needed primarily to monitor seizure activity" (Tr. p. 32). The hearing then adjourned for the parent to obtain more information to support the request for individual nursing services (Tr. pp. 32-33).

When the hearing resumed on April 21, 2023, the parent submitted the student's medical records into the hearing record, which counsel for the parent argued supported a need for individual nursing services (Tr. pp. 39-40; Parent Ex. L). In reviewing the medical records, the IHO questioned why the student required a full-time 1:1 nurse as well as a paraprofessional at the same time; the IHO indicated he expected "an affidavit from a doctor indicating that it [wa]s imperative for the student to have, for health reasons . . . a nurse present" (Tr. pp. 41-42). Counsel for the parent then indicated that the medical records were submitted to show that, at the age of four, prior

[5] The parent's due process complaint notice included additional requests for relief, such as requests for the district to conduct evaluations and convene a CSE and for an independent neuropsychological evaluation (Parent Ex. A at p. 6); however, none of those requests were raised during the hearing and the parent has not raised them on appeal.

to the student attending school, the student received round the clock nursing services at home; however, counsel for the parent offered to obtain a letter from the student's doctor (Tr. pp. 42-43).

Consistent with the IHO's assessment during the hearing, the student's medical records contain only a passing reference to the student having a home nurse (Tr. pp. 43-44; Parent Ex. L at p. 12). The documentation, from a hospital visit in March 2023, indicates only that the student's home nurse stated the student had increasing instability in his left shoulder during the past month (Parent Ex. L at p. 12). There is no indication in the document that the student had round the clock nursing services at home, although it is at least possible that the student did receive such services considering his diagnoses (see Parent Ex. L).

During the hearing, the IHO explained that he wanted more documentation because even if the student had a nurse at home, the student did not have a paraprofessional at home; the IHO was clear that he expected an explanation from an expert as to why both services were necessary (Tr. pp. 44-45). The IHO further clarified that he was not seeking a letter from a doctor, he "need[ed] some form of affidavit from a doctor who's going to testify. Not just a letter – or some sworn statement" (Tr. pp. 47-48). The hearing was then adjourned so counsel for the parent could obtain the requested information (Tr. p. 48).

The hearing resumed on May 26, 2023, at which time the parent submitted a letter from the student's physician into the hearing record (Tr. p. 54; Parent Ex. M). The IHO then asked counsel for the parent "[s]o the total amount that the [p]arent is seeking is $267,097.60" (id.). Counsel for the parent then responded "[t]hat is correct" (id.). The IHO issued his decision the same day as the final date of the hearing (see IHO Decision). As discussed above, in his decision, the IHO awarded the parent a total of $267,097.60 that the parent requested for the costs of the student's tuition at iBrain for the 2022-23 school year.

Upon review of the physician's letter offered by the parent into evidence, the letter did not comply with the directives the IHO clearly stated at the April 21, 2023 hearing date (Tr. pp. 44-45, 47-48). The submitted letter, dated May 9, 2023, noted the student's complex medical history including a list of the student's diagnoses and indicated that it was "medically necessary for a 1:1 nurse to be attending to [the student] full time during school and travel"; the letter specifically noted that the student could have seizures at any time and that the student was g-tube dependent for feeds throughout the day (Parent Ex. M). However, the letter does not clearly state why the student required both 1:1 nursing services and 1:1 paraprofessional services at school, or why the student required those services in addition to his school program, which consisted of placement in a 6:1+1 special class with approximately 18 hours per week of individual related services (see Parent Exs. M). The letter failed to meet the clear expectations set by the IHO in that it was not in the form of an affidavit, the doctor was not available for questioning, and the document itself offers no explanation as to why both services were simultaneously necessary for the student to attend school. Accordingly, without further documentation, the letter itself does not provide sufficient information to overturn the IHO's decision not to award funding for 1:1 nursing services.

In review of the rest of the hearing record, there is testimony and documentary evidence indicating the student required the services of both a 1:1 paraprofessional and a 1:1 school nurse; however, the information included is vague and does not fully address the IHO's question as to why the student required the services of both providers at the same time, especially considering

the student was placed in a class with a 6:1+1 ratio and received approximately 18 hours of 1:1 related services per week.

The iBrain director of special education testified that the student attended a 6:1+1 special class with related services including five 60-minute sessions of individual OT per week; five 60-minute sessions of individual PT per week; five 60-minute sessions of individual speech-language therapy per week; three 60-minute sessions of individual vision education services per week; and three 60-minute sessions of individual music therapy per week (Parent Ex. I at ¶ 12; Parent Ex. H at p. 67).[6] The director also testified that the student received 1:1 paraprofessional services "all day, every day, to support his needs" (Parent Ex. I at ¶ 14). In addition, she testified that the student was "mandated to receive the services of a 1:1 nurse all day, every day, to monitor his condition and to support his medical needs" (id. at ¶ 15).

A February 2023 iBrain progress report noted the student received the support of 1:1 nursing services in several locations (Parent Ex. H at pp. 15-16, 18, 20, 39, 60-62, 65-67). In noting the equipment and supports the student required, the iBrain IEP indicated that the student "require[d] a 1:1 bilingual paraprofessional and /or nurse . . . to assist with mobility and navigation throughout the school, changing and dressing, feeding, transfers, and setting up/cleaning up equipment for therapy sessions" (id. at pp. 15-16). It also stated the student required a 1:1 paraprofessional for navigating his environment, activities of daily living skills, assistance with assistive technology, transfers, and overall safety and also "required[d] his 1:1 nurse throughout the school day to monitor his health and safety including g-tube management" (id. at p. 18). At another point, without further explanation, the iBrain IEP noted the student required "a 1:1 paraprofessional and 1:1 private nurse throughout the school day" (id. at p. 20). At another point, the IEP noted the student required "a 1:1 paraprofessional to assist with set-up of classroom activities, access to and use of assistive technology devices and technology, assistance with attention to tasks, and to provide frequent repositioning" and "also need[ed] a nurse to assist his medical condition" (id. at p. 39). The iBrain IEP included annual goals regarding the services a 1:1 paraprofessional provided for the student and in those goals it indicated the paraprofessional would consistently consult with the 1:1 nurse; however, those annual goals contained a different student's name and, without an explanation as to why, they do not appear to be reliable evidence of the student's programming (id. at pp. 60-62). At the end, iBrain recommended that the student receive a 12-month program in a 6:1+1 class, with related services, as well as a 1:1 paraprofessional, and a 1:1 nurse (id. at pp. 65-67).

Based on the above, the evidence of the student's need for individual nursing services is insufficiently vague to support a finding that appropriate programming for the student included all of the individual services the student was receiving.

As a final matter, regardless of whether the student required 1:1 nursing services, there is also little evidence in the hearing record that the student actually received nursing services during

[6] The February 2023 iBrain IEP did not note music therapy as a related service for the student (Parent Ex. H at p. 67). However, it does indicate a recommendation for two weekly sessions of music therapy, then later a recommendation for three weekly sessions, two individual and one group (id. at pp. 28-29, 59).

the 2022-23 school year (Parent Ex. H at pp. 18, 31, 69).[7] Additionally, there is no evidence as to how or by whom such services were provided to the student and there is no indication in the hearing record that the parent has a financial obligation to pay for such services.

The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington– Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]; see also Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 430 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]).

Unlike the E.M. case, there is no proof of any agreement, either written or oral, between the parent and whoever delivered individual nursing services to the student to show that the parent was responsible for the costs of the nursing services for the 2022-23 school year. As noted by the district, the parent's contract with iBrain does not include individual nursing services, in fact, as the parent repeatedly notes the contract with iBrain explicitly excludes individual nursing services from the base tuition (Parent Ex. D at p. 8). Additionally, the only other mention of nursing services in the contract is that the base tuition includes the services of a school nurse (id.). Accordingly, there is no evidence that iBrain provided individual nursing services to the student or the cost of such services (id. at pp. 8-13).

Accordingly, under the circumstances of this matter, the parent's request for a determination that the district pay for privately obtained nursing services must be denied. The hearing record lacks any evidence of a contract or legal obligation binding the parent to pay for nursing services and, therefore, there is no reason to disturb the outcome reached by the IHO, namely that the parent is not entitled to anything in excess of the amount of $267,097.60 as stated in the iBrain contract.

VII. Conclusion

Based on the above, there is insufficient evidence in the hearing record to find that the student received individual nursing services during the 2022-23 school year, who may have provided the student with such services, what such a service provided for the student that could not have been provided through the support of a 1:1 paraprofessional and a school nurse, or that the parent incurred a financial obligation to pay for individual nursing services or what the cost of such services would have been. Additionally, as counsel for the parent was asked during the hearing what relief was being sought and responded that the only relief sought was the student's tuition at iBrain in the amount of $267,097.60, the IHO did not err in granting the parent the requested relief.

[7] The February 2023 iBrain report lists a school nurse as one of the student's providers but does not identify an individual nurse for the student (Parent Ex. H at p. 69).

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

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
August 22, 2023

JUSTYN P. BATES
STATE REVIEW OFFICER