The University of the State of New York

The State Education Department
State Review Officer
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No. 23-235

Application of a STUDENT WITH A DISABILITY, by her parents, 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 petitioners, by Zack Zylstra, 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. Petitioners (the parents) appeal from that portion of a decision of an impartial hearing officer (IHO) which ordered respondent (the district) to directly fund specified categories of their daughter's tuition costs at the International Academy for the Brain (iBrain) for the 2023-24 school year.[1] The district cross-appeals from certain aspects of the IHO's ordered relief. The appeal must be sustained. The cross-appeal must be sustained in part.

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

[1] The hearing record includes references to the school as both the International Academy for the Brain and the International Institute for the Brain. For purposes of this decision, the school will be referred to as "iBrain."

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 parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited herein detail. The student has attended Brain since the 2018-19 school year (see Parent Ex. I ¶ 11) and has been the subject of three prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 23-

017; Application of a Student with a Disability, Appeal No. 22-138; Application of a Student with a Disability, Appeal No. 20-036).

On March 3, 2023, the CSE met and developed an IEP for the student with a projected implementation dated of March 22, 2023 (Dist. Ex. 2). The CSE found that the student continued to be eligible for special education as a student with a traumatic brain injury and recommended that the student attend a 6:1+1 special class in a State-approved nonpublic school for a 12-month school year, along with occupational therapy (OT), physical therapy (PT), speech-language therapy, and vision education services (id. at pp. 1, 55-57, 62-63).[2] In addition, the CSE recommended the student be provided with 1:1 paraprofessional services, assistive technology devices and services, and door-to-door special transportation, including a 1:1 nurse during transport, and that the parents be provided with parent counseling and training (id. at pp. 55-57).

On June 20, 2023, the parents provided the district with notice of their intent to unilaterally place the student at iBrain and seek reimbursement for costs of tuition at iBrain, related services, transportation, and nursing services for the 12-month, 2023-24 school year (Parent Ex. C).[3] On June 29, 2023, the parents executed an enrollment contract with iBrain for the student's attendance during the 2023-24 school year, and, on July 10, 2023, the parents entered a transportation contract with Sisters Travel and Transportation Services, LCC, for the 2023-24 school year (Parent Exs. D; E).

In a due process complaint notice, dated July 5, 2023, the parents alleged that the district failed to offer the student a FAPE for the 2023-24 school year due to the district's failure to conduct appropriate and timely evaluations, the March 2023 CSE's failure to recommend music therapy, 1:1 nursing services, sufficient and appropriate support for the student's assistive technology, or appropriate special transportation, and the district's failure to provide the parents with a copy of the IEP, prior written notice, or school location letter (Parent Ex. A).[4, 5] For relief, the parents requested an order for direct payment to iBrain for the cost of the student's tuition, related services, and 1:1 nursing services, and direct payment or prospective funding of special transportation (id. at p. 8). The parents also sought funding for a neuropsychological independent educational evaluation (IEE) (id.).

[2] The student's eligibility for special education as a student with a traumatic brain injury is not in dispute (see 34 CFR 300.8[c][12]; 8 NYCRR 200.1[zz][12]).

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

[4] In an apparent typographical error, the due process complaint notice was dated July 5, 2022 (see generally Parent Ex. A). The email transmitting the due process complaint notice attached to the exhibit was sent on July 5, 2023 and it is undisputed that the due process complaint notice should have been dated July 5, 2023 (id. at p. 9; see Answer ¶ 1 n.1).

[5] The parents also alleged that the recommendation for a 6:1+1 special class in a district specialized school was inappropriate (Parent Ex. A at pp. 4-5); however, as noted above, the March 2023 CSE recommended a State-approved nonpublic school (Dist. Ex. 2 at p. 62).

After a prehearing conference on August 8, 2023, an impartial hearing was held on September 5, 2023 before the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-98; see IHO Ex. I).

In a decision, dated September 18, 2023, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, iBrain was an appropriate unilateral placement, and equitable factors favored the parents' request for tuition funding (IHO Decision at pp. 6, 10-11). For relief, the IHO ordered the district to "directly fund [iBrain] in the amount of $190,000 within 35 days of this Order" and "directly fund [iBrain] in the amount of $108,696 base within 35 days of this Order" (id. at p. 15). Further, the IHO ordered the district to directly fund transportation services and fund individual nursing services "by a provider of the Parent's choosing, to be funded via" a related services authorization (RSA) (id.). The IHO also ordered the district to fund a neuropsychological IEE at a cost not to exceed $6,500 (id.). Finally, the IHO ordered the district to fund OT, PT, and speech-language evaluations via RSAs (id. at p. 16).

IV. Appeal for State-Level Review

The parents appeal, asserting that the IHO erred in the wording of the relief ordered. Specifically, the parents assert that the IHO erred by categorizing the $108, 696 supplemental tuition costs as being the base tuition cost. For relief, the parents ask that the IHO's order be modified to clarify the award for direct funding of tuition to reflect the terms contained within the enrollment contract.

In an answer with cross-appeal, the district does not object to the parents' request for a modification of the IHO's tuition award to reflect the amounts for the base and supplemental tuitions. However, the district cross-appeals those portions of the IHO's decision that found that equitable considerations supported an award of tuition funding and which ordered the district to directly fund the student's tuition costs, fund 1:1 nursing services via RSA, fund a neuropsychological IEE, and fund, via RSAs, the OT, PT, and speech-language evaluations (id. at p. 16). In a reply and answer to the district's cross-appeal, the parents respond to the district's material allegations.

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]).[6]

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).

VI. Discussion

At the outset, the parties have not appealed the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year and iBrain was an appropriate unilateral placement. As a result, these determinations have 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]).

A. Direct Funding Relief

1. Equitable Considerations

The district asserts that the parents did not appear at the impartial hearing in this matter and that, as a result, the district was prevented from cross-examining them regarding their cooperation with the district. The district requests a reduction in the award of tuition funding as a result.

[6] 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).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014] [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Here, the district does not assert and the hearing record does not support a finding that the parents failed to cooperate with the district in creating the March 2023 IEP or failed to provide the required "10-day notice" of their intent to unilaterally place the student (see Parent Ex. C). During the impartial hearing, the district purportedly "reserve[d] the right to argue that the equities [we]re in its favor, subject to any testimony and disclosure" (Tr. pp. 38-39), but the district thereafter did not object to the parents' absence during the impartial hearing, attempt to call the parents as witnesses or request a subpoena requiring their testimony, present evidence of any lack of cooperation on the part of the parents, or present any argument during the impartial hearing related to equitable considerations or the parents' lack of appearance and testimony (see generally Tr. pp. 1-98). On appeal, the district's argument is entirely speculative and the district offers no factual basis for asserting that a lack of cooperation occurred or explanation for its failure to present evidence of the same as part of its direct case. Accordingly, there is no basis in the hearing record to modify the IHO's determination that equitable considerations weighed in favor of an award of the parents' requested relief.

2. Parent's Financial Need

The district argues that the IHO erred in ordering direct funding relief instead of tuition reimbursement given that the parents did not demonstrate financial need warranting a direct funding remedy.

With regard to fashioning equitable relief under the IDEA for private school tuition, courts have determined that it may be appropriate to order a school district to make retroactive tuition payment directly to a private school where: (1) a student with disabilities has been denied a FAPE; (2) the student has been enrolled in an appropriate private school; and (3) the equities favor an award of the costs of private school tuition; but (4) the parents, due to a lack of financial resources,

have not made tuition payments but are legally obligated to do so (Mr. and Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403,406 [S.D.N.Y. 2011]; see E.M., 758 F.3d at 453 [noting that "the broad spectrum of equitable relief contemplated [by] the IDEA encompasses, in appropriate circumstances, a direct-payment remedy" [internal quotation marks omitted]). It has been held that "[w]here . . . parents lack the financial resources to 'front' the costs of private school tuition, and in the rare instance where a private school is willing to enroll the student and take the risk that the parents will not be able to pay tuition costs—or will take years to do so—parents who satisfy the Burlington factors have a right to retroactive direct tuition payment relief" (Mr. and Mrs. A., 769 F. Supp. 2d at 428; see also A.R. v. New York City Dep't of Educ., 2013 WL 5312537, at *11 [S.D.N.Y. Sept. 23, 2013]).

The Mr. and Mrs. A. Court relied in part on dicta from earlier cases in which claims seeking direct prospective payment to a private non-approved school were asserted (see Connors v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998] [opining that, under the facts presented, where both the parent and district agreed that the student's needs required placement in a private non-approved school, denial of prospective placement "would deny assistance to families that are not able to front the cost of a private non-approved school, without exception"]; see also S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 360 [S.D.N.Y. 2009]). In Mr. and Mrs. A., the district court held that, in fashioning such relief, administrative hearing officers retain the discretion to reduce or deny tuition funding or payment requests where there is collusion between parents and private schools or where there is evidence that the private school has artificially inflated its costs (769 F. Supp.2d at 430).

In light of this authority, SROs in the past have required parents seeking direct funding relief to show a lack of financial resources (see, e.g., Application of a Student with a Disability, Appeal No. 11-049; Application of the Dep't of Educ., Appeal No. 11-041). However, recently, the District Court for the Southern District of New York has ruled in certain cases that such proof is not required before direct funding may be ordered (see Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered by the parents about their financial means to award direct tuition payment]). In Cohen, the court acknowledged the prior language in the decisions discussed above, noting that all of the courts which awarded direct funding "mentioned a parent's financial inability to pay tuition" (Cohen, 2023 WL 6258147, at *4, citing E.M., 758 F.3d 442 at 453 n.14, Mr. & Mrs. A., 769 F. Supp. 2d at 406, Connors, 34 F. Supp. 2d 795, and A.R., 2013 WL 5312537, at *11). However, the court found that language about parents' financial risk, arose in "cases where the Burlington prerequisites had not yet been satisfied," whereas in instances "where it has already been established that the district has failed to provide a child with a FAPE and (2) the private educational services obtained by the parents were appropriate, an award for direct retrospective payment would merely require the district to pay 'expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen, 2023 WL 6258147, at *5, quoting E.M., 758 F.3d at 453 [internal quotations omitted]). The court further discussed the potential

pitfalls of a different requirement, including "disparate requirements for parents of disabled children based on financial resources, notwithstanding the IDEA's requirement that all children with disabilities are entitled to a free education" (Cohen, 2023 WL 6258147, at *5 [emphasis in the original]).

With respect to financial risk (as opposed to parents' inability to pay), the court's decision in Cohen could be read broadly to overlook, in some instances, a parent's failure to establish financial risk if it was established that the district denied the student a FAPE and that the unilateral placement was appropriate (see Cohen, 2023 WL 6258147, at *5). However, such a broad reading would be contrary to longstanding precedent and would likely have problematic consequences for the process and the system.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "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]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359,374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove, 557 U.S. at 247 [citing criteria for tuition reimbursement, as well as the requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, the financial risk taken by the parents tends to support a view that the costs of the program are reasonable, at least absent contrary evidence in the hearing record.

On the other hand, as the court in Cohen noted, there may be disparate levels of access to tuition reimbursement relief based on parents' financial means (Cohen, 2023 WL 6258147, at *5). In light of this concern, another SRO recently observed that:

> The approach of requiring proof of financial need to obtain direct funding of private school tuition, instead of reimbursement, seemed the middle ground that permitted more equitable access to this type

> of relief. But doing away with the requirement for showing financial need seems to most directly benefit parents that have financial means rather than broadening access to the relief to parents of less means as administrative hearing officers in due process proceedings were already routinely providing direct funding relief to those who lacked the resources to pay the tuition and seek reimbursement.

(see Application of a Student with a Disability, Appeal No. 23-216). Nevertheless, given the continuing shift in authority within the District Court for the Southern District of New York in favoring direct payment and the large cadre of private schools and agencies operating within the boundaries of the New York City Department of Education willing to absorb the risks that parents may not prevail in due process litigation involving unilateral placement, I find that appropriate equitable relief may under certain circumstances include direct funding notwithstanding a lack of evidence about a parent's financial need, so long as there is evidence of financial risk. The district explained its concerns to the Court in Mr. & Mrs. A. that private schools and agencies who absorb the risks would artificially inflate costs beyond reasonable market rates, and the Court responded that, "where there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (769 F. Supp. 2d at 429-30). While the costs of private schools and special education services unilaterally obtained by parents within this district do seem to have skyrocketed in cases before the undersigned in recent years, thus far, the district has made few efforts to come forward with arguments based on factual evidence in the manner described in Mr. & Mrs. A. or explain why it was prevented from doing so.

Accordingly, while the hearing record lacks evidence concerning the parent's ability to pay for the services provided by iBrain, under the developing case law described above and under the circumstances present here, there is no basis to modify the IHO's award of direct funding of the costs of the unilateral placement.

3. Base and Supplemental Tuition Funding

With respect to the parents' appeal, a review of the hearing record reveals that, according to the relevant tuition agreement terms, the base tuition at iBrain is $190,000 and includes "the cost of an individual paraprofessional, and school nurse as well as the academic programming" and the supplemental tuition is $108,696 and includes "the cost of the Student's related services programming such as physical therapy, occupational therapy, speech-language therapy, vision education services, assistive technology services, music therapy, hearing education services and parent counseling and training" (Parent Ex. D at pp. 1-2). As the parties are in agreement that the IHO's order reversed the relevant tuition categories when ordering relief, the IHO's decision will be modified accordingly.

B. Nursing Services

Next, in its cross-appeal, the district argues that the IHO erred in ordering the district to fund 1:1 nursing services via RSA. Initially, iBrain is not delivering nursing services to the student during the 2023-24 school year but, instead, the services are purportedly delivered by a separate

agency. Generally, a parent may structure a unilateral placement in this manner, for example, by obtaining outside services for a student in addition to a private school placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 365 [2d Cir. 2006]).

However, there is little evidence in the hearing record regarding nursing services obtained for the student for the 2023-24 school year. Further, there is no indication in the hearing record that the parent has a financial obligation to pay for such services. The parents' counsel indicated that the parents would disclose a "nursing affidavit" (Tr. pp. 4-5); however, no such affidavit was offered into evidence. During the impartial hearing, the iBrain director of special education (iBrain director) testified that 1:1 nurses assigned to students attending iBrain were from an agency "called Park Avenue Nursing" (Tr. p. 52). In her written testimony, the iBrain director also indicated that the student "ha[d] 1:1 nursing services" at iBrain" (Parent Ex. I ¶ 14). In addition, the iBrain educational plan included goals for the student to be addressed by a 1:1 nurse (Parent Ex. B at pp. 44-48).

With respect to the parents' original request in their due process complaint notice for direct payment by the district for the privately obtained 1:1 nursing services (Parent Ex. A at p. 8), as discussed further above, 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., 758 F.3d at 453; see also Mr. and Mrs. A, 769 F. Supp. 2d at 430 [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]).

However, here, unlike the E.M. case, the parents failed to introduce any evidence of an agreement, either written or oral, between the parent and the provider of the individual nursing services to show that the parent was responsible for the costs of the nursing services for the 2023-24 school year. The parent's contract with iBrain does not include individual nursing services, and, in fact, explicitly excludes individual nursing services from the base tuition (see Parent Ex. D at p. 1). In their due process complaint notice, the parents refer to a nursing contract between the parents and the provider of the nursing services (Parent Ex. A at p. 9); however, such a contract was not offered into evidence. Accordingly, the IHO correctly denied the parents' request for direct funding of the nursing services.

While the IHO correctly declined to order direct funding of the privately-obtained nursing services given the lack of evidence, the IHO nevertheless ordered relief in an alternative form related to nursing services. In particular, the IHO ordered the district to fund private nursing services through RSAs (IHO Decision at p. 15).[7] However, the parent had already engaged in a

[7] Although not defined in the hearing record, RSA is a common acronym for "related service authorization," which "allows a family to secure an independent provider paid for by the [district]" and "is issued only when a contracted agency cannot provide the service" for the district (see F.O. v. New York City Dep't of Educ., 976 F.

self-help remedy and the hearing record does not indicate that an alternative form of relief was warranted to cure the deficiencies in the parent's evidence. To the extent nursing services were not delivered as a part of the iBrain program or as a separate unilaterally obtained service to supplement the school placement, the lack of such service would tend to call into question the appropriateness of the unilateral placement given the parent's contention and the IHO's determination that the student needed individual nursing services. This is particularly so in this instance given that one of the parents' allegations regarding the district's recommended programming for the student for the 2023-24 school year was that it lacked a recommendation for individual nursing services (Parent Ex. A at pp. 4, 6 [alleging that "[m]ost egregious was the CSE's failure to recommend 1:1 nursing for [the student]"]; see Berger, 348 F.3d at 523 [finding that one of the factors to consider in determining if a private school is appropriate is whether the unilateral placement "at a minimum, provide[s] some element of special education services in which the public school placement was deficient"]; see also Frank G., 459 F.3d at 365 [describing how the unilateral placement provided services the district acknowledged that the student required, yet failed to provide]; Mason v. Carranza, 2023 WL 6201407, at *13 [E.D.N.Y. Sept. 22, 2023] [noting that if an IEP were deemed "substantively inadequate" based on the omission of assistive technology, then relief would be denied "based on the next Burlington/Carter prong—i.e., that 'the parents' alternative private placement was appropriate,'—because iBRAIN lacked the required assistive technology devices and services . . . and thus was not an appropriate alternative placement"], quoting Ventura de Paulino, 959 F.3d at 526-27). To the extent the services were provided, the parents failed to present evidence regarding their financial obligation for the services.

The IHO found the unilateral placement appropriate based on a totality of the circumstances and no additional services above and beyond funding of the unilateral placement as described in the evidence is warranted.[8] Accordingly, under the circumstances of this matter, the

Supp. 2d 499, 507 n.4 [S.D.N.Y. 2013] [citing a document published by the district]). The State Education Department has issued guidance indicating that it is permissible for districts to contract with private entities to provide related services to students with disabilities ("Questions and Answers Related to Contracts for Instruction," Office of Special Educ. [June 2, 2010], available at http://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Thus, RSAs are meant as a means for the district to deliver recommended programming, not to supplement a parent's unilateral placement after the parent rejected the district placement.

[8] To the extent the order for the district to fund private nursing services via RSA could be viewed as a form of compensatory education, one court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W. w. New York City Dep't of Educ., 2022 WL 3448096, at *5-*6 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]). To the extent this blended approach is adopted, it then begins to blur the parents' responsibility in the hearing process to establish that the unilateral services they obtained for their child are appropriate because it calls on school districts to simultaneously become responsible to correct the shortcomings or defects of a unilateral placement with compensatory education. As another SRO recently opined, "[s]hould cases continue to trend toward blended unilateral placement and compensatory education forms of equitable relief during the same time period, it will not be possible to effectively differentiate the burden of proof with respect to the unilateral placement that has been placed on parents and the burden of proof with respect to compensatory education which SROs thus far have found rests on districts under state law burden shifting provisions . . . because the argument that the unilateral placement successfully enables the student to receive the educational benefits defined by Rowley works against the argument that further compensatory education is necessary to remediate the deprivation of FAPE called for in Rowley" (Application of a Student with a Disability, Appeal No. 23-096; see Educ. Law § 4404[1][c]; Schaffer v. Weast, 546 U.S. 49, 59-

evidence in the hearing record does not support the IHO's order requiring the district to pay for privately obtained 1:1 nursing services through RSAs.

C. Independent Educational Evaluations

In its cross-appeal, the district asserts that the IHO erred in ordering district funding of a neuropsychological IEE and funding of OT, PT, or speech-language evaluations via RSAs.

As an initial matter, to the extent the IHO ordered the use of RSAs to fund OT, PT, and speech-language evaluations, it appears the IHO intended to order the district to fund independent evaluations, and, as such, the relief is indistinguishable from an order for an IEE at district expense and shall be examined as such.

The IDEA and State and federal regulations guarantee parents the right to obtain an IEE (see 20 U.S.C. § 1415[b][1]; 34 CFR 300.502; 8 NYCRR 200.5[g]), which is defined by State regulation as "an individual evaluation of a student with a disability or a student thought to have a disability, conducted by a qualified examiner who is not employed by the public agency responsible for the education of the student" (8 NYCRR 200.1[z]; see 34 CFR 300.502[a][3][i]). Parents have the right to have an IEE conducted at public expense if the parent expresses disagreement with an evaluation conducted by the district and requests that an IEE be conducted at public expense (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]; see K.B. v Pearl Riv. Union Free Sch. Dist., 2012 WL 234392, at *5 [S.D.N.Y. Jan. 13, 2012][noting that "a prerequisite for an IEE is a disagreement with a specific evaluation conducted by the district"]; R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 234-35 [D. Conn. 2005][finding parental failure to disagree with an evaluation obtained by a public agency defeated a parent's claim for an IEE at public expense]).

If a parent requests an IEE at public expense, the school district must, without unnecessary delay, either (1) ensure that an IEE is provided at public expense; or (2) initiate an impartial hearing to establish that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 CFR 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv). If a school district's evaluation is determined to be appropriate by an IHO, the parent may still obtain an IEE, although not at public expense (34 CFR 300.502[b][3]; 8 NYCRR 200.5[g][1][v]). Additionally, both federal and State regulations provide that "[a] parent is entitled to only one [IEE] at public expense each time the public agency conducts an evaluation with which the parent disagrees" (34 CFR 300.502[b][5]; 8 NYCRR 200.5[g][1]). The Second Circuit Court of Appeals has recently found that, if a district and a parent agree that a student should be evaluated before the required triennial evaluation "the parent must disagree with any given evaluation before the child's next regularly scheduled evaluation occurs" or "[o]therwise, the parent's disagreement will be rendered irrelevant by the subsequent evaluation" (D.S. v. Trumbull Bd. of Educ., 975 F.3d 152, 170 [2d Cir. 2020]).

62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). Here, where the parents already obtained the private nursing services but failed to meet their evidentiary burden during the impartial hearing regarding such services, this is not an instance where an award of compensatory education in addition to funding of the unilateral placement would be warranted.

In past decisions SROs have permitted a parent to request a district-funded IEE in a due process complaint notice in the first instance (see, e.g., Application of the Dep't of Educ., Appeal No. 21-135); however, SROs have also expressed reservations that this is not the process contemplated by the IDEA and its implementing regulations (Application of the Dep't of Educ., Appeal No. 23-034; Application of a Student with a Disability, Appeal No. 22-150) and observed that the approach has caused more problems than it resolves (34 CFR 300.502[b]; 8 NYCRR 200.5[g][1]). The statute clearly indicates that a district is required to either grant the IEE at public expense or initiate due process to defend its own evaluation of the student, but a district need only do so "without unnecessary delay" (34 CFR 502[b][2]). The process envisions that a district has an opportunity to engage with the parent on the request for an IEE at public expense outside of due process litigation, and if a delay should occur as a result, one of the fact-specific inquiries to be addressed is whether the IEE at public expense should be granted because the district's delay in filing for due process was unnecessary under the circumstances (see Cruz v. Alta Loma Sch. Dist., 849 F. App'x 678, 679-80 [9th Cir. 2021] [discussing the reasons for the delay and degree to which there was an impasse and finding that the 84-day delay was not an unnecessary delay under the fact specific circumstances]; Pajaro Valley Unified Sch. Dist. v. J.S., 2006 WL 3734289, at *2 [N.D. Cal. Dec. 15, 2006] [finding that an unexplained 82-day delay for commencing due process was unnecessary]; Alex W. v. Poudre Sch. Dist. R-1, 2022 WL 2763464, at *14 [D. Colo. July 15, 2022] [holding that simply refusing a parent's request for an IEE at public expense is not among the district's permissible options]; MP v. Parkland School District, 2021 WL 3771814, at *18 [E.D. Pa. Aug. 25, 2021] [finding that the school district failed to file a due process complaint altogether and granting IEE at public expense]; Jefferson Cnty. Bd. of Educ. v. Lolita S., 581 F. App'x 760, 765-66 [11th Cir. 2014]; Evans v. Dist. No. 17 of Douglas Cnty., Neb., 841 F.2d 824, 830 [8th Cir. 1988]). As the Second Circuit observed, at no point does a parent need to file a due process complaint notice to obtain an IEE at public expense (Trumbull, 975 F.3d at 168-69). Accordingly, based on the continued study of the judicial and administrative guidance on the topic, other SROs have changed the previous approach of allowing the parent to initially disagree with a district evaluation and request an IEE in a due process complaint notice (without attempting to raise such disagreement with the district first (see, e.g., Application of a Student with a Disability, Appeal No. 23-081).

Here, there is no indication in the hearing record that, prior to the due process complaint notice in this matter, the parents expressed disagreement with a district evaluation and requested an IEE at public expense. The parents point to a due process complaint notice filed in a prior proceeding involving the student; however, even assuming that the prior due process complaint notice would have triggered the district's obligation to respond outside of the impartial hearing process, the language quoted by the parents from that complaint alleges only the student's need for a neuropsychological evaluation but does not express disagreement with a district evaluation or request district funding of an IEE.[9] The parents' July 5, 2023, due process complaint notice in present matter alleged that the district failed to conduct updated evaluations of the student in

[9] The parents indicate that the prior due process complaint notice was included with their reply and answer to the cross-appeal as an exhibit; however, the only attachment included as additional evidence with the filing is an opinion and order from the District Court of the Southern District of New York involving a different student which is relevant precedent relating to the above discussion of the appropriateness of direct funding relief but which does not address the question of the parents' request for an IEE.

advance of the 2023-24 school year and that, therefore, the parents were "formally request[ing]" that the district fund a neuropsychological IEE (Parent Ex. A at pp. 6, 8).

Based on the foregoing, I find that the IHO erred in ordering the district to fund a neuropsychological IEE or fund OT, PT, and speech-language evaluations via RSAs as the parents' request for an IEE at district expense was raised for the first time in the due process complaint notice.

VII. Conclusion

Having determined that equitable considerations support an award of tuition funding, there is no basis to modify the IHO's award of direct funding of the costs of the student's attendance at iBrain for the 2023-24 school year, except that, consistent with the agreement of the parties, the IHO's decision will be modified to reflect the categories of tuition owed pursuant to the parents' contract with iBrain. However, the evidence in the hearing record does not support the IHO's award of district funding of 1:1 nursing services via RSA or district funding of independent neuropsychological, OT, PT, or speech-language evaluations.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated September 18, 2023, is modified by reversing those portions which ordered the district to fund 1:1 nursing services via RSA, fund a neuropsychological evaluation, and fund OT, PT, and speech-language evaluations via RSAs; and

IT IS FURTHER ORDERED that the IHO's decision, dated September 18, 2023, is modified to provide that the district shall directly fund iBrain in the amount of $190,000 base tuition and $108,696 supplemental tuition.

Dated: **Albany, New York**
January 10, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER