The University of the State of New York

The State Education Department
State Review Officer
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No. 24-065

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Jared B. Arader, Esq.

Law Offices of Irina Roller PLLC, attorneys for respondent, by Benjamin J. Hinerfeld, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to directly fund the cost of the student's education at the International Academy of Hope (iHope) and to reimburse the parent for his daughter's individual nursing services for a portion of the 2022-23 school year. The 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 school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

The student in this case has been the subject of two prior State-level administrative appeals (see Application of a Student with a Disability, Appeal No. 21-156 and Application of a Student with a Disability, Appeal No. 22-062). Accordingly, the parties' familiarity with this matter is presumed and the detailed facts and procedural history of the case and the IHO's decision will not be fully recited here. Briefly, the student has reportedly received a brain injury diagnosis, along with secondary diagnoses of focal epilepsy, scoliosis, cortical visual impairment, and hypotonia, resulting in global developmental delays (Parent Exs. E at p. 1; K at p. 1; Dist. Exs. 4 at p. 1; 9 at

p. 1).[1] The student is non-ambulatory, nonverbal, and g-tube dependent for her hydration, nutrition, and medication administration (Parent Ex. E at p. 1). The student attended iHope for the 2016-17 and 2017-18 school years and attended the International Academy for the Brain (iBrain) for the 2018-19, 2019-20, 2020-21, and 2021-22 school years (see generally IHO Ex. X).[2]

The CSE convened on March 21, 2022 and finding the student eligible for special education services as a student with a traumatic brain injury (TBI) recommended an educational program with an implementation date of March 28, 2022 (Dist. Ex. 11 at p. 1, 57-58, 63-64). The March 2022 IEP recommended that the student attend a 12-month program in a 12:1+(3:1) special class in a district specialized school and receive related services of four 60-minute sessions per week of individual occupational therapy (OT), five 60-minute sessions per week of individual physical therapy (PT), five 60-minute sessions per week of individual speech-language therapy, and three 60-minute sessions per week of individual vision education services (id. at pp. 57-59). The CSE also recommended that the parent be provided with one 60-minute session per month of group parent counseling and training (id.). Additionally, the March 2022 CSE recommended that the student be provided with the assistance of a full-time, individual paraprofessional for health, ambulation, and safety (id. at p. 58). The CSE also recommended the student for assistive technology devices identified as switches and a mount and one 60-minute session per week of individual assistive technology services (id. at p. 58).

On June 9, 2022, the parent entered into an enrollment contract for the student to attend iHope for the 2022-23 school year starting on July 11, 2022 and continuing through June 30, 2023 (Parent Ex. G).

In a letter dated June 16, 2022, the student's parents disagreed with the recommendations contained in the March 2022 IEP, as well as with the particular public-school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at iHope (Parent Ex. C). In response to the parents' ten-day notice letter, the district responded that the claim for the unilateral placement was "not appropriate for settlement" and the parents must file a due process complaint notice (Parent Ex. D).

The student then attended iHope from July 11, 2022 through March 31, 2023 (Parent Ex. I ¶ 3). While at iHope the student received the services of a 1:1 private nurse throughout the school day, beginning on October 26, 2022 (id. ¶ 5). According to the director of operations at iHope, the student's tuition at iHope (prorated for nine months) was $160,560 and the cost of 1:1 nursing services was $35,035, resulting in a total amount owed to iHope of $195,595 (id. ¶¶ 6, 8).

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

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

Next, on February 7, 2023, the CSE convened and found the student eligible for special education as a student with multiple disabilities and developed an IEP for the end of the 2022-23 school year and the beginning of the 2023-24 school year (Dist. Ex. 18 at pp. 1, 36). The February 2023 CSE recommended a 12-month program for the student that included attendance in a 12:1+(3:1) special class in a district specialized school and participation in adapted physical education three times per week (id. at pp. 29-30). Additionally, the February 2023 CSE recommended that the student receive the following related services: four 60-minute sessions per week of individual OT, four 60-minute sessions per week of individual PT, individual school nurse services as needed, four 60-minute sessions per week of individual speech-language therapy, and three 45-minute sessions per week of individual vision education services (id. at p. 30). The CSE also recommended that the parent receive one 60-minute session per month of group parent counseling and training (id.). The February 2023 CSE continued to recommend that the student receive the assistance of a full-time individual paraprofessional and that she be provided with assistive technology devices consisting of a switch and a mount (id. at pp. 30-31).

In a letter dated March 22, 2023, the parent advised the district that he disagreed with the recommendations contained in the February 2023 IEP and of his intent to place the student at iBrain from April 2023 through June 2023 (Dist. Ex. 22).

The student attended iBrain from April 17, 2023 through June 23, 2023 (Dist. Ex. 23).

In a due process complaint notice, dated June 24, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). In particular, the parent alleged that the March 2022 CSE was not properly constituted; the district failed to conduct timely and appropriate evaluations of the student; the March 2022 IEP included present levels of performance that failed to adequately describe the student, annual goals that were vague and unmeasurable, a recommendation for placement in a 12:1+(3:1) special class that was too large for the student; the March 2022 CSE failed to recommend 1:1 school nurse services and music therapy; the CSE predetermined its recommendations; and the assigned school was not accessible or appropriate for the student (Parent Ex. A at pp. 4-9).[3] The parent further asserted that iHope was an appropriate unilateral placement for the student and that he cooperated with the district (id. at pp. 15-16). As relief, the parent sought a finding that the district failed to offer the student a FAPE for the 2022-23 school year, that iHope was an appropriate unilateral placement for the student, and that equitable considerations favored the parent (id. at p. 16). Further, the parent sought direct funding/reimbursement of the student's tuition costs at iHope from July 11, 2022 to March 31, 2023, funding of 1:1 private duty nursing services, and reimbursement or direct funding of private evaluations and transportation of the student to and from iHope (id.). The district submitted a response to the parents' due process complaint notice (see Parent Ex. V).

[3] In their due process complaint notice, the parents also alleged that the February 2023 IEP failed to offer the student a FAPE for the remainder of the 2022-23 school year; however, these allegations were raised in a separate proceeding related to the student's attendance at iBrain (Parent Ex. A at pp. 10-15; Dist. Ex. 2). The hearing in this matter is limited to the student's placement at iHope for the 2022-23 school year and, accordingly, the IEP at issue in this proceeding is the March 2022 IEP, the IEP in effect when the parents made their decision to place the student at iHope.

After a prehearing conference before the Office of Administrative Trials and Hearings (OATH) on August 3, 2023 (Aug. 3, 2023 Tr. pp. 1-56), an impartial hearing convened on August 29, 2023 and concluded on December 18, 2023, after five days of proceedings (Tr. pp. 1-306).[4, 5] On August 17, 2023, the IHO denied consolidation of this proceeding with the due process complaint notice involving the student's placement at iBrain for the 2022-23 school year and another due process complaint notice filed on July 5, 2023 pertaining to the 2023-24 school year (see Dist. Ex. 2; IHO Exs. VII-VIII).

In a decision dated January 18, 2024, the IHO determined that the district failed to offer the student a FAPE from July 11, 2022 through March 31, 2023, that iHope was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parent's request for direct funding of the iHope tuition (IHO Decision at pp. 6-9, 15, 17-18). Additionally, the IHO found that the student required the support of a 1:1 nurse throughout her school day and on the bus and found the cost of the nursing services reasonable (id. at p. 18). The IHO found that the parent's request for special education transportation services was moot as the 2022-23 school year was over (id. at p. 19). As relief, the IHO ordered the district to directly fund the tuition at iHope for the period of July 11, 2022 through March 31, 2023 in the amount of $160,560 and reimburse iHope for nursing services provided to the student in the amount of $35,035 (id. at p. 20).

IV. Appeal for State-Level Review

The district appeals. The parties' familiarity with the particular issues for review on appeal in the district's request for review and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The main issue presented on appeal relates to the IHO's conduct of the hearing with the district asserting the IHO denied it the right to due process.[6] The district requests that the matter be remanded to permit the testimony of a witness who was present at the March 2022 CSE meeting. The district also asserts that the IHO erred in finding that it denied the student a FAPE based on the CSE's failure both to recommend 1:1 nursing services for the student and to offer a placement "capable of implementing" the student's IEP. Lastly, the district argues, in the alternative, that the IHO erred in ordering it to fund the student's

[4] On July 7, 2023, a pendency hearing was held with respect to the impartial hearing regarding the student's placement at iBrain (IHO Ex. V at p. 3). On July 12, 2023, the IHO issued an order finding that pendency in that proceeding consisted of placement at iBrain with the district providing special transportation accommodations to and from iBrain (id. at p. 5). During the prehearing conference the parties agreed that pendency was not an issue in this proceeding (Aug. 3, 2023 Tr. pp. 12-13). Transcripts for the prehearing conference were not consecutively paginated with the remainder of the hearing; accordingly, citations to the prehearing conference will include the date of the hearing while the remainder of the citations to the transcript will not be identified by date.

[5] On August 17, 2023, the IHO issued a Prehearing Conference Summary and Order (prehearing order) (see IHO Ex. I).

[6] The district does not appeal from the IHO's findings that iHope was an appropriate unilateral placement for the student or that equitable considerations did not weigh against the parent's requested relief. As such, these findings 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]).

individual nursing services without any evidence in the hearing record about the nursing services provided to the student or the parent's obligation to pay for the same.

The parent seeks to uphold the entirety of the IHO's decision. The parent argues that the district was not denied due process and that the IHO followed her rules and deadlines in managing the hearing. The parent further asserts that he was legally obligated to pay for the nursing services while the student attended iHope (id. at p. 8). The district replied to the parent's answer.

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]).[7]

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

[7] 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).

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

A. Preliminary Matter

1. Conduct of Impartial Hearing

The crux of the appeal by the district is that the IHO denied it due process in excluding one of the district's witnesses from testifying at the impartial hearing. The district asserts that the IHO's directives for the conduct of the impartial hearing were "unreasonable," particularly in requiring an affidavit of unavailability for one of the district's witnesses within a specific timeframe. Further, the district claims that the IHO was unequal in the treatment of the parties in developing the hearing record. In particular, the district asserts that it was precluded from developing the hearing record as to whether the student required 1:1 nursing services for the 2022-23 school year. Conversely, the parent argues that the district repeatedly failed to comply with the IHO's directives and failed to demonstrate how the exclusion of the district's witness testimony would have demonstrated that the student did not require 1:1 nursing services for the 2022-23 school year.

State regulations set forth the procedures for conducting an impartial hearing and address, in part, minimal process requirements that shall be afforded to both parties (8 NYCRR 200.5[j]). Among other process rights, each party shall have an opportunity to present evidence, compel the attendance of witnesses, and to confront and question all witnesses (8 NYCRR 200.5[j][3][xii]). Furthermore, each party "shall have up to one day to present its case" (8 NYCRR 200.5[j][3][xiii]). State regulation further provides that the IHO "shall exclude any evidence" that he or she determines to be irrelevant, immaterial, unreliable, or unduly repetitious" and "may limit examination of a witness by either party whose testimony the impartial hearing officer determines to be irrelevant, immaterial or unduly repetitious" (8 NYCRR 200.5[j][3][xii][c], [d]). State regulation further provides that parties to the proceeding may be accompanied and advised by legal counsel and by individuals with special knowledge or training with respect to the problems of students with disabilities, that an IHO may assist an unrepresented party by providing information relating only to the hearing process, and that nothing contained in the cited State regulation shall be construed to impair or limit the authority of an IHO to ask questions of counsel or witnesses for the purpose of clarification or completeness of the record (see 8 NYCRR 200.5[j][3][vii]).

Generally, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). At the same time, the

IHO is expected to ensure that the impartial hearing operates as an effective method for resolving disputes between the parents and district (id.). State and federal regulations balance the interests of having a complete hearing record with the parties having sufficient opportunity to prepare their respective cases and review evidence. Also, as a general matter, the parties to an impartial hearing are obligated to comply with the reasonable directives of the IHO regarding the conduct of the impartial hearing (see Application of a Student with a Disability, Appeal No. 14-090; Application of a Student with a Disability, Appeal No. 09-073; Application of a Child with a Disability, Appeal No. 05-026; Application of a Child with a Disability, Appeal No. 04-103; Application of a Child with a Disability, Appeal No. 04-061).

In the event that an IHO does not accord one or both of the parties' due process during the impartial hearing, remand may be an appropriate remedy (8 NYCRR 279.10[c] [providing that a State Review Officer is authorized to remand matters back to an IHO to take additional evidence or make additional findings]; see Application of a Student with a Disability, Appeal No. 22-054).

Following the August 3, 2023 prehearing conference, in which the IHO and parties established hearing dates, on August 17, 2023, the IHO emailed the parties a prehearing conference summary and order (Aug. 3, 2023 Tr. pp. 25, 32, 47-50; IHO Exs. I; XIII at pp. 22-23, 30-31, 37-38, 42-43). The August 17, 2023 prehearing conference summary and order stated the purpose of the order was "to set firm expectations of the [p]arties to resolve the matter fairly and efficiently" and set forth the schedule of hearing dates (IHO Ex. I at pp. 1-2). One of the provisions of the order discussed adjournments and explained that an application for an adjournment, without the consent of the opposing party, needed to contain an "Affidavit of Unavailability" (id. at p. 2). Further, the IHO's prehearing conference summary and order directed the parties "to use affidavit testimony" for witnesses and directed that the affidavits must be included with the parties' disclosure package and that witnesses must appear for cross-examination (id. at pp. 3-4).[8] The prehearing order also noted that an "adjournment w[ould] not be granted based on witness unavailability, and any request for an adjournment based on an emergency or extenuating circumstance must be accompanied by an affidavit of unavailability," further noting that whether any request for an adjournment would be granted was "at the discretion of the hearing officer" (id. at p. 4).

After receipt of the prehearing order, the district's counsel expressed concern about obtaining timely affidavit testimony from both district witnesses and requested that one witness testify in person and not by affidavit and further requested an adjournment of one of the hearing dates (IHO Ex. XIII at pp. 20, 25, 28-29). The IHO denied the district's requests (id. at p. 13).

Then, the parties appeared on August 29, 2023, to discuss the district witness's testimony with the district's attorney again stating that he was unable to prepare the witnesses affidavits prior to the first hearing date but they were available to testify in-person (Tr. pp. 19-20-22, 26-27). The IHO stated she needed to conduct the hearing in a timely manner and could not understand why

[8] At another point in the prehearing conference summary order, the IHO noted that her "preference [wa]s direct testimony by affidavit where practical" implying some leeway in the requirement for direct testimony by affidavit (IHO Ex. I at p. 3). However, at the August 3, 2023 prehearing conference, the IHO had explained that all witnesses were required to provide affidavit testimony (August 3, 2023 Tr. p. 28). In an August 17, 2023 email, the IHO clarified again that all witnesses would be required to testify by affidavit (IHO Ex. XIII at p. 25).

the district could not comply with her directives discussed at the August 3, 2023 prehearing conference (Tr. pp. 22-24). After discussions between the IHO and district's counsel, the IHO agreed to allow one of the district's witnesses to present testimony live on September 5th with the affidavit of the other witness to be disclosed on that same date by 12:00 p.m. with cross-examination of that witness to take place on September 6th (Tr. pp. 52-54).[9]

On August 31, 2023, the district's counsel emailed the IHO that one of the district witnesses' mother had passed away and he requested that the district be permitted to substitute the testimony of the district special education teacher who participated at the CSE meeting (IHO Ex. XIII at p. 6). In response, the IHO instructed the district to provide a "notarized affidavit," from the witness whose mother had recently passed, explaining why the witness was unable to testify on the scheduled date and that the affidavit and a new witness list be provided by September 5, 2023 at 10:00 a.m. (id. at p. 5). On September 1, 2023, district's counsel responded to the IHO's email stating that since the witness had "experienced a tragic and unexpected death in her immediate family, [he was] unable to secure the requested affidavit" but was able to obtain the testimony of another witness (id. at p. 4). The IHO denied all of the district's requests (id. at pp. 1-4).

Next, the parties appeared on September 5, 2023 and the IHO raised the issue of the district witness affidavit that was required to be submitted by 10:00 a.m. on September 5th (Tr. p. 108). District's counsel stated that he thought the affidavit was due at 12:00 p.m. (Tr. p. 109). The IHO stated that it was currently 12:10 p.m. and therefore whether it was 10:00 a.m. or 12:00 p.m., the affidavit was still late (id.). The district's counsel stated that he sent it at 11:53 a.m. (id.). Parent's counsel confirmed that she received the affidavit prior to 12:00 p.m. and specifically at 11:53 a.m. (Tr. pp. 110-11). Additionally, the IHO addressed the district's August 31st email regarding the unavailability of the district witness (Tr. pp. 112-13). Counsel for the district stated that he was able to get an unsworn letter from the witness's supervisor about the witness's unavailability (Tr. pp. 114-15, 118). After an exchange with counsel for the district,[10] the IHO indicated she would allow the witness to testify if parent's counsel was "okay with it" but noted she was not inclined to grant the district's requests (Tr. p. 116). Parent's counsel stated she would not object to the substitution of district witnesses (Tr. pp. 116-17). However, after hearing this, the IHO decided that she would not allow for a substitution of witnesses or for the unavailable witness to testify on another date (Tr. pp. 117-19).

On September 6, 2023, the district's only remaining witness, the district unit coordinator, testified, and the district rested its case (Tr. pp. 133-64; see Dist. Ex. 27). Due to an emergency of the parent, the father's testimony was adjourned until September 11, 2023 at which time he completed his testimony (Sept. 6, 2023 Tr. pp. 180-82; Sept. 11, 2023 Tr. pp. 198-245).[11] Thereafter, district's counsel made a statement on the record that the parent was provided an

[9] The district submitted affidavit testimony of the district unit coordinator for one of the district's schools (see Dist. Ex. 27).

[10] Counsel for the district correctly noted that the IHO's prehearing conference summary and order did not specify who must complete the "Affidavit of Unavailability"; however, the IHO cut off this argument stating "From the person that's testifying . . . . it's very obvious by whom" (Tr. pp. 115-16; IHO Ex. I at pp. 2, 4).

[11] An affidavit of unavailability of the parent was submitted into the hearing record (see generally IHO Ex. XVII).

adjournment because of an emergency but the district was not offered the same "courtesy" and requested that the witness be permitted to testify and the failure to allow such testimony amounted to a "denial of due process" (Sept. 11, 2023 Tr. pp. 286-87). The IHO "noted" the district's statement and advised the parties that closing briefs were due on October 6, 2023 (Sept. 11, 2023 Tr. pp. 286-88).

The parties submitted closing briefs dated October 5, 2023, and October 6, 2023 (IHO Exs. XI; XII).

On November 20, 2023, the parent's attorney emailed the IHO asking when the decision would be issued (IHO Ex. XVI at p. 5). In response, the IHO stated that she wanted to schedule a conference "to address some administrative issues, more specifically exhibits and the [p]arent's testimony" (id.). The district's attorney responded stating that he had "several objections" and would not agree to any extension of the compliance deadline (id. at pp. 2-3). He further stated that it appeared additional time was being provided for the parent's witness, but the district was denied the opportunity to present a witness which he stated was "uneven enforcement of the [IHO's] rules [] resulting in a deprivation of due process to the [district]" (id. at p. 3).

On December 18, 2023, the IHO held a status conference to request the parent to provide the student's attendance record and contract for nursing services (Tr. pp. 290-306). Parent's counsel stated that it was her understanding that there was not a specific nursing agreement for the student but "a general contract that [iHope] has with the nursing agency" for those students requiring nursing services (Tr. pp. 293-94).[12]

Although it would have been better practice for the IHO to have permitted the district to either present the testimony (by affidavit or in-person) of the unavailable witness at a later date or to have allowed the substitute witness to testify, the IHO retains broad discretion in the efficient conduct of the hearing and to set reasonable directives for the conduct of the impartial hearing. The hearing record shows that the district's attorney had difficulty complying with the directives of the IHO. Overall, although the IHO's interpretation and adherence to her prehearing conference order and summary may not have been ideal, the IHO was not irrational in the exercise of her discretion to preclude the district witnesses from testifying during the hearing. Nevertheless, the IHO should take more care in considering the balance between managing an effective hearing system, in ensuring that each party has the opportunity to present evidence, and in ensuring that there is a complete hearing record. This becomes particularly concerning where there is an extensive delay in completing the hearing as the parties submitted post hearing briefs in October 2023; however, the IHO allowed for the hearing record to remain open until January 2024 (see IHO Exs. XI; XII; IHO Decision).

Regardless of the IHO's determinations, the district has not presented a sufficient explanation on appeal as to what its proposed witnesses would add at this point of the proceeding The district asserts that the IHO precluded the district from fully developing the hearing record and specifically providing testimony of a member of the March 2022 CSE meeting (Req. for Rev. ¶¶ 11, 15). The district then argues that the IHO's denial of FAPE based on the failure of the

[12] The parent submitted an affidavit from the iHope director of admissions and family engagement regarding the nursing services provided to the student from July 11, 2022 through March 31, 2023 (see IHO Ex. XV).

district to recommend individual nursing services "could have been expanded upon by either witness proposed, both of whom attended the [CSE] meeting" (id. ¶¶ 15, 20).

Unfortunately, absent from the district's request for review is any proffer of evidence that describes the specifics of the anticipated testimony of the witness and the district does not demonstrate that the individual would have offered testimonial evidence above and beyond that which was or could have been presented at the impartial hearing, which included substantial documentary evidence. Moreover, the district failed to describe or explain how the anticipated testimony would have possibly changed the result in this matter, and as will be discussed below, particularly in light of the March 2022 IEP describing the student as having a need for 1:1 nursing during the school day, it does not appear that there is a sufficient basis for remanding this matter and adding further delay to a resolution of the appeal. Accordingly, there is insufficient basis in the hearing record to remand the matter to an IHO to receive additional evidence regarding nursing services and the district's offer of FAPE to the student for the 2022-23 school year.

B. March 21, 2022 IEP – 1:1 Nursing Services

The district argues that the IHO erred in finding that the March 2022 IEP failed to offer the student a FAPE because of the lack of a recommendation for 1:1 nursing services. The district claims that the IHO did not consider the March 2022 CSE's recommendation for a full time 1:1 paraprofessional for health, ambulation, and safety as appropriate to meet the student's medical needs. In particular, the district argues that the March 2022 IEP contains a goal for the paraprofessional to consult with the school nurse for positioning, monitoring the student's medical needs, and maintaining skin integrity of the student, and thereby, the 1:1 paraprofessional could "address the [s]tudent's medical needs and allow the [s]tudent to access her educational program."

The IHO found that the March 2022 IEP "clearly documented" the student's need for a 1:1 nurse but the CSE failed to recommend the service for the student (IHO Decision at p. 6). The IHO found that the student's present levels of performance and management needs noted the student's need for the support of 1:1 nursing services (id. at pp. 6-7). Additionally, the IHO relied on the parent's testimony that the student required individual nursing in school and on the bus and without such services the student would not be able to attend school (id. at p. 7). The IHO was "unpersuaded" by the district's argument that the parent failed to notify the district of the student's need for 1:1 nursing services, and found that since the 2018-19 school year, the district knew of the student's need for nursing services (id.). The IHO found the CSE's failure to recommend 1:1 nursing services was a "fundamental violation of FAPE" given the student's "level of need and disability" (id.).

Generally, a student who needs school health services[13] or school nurse services[14] to receive a FAPE must be provided such services as indicated in the student's IEP (see School Health

[13] "School health services means health services provided by either a qualified school nurse or other qualified person that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][1]).

[14] "School nurse services means services provided by a qualified school nurse pursuant to section 902(2)(b) of the Education Law that are designed to enable a student with a disability to receive a [FAPE] as described in the [IEP] of the student" (8 NYCRR 200.1[ss][2]).

Services and School Nurse Services, 71 Fed. Reg. 46,574 [Aug. 14, 2006]; see also 34 CFR 300.34[a], [c][13]; 8 NYCRR 200.1[qq], [ss]; Cedar Rapids Community Sch. Dist. v. Garret, 526 U.S. 66, 79 [1999] [indicating that school districts must fund related services such as continuous one-on-one nursing services during the school day "in order to help guarantee that students . . . are integrated into the public schools"]). With regard to skilled nursing services on a student's IEP, State guidance provides that "[d]ue to the frequency of changes to orders for nursing treatment and/or medications, the specific nursing service and/or medication to be provided should not be detailed in the IEP" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 4, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). Instead, the guidance document instructs that "[t]he nursing treatment and/or medication orders [should be] documented on an Individualized Health Plan (IHP), which is a nursing care plan developed by a R[egistered] N[urse] (RN) [and] maintained in the student's cumulative health record . . . and . . . updated as necessary" (id. at p. 4).[15] For administration of medication in school, provider orders must be obtained, and, according to State guidance, "[i]f a school has concerns or questions regarding a provider's order, the school's medical director or school nurse should call the provider to resolve concerns and/or clarify the order" ("Guidelines for Medication Management in Schools," at p. 20, Office of Student Support Servs. [Oct. 2022], available at https://www.p12.nysed.gov/sss/documents/medication-management.pdf).

State guidance further indicates that, in determining whether a student needs a 1:1 nurse, a CSE must obtain evaluative information in all areas of the student's disability or suspected disability; generally, it is expected that "[t]his information may include information from a physician, such as a written order to the school nurse from a student's health care provider" ("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at p. 2, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf). In providing school nurse services, "the school remains responsible for the health and safety of the student and ensuring the care provided to the student is appropriate and done in accordance with healthcare provider orders" (id. at p. 5). However, there is also State guidance indicating that "[i]f the CSE/CPSE determine that a student's health needs in accordance with provider orders for treatment can be appropriately met by the school's building nurse, a shared nurse, a 1:1 aide to monitor and alert the school nurse, then a 1:1 nurse is not necessary" ("Provision of Nursing Services in School Settings - Including One-to-One Nursing Services to Students with Special Needs," at pp. 11-12, Office of Student Support Servs., [Jan. 2019], available at https://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf). To determine whether a student requires the support of a full-day, continuous 1:1 nurse, State guidance indicates the CSE "must weigh the factors of both the student's individual health needs and what specific school health and/or school nurse services

[15] In other State guidance, it is acknowledged that an IHP is not required by law, but "is strongly recommended for all students with special health needs—particularly those with nurse services as a related service on their [IEP]" ("Provision of Nursing Services in School Settings—Including One-to-One Nursing Services to Students with Special Needs," at p. 9, Office of Student Support Servs. [Jan. 2019], available at http://www.p12.nysed.gov/sss/documents/OnetoOneNSGQAFINAL1.7.19.pdf).

are required to meet those needs" and provides the following set of factors to consider when making that determination:

- The complexity of the student's individual health needs and level of care needed during the school day to enable the student to attend school and benefit from special education;

- The qualifications required to meet the student's health needs;

- The student's proximity to a nurse;

- The building nurse's student case load; and,

- The extent and frequency the student would need the services of a nurse (e.g., portions of the school day or continuously throughout the day).

("Guidelines for Determining a Student with a Disability's Need for a One-to-One Nurse," at pp. 2-3, Office of Special Educ. Mem. [Jan. 2019], available at https://www.nysed.gov/sites/default/files/programs/special-education/guidelines-for-determining-a-student-with-a-disability-need-for-a-1-1-nurse.pdf).

A review of the evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year because the March 2023 CSE failed to recommend the support of 1:1 nursing services to meet the student's health and medical needs.

A health examination form dated March 7, 2022 indicated that the student was nonverbal, "wheelchair bound," presented with contractures and a spinal fusion scar, and used a gastronomy tube for nutrition (Dist. Ex. 9 at p. 11).[16] Additionally, the evidence in the hearing record shows that the March 2022 CSE was aware that the student had surgery in November 2021 to address her scoliosis and, as a result, required close monitoring of her complex medical needs (Dist. Ex. 11 at pp. 6-7, 17). As noted in the March 2022 IEP, at the time of the CSE meeting, the student was attending iBrain and had both a 1:1 paraprofessional and 1:1 nurse (Dist. Exs. 11 at p. 3; 12 at p. 1).

A February 9, 2021 report from iBrain was substantially incorporated into the March 2022 IEP (compare Dist. Ex. 11, with Dist. Ex. 12). The iBrain report noted that the student required a 1:1 nurse for her medical needs for g-tube feeds, concerns with skin integrity, suctioning of secretions, administration of anticonvulsive medications and monitoring side effects, positioning, and monitoring of vital signs including blood-oxygen levels which may necessitate breathing treatments (Dist. Ex. 12 at pp. 7-8, 10, 16-18, 32, 36, 61). For the 2022-23 school year, the iBrain report also recommended a 1:1 nurse for the student in school and on the bus (id. at pp. 62, 64-65).

[16] The March 2022 IEP also noted that the student's then-current wheelchair was "insufficient to meet her needs" following spinal surgery "as her physical structure ha[d] changed and restrict[ed] her ability to participate in activities [which] require[ed] reaching with upper extremities and using the side of her head to communicate with a switch"; therefore, the student required "a custom-mold[ed] wheelchair that w[ould] be more supportive during the school day" (Dist. Ex. 11 at p. 21).

The March 2022 IEP present levels of performance described how the 1:1 nurse repositioned the student in her wheelchair to make her more comfortable (Dist. Ex. 11 at p. 8). The March 2022 IEP noted that the student "require[d] 1:1 nursing throughout the school day, particularly to attend to [the student's] g-tube feeds" and that during OT sessions "it [wa]s necessary to collaborate with [the student's] nurse regarding optimal positioning" (id. at p. 14). In connection with her physical development, the March 2022 IEP noted that the student required both a 1:1 paraprofessional and 1:1 nurse "to support her medical, physical, cognitive, and sensory needs" (id. at pp. 21, 26). Similar to the iBrain report dated February 9, 2021, the March 2022 IEP indicated that the student needed a 1:1 nurse for g-tube feeding, monitoring skin integrity, positioning, and monitoring of vital signs (compare Dist. Ex. 11 at p. 21, with Dist. Ex. 12 at p. 8). The IEP noted that the 1:1 nurse attended related service sessions, including PT, where the nurse attended to the student's safety with respect to positioning and intervened when the student coughed or had secretions (Dist. Ex. 11 at pp. 31-32). The student's management needs stated that the student "require[d] 1:1 nursing for [g]-tube feeding, managing secretions and due to her medical complexity" (id. at p. 34). The March 2022 IEP noted that the student demonstrated "impaired skin integrity related to [her] physical disability; neuromuscular, perceptual and cognitive impairment" (id. at p. 35). The March 2022 IEP further indicated that in addition to impaired skin integrity, the student was at risk for hygiene, grooming, and toileting self-care deficits; impaired urination; bowel incontinence; and constipation (id.). Despite the description of the student included in the March 2022 IEP, indicating that the student required a 1:1 nurse, the March 2022 CSE recommended the student receive the assistance of a full time, individual paraprofessional for health, ambulation, and safety for the 2022-23 school year (id. at p. 58). The March 2022 IEP also included an annual goal for the recommended 1:1 paraprofessional to "consistently consult with the school nurse regarding close monitoring of [the student's] medical needs" in order to ensure that the student's "feeding, and ambulation needs [we]re addressed" (id. at p. 56). The district's unit coordinator of the assigned school testified by affidavit that the nursing services, including g-tube support, would be delivered in accordance with the student's medical administration form and the student's 1:1 paraprofessional would support the school nurse in the process (Dist. Ex. 27 ¶ 8).

The parent testified that a 1:1 school nurse for the student was essential for her safety in an educational environment and she could not be educated without a 1:1 nurse (Parent Ex. T ¶ 15). Specifically, the parent testified that the 1:1 nurse helped move the student around school and complete activities because she needed two-person support at times and frequent changes to her position; additionally, the nurse helped with the student's g-tube feedings and monitored her skin integrity, vital signs, and breathing because of low blood oxygen level risks (id.).

At the March 2022 CSE meeting, the parent expressed "considerable concern about the lack of initiation of a 1:1 nurse given [the student's] [then] current medical needs" (Dist. Exs. 11 at p. 66; 14 at p. 2). In response to the parent's concerns, the district indicated the CSE "discussed the need for updated medical forms" and that the CSE would "reconvene once additional date was made available and reviewed" (id.). However, there is no indication in the hearing record that the district made any further attempts to either obtain updated medical forms or to reconvene the CSE to consider them.

Here, the March 2022 IEP indicated, in numerous locations, that the student needed 1:1 nursing services, in conjunction with the support of 1:1 paraprofessional services, throughout the

school day (Dist. Ex. 11 at pp. 3, 4, 8, 14, 26, 34). Despite the district's arguments that the testimony from one of the witnesses who attended the CSE meeting would have provided information as to whether the student required 1:1 nursing services, the district has not provided any explanation as to how any such testimony could contradict the description of the student included in the March 2022 IEP, which specifically, and repeatedly, acknowledged the student's need for 1:1 nursing services.

Accordingly, the evidence in the hearing record supports the IHO's finding that the student required the support of 1:1 nursing services, and the district's failure to recommend 1:1 nursing services for the student denied the student a FAPE for the 2022-23 school year.[17]

C. Unilaterally Obtained Nursing Services

Turning to relief, the district appeals from the IHO's award of reimbursement to iHope for the cost of 1:1 nursing services for the student for the 2022-23 school year. The issue involving the parent's unilaterally obtained nursing services also arose in Application of a Student with a Disability, Appeal No. 22-062. In that case, and again here, the parent has failed to submit evidence that he is legally obligated to pay the third-party agency for the nursing services delivered to the student at iHope.

The district argues that the IHO erred in awarding the parent the cost for the private nursing services without any evidence presented about the specific services provided by the agency or evidence that the parent was "legally obligated" to pay for the nursing services. In response to the district's contentions, the parent argues that the language contained in the iHope agreement makes the parent responsible for 1:1 nursing services.

As explained here, and as previously explained in Application of a Student with a Disability, Appeal No. 22-062, while the hearing record clearly indicates the student's need for full-time, individual nursing services, the IHO's award of direct funding for the costs of nursing services as relief must be reversed.

Initially, it is undisputed that iHope did not deliver nursing services to the student but that instead, the services were delivered by a separate agency—Horizon Healthcare Staffing Agency (Horizon Health Care) (see Parent Exs. G at p. 2; I ¶¶ 5, 6; S ¶¶ 51-52; IHO Ex. XV ¶¶ 2-5). Beginning on July 11, 2022 and continuing through October 25, 2022, the district provided the student with 1:1 nursing services at school and on the bus through Horizon Health Care (Tr. pp. 250-251; IHO Ex. XV ¶¶ 4-5). This was also confirmed in the affidavit testimony of the iHope principal and executive director (principal) that the district provided the student with 1:1 nursing services from July 11, 2022 through October 25, 2022, at which time iHope received a call from the district informing it that the district had discontinued the student's 1:1 nursing services (Parent Ex. S ¶ 51). The iHope principal testified that because the student was unable to attend school without a 1:1 nurse, as it was "not medically or educationally appropriate or safe for her to do so," iHope arranged for and took over payment from Horizon Health Care to provide the 1:1 nursing services from October 26, 2022 through March 31, 2023 (Tr. pp. 250-51; Parent Exs. I ¶ 5; S ¶

[17] In light of this determination, it is unnecessary to reach the district's cross-appeal concerning the IHO's finding that the assigned public school could not implement the student's IEP (see IHO Decision at pp. 8- 9).

52). According to the iHope tuition affidavit for the 2022-23 school year, since the cost of tuition at iHope did not include 1:1 nursing services, the nursing services provided by Horizon Health Care were billed to iHope with the parent ultimately being responsible for the 1:1 nursing services obtained by iHope and provided by Horizon Health Care at iHope (Parent Ex. I ¶¶ 5-8).

A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral 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., 459 F.3d at 365). Here, the IHO found that the parent met his burden to prove that the student's unilateral placement for the 2022-23 school year—including the nursing services—was appropriate (IHO Decision at pp. 9-15).

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement 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 [emphasis added]]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K. v. New York City Dep't of Educ., 674 Fed. App'x at 101 [2d Cir. Jan. 19, 2017]; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

In this matter, any suggestion that nursing services were in excess of the requirements of a FAPE are contradicted by the March 2022 IEP, which clearly indicated that the student required a 1:1 nurse throughout her school day. Turning to the testimony of the iHope principal, the student had 1:1 nursing services at iHope beginning in July 2022 for the 2022-23 school year (Tr. pp. 248-49).[18] According to the testimony of the iHope principal "based on several sources of information," including the March 2022 IEP, the student required 1:1 nursing services to attend to

[18] The intake evaluation conducted by iHope dated May 6, 2022, noted that the student required a "private duty nurse to attend to her significant medical needs" and therefore, made a recommendation for 1:1 nursing and a travel nurse for the student for the 2022-23 school year (Parent Ex. E at pp. 1, 5).

her significant medical needs throughout the school day (Parent Ex. S ¶ 50). Additionally, the iHope principal testified by affidavit that the parent had notified iHope that the student had 1:1 nursing services provided by the district since she began attending school at five years old (id.). The iHope principal further testified that iHope staff reviewed medical information provided by the parent that "supported" the student's need for 1:1 nursing services to support her "unique educational needs" (id.). Furthermore, with respect to how iHope determined the student's need for 1:1 nursing services, the principal testified that iHope had nurses who assessed the student, and the student's most recent prior school, iBrain, had also recommended 1:1 nursing services (Tr. p. 249). Finally, the iHope principal testified that the student needed 1:1 nursing services as part of special transportation services afforded to her in the March 2022 IEP, and that 1:1 nursing services were necessary for the student to access her education (Parent Ex. S ¶¶ 53, 71).

Based upon the foregoing evidence contained in the hearing record, the evidence establishes that the provision of full-time, individual nursing services to the student was not excessive in addition to services that may have been provided by a school nurse at iHope to address her health and medical needs. However, the inquiry is not yet at an end, because, for the nursing services delivered by the third-party agency to represent a portion of the unilateral placement, the parent must undergo the financial risk associated with unilateral placements (see Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] ["Parents who are dissatisfied with their child's education can unilaterally change their child's placement during the pendency of review proceedings and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk.] As the parent is well aware, he can obtain retroactive reimbursement from the school district after the IEP dispute is resolved, if he satisfies the three-part Burlington-Carter test [first emphasis added] [internal quotations marks and footnotes omitted]; see also Carter, 510 U.S. at 14).

To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [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]). 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]). However, unlike the E.M. case, and exactly the same as in Application of a Student with a Disability, Appeal No. 22-062, the hearing record in this matter is devoid of evidence that the parent is legally obligated to pay the third-party agency for the nursing services delivered to the student.

The hearing record contained no evidence of an agreement between the parent and Horizon Health Care (see generally Parent Exs. A-V). The parent contends that his agreement with iHope requires that the parent pay for the student's nursing services; however, a review of the contract does not indicate any affirmative duty on the parent to pay for the nursing services provided by Horizon Health Care (Parent Ex. G). The contract with iHope only indicates that the costs of the educational program "do not include the cost of a transportation paraprofessional or a 1:1 private

duty nurse" (id. at p. 2). Additionally, there is no contract included in the hearing record for the services provided by Horizon Health Care. The only information in the hearing record showing that the parent has some obligation to pay for the nursing services provided by Horizon Health Care is the affidavit of the director of operations at iHope indicating that Horizon Health Care billed iHope for nursing services, and in turn the amount for the student was billed to the parent (Parent Ex. I ¶¶ 6, 8). As there is insufficient evidence in the hearing record, such as a written contract between the parent and the third-party agency or an invoice prepared by the agency delivering services directed to the parent revealing a legal obligation to pay, it is not possible to find that the parent incurred a financial obligation for the nursing services delivered to the student that would support an award of reimbursement or direct payment relief.

As there is inadequate proof that the parent has expended any funds to pay for nursing services for the 2022-23 school year or is legally obligated to do so, it is not appropriate equitable relief in this due process proceeding to require the district to either reimburse the parent for the costs of nursing services or to directly fund the nursing services under the relevant legal standards discussed above.

VII. Conclusion

The evidence in the hearing record supports the IHO's finding that the district failed to offer the student a FAPE for the 2022-23 school year. The evidence in the hearing record does not, however, support the IHO's decision to award direct funding or reimbursement for the cost of privately obtained nursing services.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision, dated January 18, 2024, is modified by reversing that portion which ordered the district to reimburse iHope for the nursing services paid for the student for the 2022-23 school year.

Dated: **Albany, New York**
May 6, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER