The University of the State of New York

The State Education Department

State Review Officer

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No. 24-408

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

As further described below, this State-level administrative review is being conducted pursuant to an order of remand issued by the United States District Court for the Southern District of New York (see Moonsammy v. Banks, 2024 WL 4277521 [S.D.N.Y. Sept. 23, 2024]. This proceeding initially arose 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 parents) previously appealed from the decision of an impartial hearing officer (IHO) which denied reimbursement/direct funding of the student's unilateral placement for the 2021-22 and 2022-23 school years. Respondent (the district) previously cross-appealed from the IHO's decision regarding equitable considerations and that ordered the district to fund a neuropsychological independent educational evaluation (IEE). Upon having provided the parties an opportunity to be heard and reexamination of the hearing record of the impartial hearing proceedings, the prior State-level submissions and administrative decisions, as well as the District Court's order of remand, I find that the parents are entitled to direct funding of the International Academy for the Brain (iBrain) tuition for the 2021-22 and 2022-23 school years and direct funding for the transportation services provided by Sisters Travel and Transportation Services, LLC (Sisters Travel) for the 2022-23 school year. Further, I find that the parents are not entitled to reimbursement or direct funding of 1:1 nursing services.

II. Overview—Administrative Procedures

In a due process proceeding conducted pursuant to the IDEA, the decision of an IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]). A party aggrieved by the decision of an IHO may 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]).

III. Facts and Procedural History

The detailed facts regarding the student's educational history and the prior procedural history of this case at the school district and administrative hearing levels was set forth in Application of a Student with a Disability, Appeal No. 23-102. The parties' familiarity with those matters and the IHO's decision is presumed; however, the judicial review that followed the local and State-level administrative proceedings and the consequent remand by the District Court are set forth below with some pertinent facts repeated from the prior State level decision to provide the background context for this determination.

The student has received diagnoses of spastic quadriplegic cerebral palsy, hypotonic infantile spasm, microcephaly, Lennox Gastaut Syndrome, and cortical visual impairment (CVI) (Parent Ex. I at p. 1; Dist. Ex. 6 at p. 1).[1] She presented with "absent and myoclonic seizures" approximately three to four times per day and received nutrition through a gastrostomy tube (G-tube) (Parent Exs. I at p. 1; R ¶ 3).

A Committee on Preschool Special Education (CPSE) convened on January 15, 2020 and reconvened on August 25, 2020, to formulate the student's IEP for the 2020-21 school year (see generally Parent Ex. B). Next, a CPSE convened on August 17, 2021, to develop the student's IEP for the 2021-22 school year (see generally Parent Ex. C). The parents disagreed with the recommendations contained in the August 2021 IEP, and, as a result, in March 2022 notified the district of their intent to unilaterally place the student at iBrain for the remainder of the 2021-22 school year (see Parent Ex. F).[2] Next, a CSE convened on May 27, 2022, and determined that the student was eligible for special education services as a student with a traumatic brain injury (TBI) and developed the student's IEP for the 2022-23 school year (see Parent Ex. H; see Dist. Ex. 34). Again, the parents disagreed with the recommendations contained in the May 2022 IEP, and, as a

[1] A January 2020 assessment report described Lennox Gastaut Syndrome as a rare and severe form of epilepsy (Dist. Ex. 9 at p. 1).

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

result, in June 2022 notified the district of their intent to unilaterally place the student at iBrain for the 2022-23 12-month school year (see Parent Ex. N).

By due process complaint notice dated October 18, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21, 2021-22, and 2022-23 school years and sought tuition reimbursement/direct funding for iBrain (see generally Parent Ex. A). In connection with the 2020-21 school year, the parents alleged that the CPSE failed to: recommend related services sessions that were longer than 30 minutes; assign the student to a school placement; evaluate the student in all areas of suspected disability; recommend a 1:1 paraprofessional; recommend a 1:1 nurse; recommend assistive technology devices; or recommend adult supervision on the bus (Parent Ex. A at pp. 3-4). The parents made similar allegations with respect to the 2021-22 school year, that the CPSE failed to recommend a 1:1 paraprofessional, a 1:1 nurse, a 1:1 travel nurse, and further failed to provide the student with all of her recommended related services (id. at pp. 4-5). Next, in connection with the 2022-23 school year, the parents argued that the recommendation for a 12:1+(3:1) special class in a district specialized school was too large for the student and would not be able to offer the student 1:1 instruction (id. at p. 5). Additionally, the parents disagreed with the district's failure to recommend music therapy, a 1:1 nurse, and an augmentative communication device (id. at pp. 5-6). The parents claimed that iBrain was an appropriate unilateral placement and that equitable considerations weighed in their favor (id. at pp. 6, 11). As relief, the parents requested a declaratory finding that the district failed to offer the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years and that iBrain was an appropriate unilateral placement for the student for the 2021-22 and 2022-23 school years (id. at pp. 11-12). The parents further requested direct funding of the cost of tuition at iBrain for the 2021-22 and 2022-23 school years including the costs of related services, 1:1 nursing services, 1:1 paraprofessional services, and special education transportation services (id. at p. 12). Lastly, the parents sought an neuropsychological IEE (id.).

In a decision dated April 27, 2023, the IHO found that the district offered the student a FAPE for the 2020-21, 2021-22, 2022-23 school years, and denied the parents' request for tuition reimbursement/direct funding to iBrain for the 2021-22 and 2022-23 school years (IHO Decision at pp. 9-13). In addition, the IHO made alternative findings that iBrain was an appropriate unilateral placement for the student, but that the parents would not have been entitled to direct funding and that equitable considerations warranted a 25 percent reduction in tuition reimbursement for the 2022-23 school year. The IHO granted the parents' request for a neuropsychological independent educational evaluation (IEE) (id. at pp. 12-13).

In a State-level administrative appeal from the April 27, 2023 IHO decision, the parents argued that the IHO erred in finding that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years, and by denying tuition reimbursement/direct funding at iBrain for the 2021-22 and 2022-23 school years (see IHO Decision at pp. 9-13). For both the 2020-21 and 2021-22 school years, the parents asserted that the district was obligated to provide a school location letter prior to the start of the school year, even though they did not intend to send the student to a public school during those school years (Req. for Rev. ¶ 23). Also, in connection with the 2020-21 and 2021-22 school years, the parents claimed that the IHO "glossed over" the fact that the district failed to recommend 1:1 paraprofessional services for the 2020-21 and 2021-22 school years, which should have been a denial of FAPE to the student (id. ¶ 27). They also argued that the IHO erred in finding that the CPSE's failure to recommend a 1:1 nurse did not rise to the

level of a denial of FAPE (id. ¶ 28). The parents contended that the IHO failed to address why the May 2022 CSE recommended a 12:1+(3:1) special class instead of a 6:1+1 special class (id. ¶ 24). Next, the parents argued that the IHO erred in finding that equitable considerations did not favor the parents (id. ¶¶ 31, 33). They also asserted that the IHO erred in finding they were not entitled to direct funding because they failed to show an inability to pay the iBrain tuition (id. ¶¶ 37, 39). The parents sought to affirm the IHO's award of a neuropsychological IEE and finding that iBrain was an appropriate unilateral placement (id. ¶¶ 42-43). As relief, the parents requested direct funding of the iBrain tuition for the 2021-22 and 2022-23 school years.

In its answer, the district argued that the request for review should be dismissed as untimely because the parents failed to file the request for review with the Office of State Review within the required time frame (Answer ¶ 7). The district argued that the IHO did not err in finding that the May 2022 CSE's recommendation for a 12:1+(3:1) special class was appropriate for the student's medical, ambulatory, and cognitive needs (id. ¶ 16). In connection with a 1:1 nurse for the 2022-23 school year, the district claimed that it was waiting for the parents to submit medical forms and the May 2022 IEP addressed school nursing services in the management needs and annual goals (id. ¶ 17). Furthermore, the district asserted that the IHO correctly found that the parents were not entitled to direct payment of the tuition at iBrain. In its cross-appeal, the district argued that tuition reimbursement should be denied for both the 2021-22 and 2022-23 school years for equitable reasons as the parents failed to cooperate with the CSE process. The district additionally argued that if tuition was awarded it should be reduced to reflect only those days the student actually attended iBrain and received related services. Lastly, the district asserted that the IHO erred in granting a neuropsychological IEE (id. ¶ 23).

On July 31, 2023, the undersigned found that the IHO erred in finding that the district offered the student a FAPE for the 2020-21, 2021-22, and 2022-23 school years (see Application of a Student with a Disability, Appeal No. 23-102). I further determined that during the development of IEPs in this case, the CPSEs and the CSE failed to consider 1:1 nursing services in light of the student's documented medical needs which resulted in a denial of a FAPE (id.). Further, I awarded reimbursement of the iBrain tuition costs for the 2021-22 and 2022-23 school years and reimbursement of transportation costs to and from iBrain for the 2022-23 school year (id.). Lastly, I found sufficient reason to reverse the IHO's award of a neuropsychological IEE (id.).

The parents sought judicial review of the undersigned's July 31, 2023 State-level decision in the United States District Court for the Southern District of New York (see Moonsammy, 2024 WL 4277521). The District Court found that the proper course was remand for clarification of whether equitable considerations supported an award of direct funding of the iBrain tuition and transportation costs (Moonsammy, 2024 WL 4277521, at *12). The District Court also stated that it would be fruitful to further develop the record (id.). Additionally, in connection with nursing services, the District Court remanded the matter to the undersigned to determine whether the award for reimbursement for iBrain tuition was intended to include 1:1 nursing services for the student (Moonsammy, 2024 WL 4277521, at *14).

The District Court also noted that remand by the undersigned to the IHO or other action at the state level was not precluded, and encouraged that the process be completed within two months (Moonsammy, 2024 WL 4277521, at *12, *17). On September 26, 2024 the district filed the

remand order with the undersigned at the Office of State Review and copied the parents. Accordingly, as part of the review process and in response to the District Court's concerns, in a letter dated September 27, 2024, the undersigned offer the parties were offered an opportunity to be heard by submitting their respective positions regarding issues remanded along with any additional documentary evidence on the issue of direct funding. The parties were invited to indicate their positions with respect to the need for further remand in their written submissions.

IV. Arguments on Remand

The district submitted a supplemental brief in accordance with the schedule set by the undersigned, which was verified and served upon the parent's counsel, Ataur Raquib, Esq., by both U.S. Mail and email. Therein the district argued that reimbursement for iBrain tuition was not intended to include 1:1 nursing services. The district asserts that the parents submitted iBrain tuition contracts for both the 2021-22 and 2022-23 school years and a transportation contract for the 2022-23 school year. The district points to the language in the iBrain contracts that specifically exclude "individual nursing services." Also, the district asserts that the parents failed to submit contracts for the 1:1 nursing services establishing the parents' financial obligation. If, the district argues, the parents now attempt to submit nursing contracts, they should not be considered as evidence because they were available at the time of the impartial hearing.

Next, the district argues that any relief awarded to the parents should be limited to reimbursement and not direct payment. The district claims that one of the parents submitted an unsworn affidavit which stated in a "conclusory" manner that they were unable to pay the tuition costs at iBrain. The district asserts that the parents failed to establish their inability to pay the iBrain tuition and Sisters Travel transportation costs. Further, the district argues that a deadline was set for additional evidence to be submitted no later than October 4, 2024, and the parents failed to submit any evidence. Therefore, if the parents subsequently submitted evidence, it would be untimely and should not be considered in determining the parents' ability to pay for the tuition and transportation.

Although the parents' counsel was copied on the district's communications with the Office of State Review and was served by both mail and email with the district's supplemental briefing upon remand, the parents failed to respond, submit additional evidence on the issue of direct funding and have not submitted any statement regarding the issues remanded.[3] Notwithstanding that point, I have conducted an impartial reexamination of the issues remanded by the District Court to the best of my ability.

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

[3] Of note, the District Court stated that it did not want to punish the parents and the student for their counsel failing to develop the hearing record on whether equitable considerations support an award of direct payment (see Moonsammy, at *12). But again, counsel for the parents has respond to communications from the Office of State Review or upon service of the district's brief upon the parent, and I am not willing to chase down the parents further upon remand to develop the hearing record.

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]).[4]

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Direct Funding

The District Court found that the parties failed to develop a hearing record as to whether the "equities support an award of direct payment" (Moonsammy, 2024 WL 4277521, at *12). The Court remanded the matter to the undersigned "to develop the record, among other points, as to whether the [parents] were contractually obligated to pay the fees assessed by iBrain and Sisters

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

[Travel] had it been determined that the [district] had offered them a FAPE, whether these fees were justifiable, whether the [parents] would have been able to pay the fees assessed (or, if excessive, reasonable fees for these services), and what the consequences to the [parents] would have been of obligating them first to pay iBrain and Sisters [Travel] and thereafter seek reimbursement" (id.).

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. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014] [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]).

In light of this authority, SROs in the past have required parents seeking direct funding relief to show that parents lacked the financial resources to pay the costs of the nonpublic school tuition (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). While this line of reasoning was applied previously, as pointed out by the District Court, more recently, the Court has ruled in certain cases that such proof is not required before direct funding may be ordered (see Mondano v. Banks, 2024 WL 1363583, at *12 [S.D.N.Y. Mar. 30, 2024]; 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 v. Mills, 34 F. Supp. 2d 795, 805-06 [N.D.N.Y. 1998]; 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]).

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). However, as another SRO recently observed:

> 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 [who] 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 shift in authority within the District Court for the Southern District of New York in favor of awarding direct payment, 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, arguing 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" (Mr. & Mrs. A, 769 F. Supp. 2d at 429-30). However, since the Cohen case was decided, SROs have stopped requiring parents to show financial hardship and instead have focused on whether they are liable for the unilaterally obtained services in the interests of avoiding the risk of artificially inflated costs. Absent misleading circumstances such as dishonestly, fraud or collusion, an arms-length transaction should result in most instances in a parent becoming liable for costs that are reasonable under the circumstances.

With respect to the parents' financial obligation in this case, the hearing record includes an enrollment contract signed by the parents on March 29, 2022 for the student's attendance at iBrain for part of the 2021-22 school year, and a contract signed by the parents on June 11, 2022 for the student's attendance at iBrain for the 2022-23 school year (see Parent Exs. K; P). Both contracts with iBrain state that the parents would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (Parent Exs. K at pp. 2-3; P at pp. 2-3). The iBrain enrollment contracts contain language that the parents' "obligation to pay tuition [was] unconditional" and once a final determination or decision was issued by a reviewing court, then "all monies then-due will become immediately due within thirty (30) days of the final adjudication" (Parent Exs. K at p. 2; P at p. 2). Here, the iBrain contracts are sufficient to demonstrate that the parents incurred a financial obligation to pay the costs of the unilateral placement (see Application of a Student with

a Disability, Appeal No. 23-102). There is no evidence that the contracts were less than an arms-length transaction, that one of the parties engaged in deceit, fraud, collusion or the like, that there was another agreement between the parties that iBrain would further excuse the parent's payment obligation if unsuccessful or refrain from engaging in debt collection activities, or that there were other lower-cost private school options that the parents could have pursued to address the student's needs.

The parents also entered into a school transportation service agreement with Sisters Travel for the period of July 1, 2022 through June 30, 2023 and agreed that the obligation to pay for the transportation fees was "unconditional" (Parent Ex. M at p. 2). The transportation service agreement stated that Sisters Travel would "suspend payment obligations until an administrative or judicial decision [wa]s made, including a pendency decision, and then payment w[ould] become immediately due within thirty (30) days of the adjudication or execution of a [s]tipulation [a]greement" (id.). Further, the transportation service agreement stated that if an "administrative decision" was not in the parents' favor that "payment w[ould] be suspended until the [parents] exhausted all legal remedies available to them to secure third party funding, when all payments will immediately become due" (id.). As with the iBrain enrollment contracts, the Sisters Travel transportation service agreement demonstrates that the parents incurred a financial obligation to pay the transportation costs.

Of note, as fully explained in Application of a Student with a Disability, Appeal No. 23-102, the hearing record does not contain a school transportation agreement with Sisters Travel for the 2021-22 school year (March 15, 2023 Tr. p. 87; see Parent Exs. A-R;). During the impartial hearing, the parents' attorneys attempted to enter into evidence information pertaining to the transportation service agreement which was not disclosed in the parents' prehearing disclosures to the district, and therefore, was precluded from evidence by the IHO (March 15, 2023 Tr. pp. 87, 125-26). Later, in connection with Application of a Student with a Disability, Appeal No. 23-102, the parents sought to introduce the 2021-22 Sisters Travel transportation service agreement into the hearing record as additional evidence which I found was properly precluded from evidence by the IHO and was not admitted as additional evidence. This exclusion was rooted in the hearing requirements attendant to IDEA which provide that "[a]ny party to a hearing conducted pursuant to §§ 300.507 through 300.513 or §§ 300.530 through 300.534, or an appeal conducted pursuant to § 300.514, has the right to—… Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five business days before the hearing," and there has been no finding that there was an abuse of discretion by the IHO in applying the rule (34 CFR § 300.512[a][3]).

As discussed above, the parents have established a financial obligation for the costs of the student's tuition at iBrain for the 2021-22 and 2022-23 school years and transportation services with Sisters Travel for the 2022-23 school year. As for the parents' ability to pay, the hearing record contained an affidavit from the student's father that the family was unable to pay the "up front cost" of the student's placement and needed to "wait for reimbursement" (Parent Ex. R ¶ 13). However, I would be remiss in failing to mention that because they did not respond upon remand, the parents still have not presented any further evidence about their ability to pay the costs of the iBrain tuition and Sisters Travel transportation expenses and whether the parents would be able to pay the tuition and transportation costs up front and later seek reimbursement for the same. At the same time, the district did not argue or present evidence of the excessiveness of the costs, evidence

of "sham transactions," fraud, or inflation of the costs by iBrain or Sisters Travel (Moonsammy, 2024 WL 4277521, at *11). Neither party has indicated a further desire for remand to the IHO for record development in the context of a trial-type hearing.

The district's arguments in its supplemental brief that the parents failed to submit additional evidence to support their argument for direct payment, and the parents' failure to establish their inability to pay and the consequences of requiring the parents to pay the upfront costs and then seek reimbursement, is contrary to the finding in Cohen, in which proof of a lack of financial resources is not required always required before direct funding may be ordered (see Cohen, 2023 WL 6258147, at *4-*5).[5, 6]

More importantly, as in the present matter, in analyzing a matter under Burlington and Carter there is little difference between reimbursement and direct payment as a remedy as both "'merely requires [the school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023], citing E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).. As noted previously, the district did not appeal the IHO's finding that iBrain was an appropriate unilateral placement which became final and binding on the parties (see Application of a Student with a Disability, Appeal No. 23-102; Bd. of Educ. of Harrison Cent. Sch. Dist. v. C.S., 2024 WL 4252499, at *13 [S.D.N.Y. Sept. 20, 2024]).

If I had decided Application of a Student with a Disability, Appeal No. 23-102 today with the benefit of the district court's subsequent decisional law in 2023 and 2024, it would have resulted in a difference in the outcome. Accordingly, I make that clarification and will exercise my discretion and order the district to directly fund the tuition at iBrain for the 2021-22 school year, the iBrain tuition for the 2022-23 school year, and the Sisters Travel costs for the 2022-23 school year, per the contracts and agreement contained in the hearing record. However, where, as here, there is no contract or agreement for services for transportation for the 2021-22 school year with Sisters Travel that should considered in light of the IDEA's disclosure rules, the equitable result is to award reimbursement of the parents' expenses for transportation upon proof of payment as the parents have failed to establish a legal obligation or financial risk for the student's transportation costs for the 2021-22 school year.

[5] The decision in Application of a Student with a Disability, Appeal No. 23-102 was issued on July 31, 2023 and the District Court decision in Cohen was filed on September 23, 2024.

[6] As stated by the District Court in Moonsammy, "[t]here is a wide recognition in this District that, although the IDEA references only the remedy of reimbursement, § 1415(i)(2)(C)(iii) empowers courts, where 'appropriate,' to order direct payment, to the service providers, of tuition and fees for related services for a child whom the educational agency had denied a FAPE. There is not, however, consensus as to the boundaries of judicial discretion under that provision, including whether a parent must show financial hardship from paying, or a durable legal obligation to pay, before a court may order direct payment in lieu of imposing a reimbursement obligation on the State." (Moonsammy, 2024 WL 4277521, at *10).

B. Relief – 1:1 Nursing Services

The District Court found the central issue related to the reimbursement of the nursing services, was my finding that the district's failure to consider 1:1 nursing services for the student due to the student's medical needs was a denial of FAPE for the 2020-21, 2021-22, and 2022-23 school years (Application of a Student with a Disability, Appeal No. 23-102). The District Court further noted that in light of this finding, the undersigned was "silent as to reimbursement for nursing services" (Moonsammy, 2024 WL 4277521, at *14). Moreover, the District Court referred to the relief awarded by the undersigned, which was for the "costs" of the iBrain tuition for the 2021-22 and 2022-23 school years as well as the costs associated with transportation by Sisters Travel that included a 1:1 nurse for transportation for the 2022-23 school year. Accordingly, as the District Court was perplexed by the exclusion of reimbursement of the 1:1 nursing services when there was a finding that the district's failure to consider 1:1 nursing services was a denial of a FAPE, the Court remanded for clarification as to whether the awarded relief for the costs of the iBrain tuition also included 1:1 nursing services.

As relief in Application of a Student with a Disability, Appeal No. 23-102, I ordered the following: that the "district shall reimburse the parents for the costs iBrain tuition for the 2021-22 and 2022-23 school years upon the parents' submission to the district of proof of attendance and payment," and that "the district shall reimburse the parents for the costs of the student's transportation to and from iBrain for the 2022-23 school year pursuant to the contract that the parents entered into with Sisters Travel upon the parents submission of proof of payment to the district." There was no mention in the awarded relief for nursing services (see Application of a Student with a Disability, Appeal No. 23-102).

Furthermore, the iBrain director of special education testified that iBrain did not employ a 1:1 nurse for the student and the nursing services were obtained from "an outside agency" (March 15, 2023 Tr. p. 101). However, absent from the hearing record was an agreement or contract with any agency providing the student 1:1 nursing services, whether the services were provided to the student and if so, the frequency and duration of the services, and the actual nursing services provided to the student (March 1, 2023 Tr. pp. 1-70; March 15, 2023 Tr. pp. 71-127; see Parent Exs. A-R;). Accordingly, the lack of evidence of 1:1 nursing services in the hearing record precludes the direct funding or reimbursement for such services.

With regard to nursing specifically, the iBrain enrollment contracts state that the tuition is comprised of the "base tuition" and "supplemental tuition," which resulted in a final tuition that the parents agreed to pay (Parent Exs. K at pp. 1-2; P at pp. 1-2). The base tuition included the cost of an individual paraprofessional, and school nurse as well as the academic program and related services as per the student's district developed IEP or iBrain IEP (Parent Exs. K at p. 1; P at pp. 1-2). The base tuition, however, did not include the cost of related services, transportation paraprofessional, "any individual nursing services," or assistive technology devices and equipment (Parent Exs. K at p. 1; P at pp. 1-2 [emphasis added]). As set forth in the contracts, the supplemental tuition included the cost of related services as follows: individual occupational therapy five times per week for 60 minutes a session; individual physical therapy five times per week for 60 minutes a session; individual speech-language therapy five times per week for 60 minutes a session; individual vision education services three times per week for 60 minutes a session; individual assistive technology services two times per week for 60 minutes a session; individual music therapy two times per week for 60 minutes a session; group music therapy once

a week for 60 minutes; and parent counseling and training once per month for 60 minutes (Parent Exs. K at pp. 1-2; P at p. 2). Accordingly, the iBrain contracts do not include the costs for individual nursing services and therefore, the award for iBrain costs for the denial of FAPE did not include the 1:1 nursing services.

Lastly, the parents' request for review did not allege that the district should have funded the cost of the 1:1 nursing services nor do the parents seek, as relief, reimbursement/direct funding for the 1:1 nursing services (see generally Req. for Rev.). State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Therefore, the parents failed to set forth nursing services as an issue to be decided by the undersigned.

For the foregoing reasons, the reimbursement/direct funding for the iBrain tuition was not intended to include 1:1 nursing services. There was no oversight by the undersigned but a careful and thorough review of the hearing record to determine if nursing services should be awarded. Accordingly, the parents are not entitled to reimbursement/direct funding of individual nursing services for the student.

The District Court fittingly noted the fact that the lack of 1:1 nursing services for the student featured prominently in the undersigned's prior decision. It sat poorly with the undersigned that what failed to pass muster for the district with regard to the FAPE violation—in terms of the parents' allegations due process complaint notice—would then be met with deafening silence regarding the same type of services when the parents were required so show that the services they obtained from iBrain (or from iBrain in conjunction with another company) were "proper under the act" given the student's serious needs.[7] If it is helpful to the Court to further understand my reasoning, candidly, the undersigned would have found that iBrain was not an appropriate unilateral placement for the student and declined to award nursing services and iBrain costs under the totality of the circumstances if that issue had been before me.[8] But it was not. It was only due to the fact, as noted above, that the district failed to appeal the IHO's conclusory finding that iBrain was an appropriate unilateral placement for the student and thus abandoned any argument to the contrary in Application of a Student with a Disability, Appeal No. 23-102. It was for that reason

[7] Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]).

[8] Courts assessing the propriety of a unilateral placement consider the "totality of the circumstances" in determining whether that placement reasonably serves a child's individual needs (Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65). The Second Circuit has also cautioned administrative hearing officers against mixing factors involving equitable considerations into with inquiries into whether a unilateral placement is appropriate (A.P. v. New York City Dep't of Educ., 2024 WL 763386, at *2 [2d Cir. Feb. 26, 2024]).

that the parents were successful in proceeding to the next phase of my analysis of equitable considerations and obtaining some relief related to iBrain. I cannot make either party's arguments for them, and both sides have been remiss in this proceeding, seeming holding back in their arguments or evidentiary presentations for reasons unknown, which results in these seemly incongruous determinations. There is a great deal of inelegance in the outcome when the parties to due process litigation conduct themselves in this manner. But like the District Court, as a matter of equitable considerations, I am reluctant to entirely punish one side over the other on this far from perfect hearing record, when there is an innocent child with significant disabilities in the middle of a monetary dispute that the adults are having.

VII. Conclusion

For the reasons described above, I clarify my prior determinations as instructed by the District Court and hold that the district is ordered to directly fund the tuition at iBrain for the 2021-22 school year, the iBrain tuition for the 2022-23 school year, and the Sisters Travel costs for the 2022-23 school year, as per the contracts and agreement contained in the hearing record. In connection with the Sisters Travel costs for the 2021-22 school year, I will award reimbursement of the parents' transportation expenses upon proof of payment by the parents for the transportation expenses for the 2021-22 school year. There was no reliable evidence regarding the provision of unilaterally obtained 1:1 nursing services for the student by iBrain or anyone else and thus no award of funding or reimbursement for the same. Accordingly, upon remand from the District Court:

IT IS ORDERED that district shall directly fund the iBrain tuition for student for the 2021-22 school year, as per the enrollment contract;

IT IS FURTHER ORDERED that the district shall directly fund the iBrain tuition for the student for the 2022-23 school year, as per the enrollment contract;

IT IS FURTHER ORDERED that the district shall directly fund the Sisters Travel transportation costs for the student for the 2022-23 school year, as per the transportation services agreement;

IT IS FURTHER ORDERED that the district shall reimburse the parents for the transportation expenses they incurred for the student's 2021-22 transportation by Sisters Travel upon submission of their proof of payment for the same; and,

IT IS FURTHER ORDERED that the parents' request funding for 1:1 nursing services for the student is denied.

Dated: **Albany, New York**
October 25, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER