The University of the State of New York

The State Education Department
State Review Officer
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No. 21-163

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:
Judy Nathan, Interim Acting General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Brain Injury Rights Group, Ltd., attorneys for respondents, by John Henry Olthoff, 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 that portion of the decision of an impartial hearing officer (IHO) which awarded the respondents (the parents) direct funding or reimbursement for tuition, related services, a 1:1 paraprofessional, a 1:1 nurse, transportation, and fees for the student's attendance at the International Institute for the Brain (iBrain) for the 2020-21 school year and the provision of an assistive technology device by the district. 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 has been the subject of prior State-level administrative review proceedings regarding the 2018-19 and 2019-20 school years, as well as an appeal involving the student's stay-put placement during the pendency of the present matter (see Application of a Student with a Disability, Appeal No. 21-136; Application of a Student with a Disability, 21-063; Application of a Student with a Disability, 20-178;[1] Application of a Student with a Disability, Appeal No. 20-

[1] Although the district was the petitioner in Appeal No. 20-178, the matter was incorrectly captioned as

051; Application of a Student with a Disability, Appeal No. 18-139). As the student's educational history up through the 2019-20 school year as well as the history of the proceedings involving the student have been set forth in detail in the prior administrative decisions, they will not be recited in detail.

A private IEP for the 2020-21 school year was created by iBrain on June 7, 2020 (see generally Parent Ex. D). The student was recommended for a 12-month program including a 6:1+1 special class placement (id. at p. 34). Additionally, the iBrain IEP provided for five 60-minute sessions of individual occupational therapy (OT) per week, five 60-minutes sessions of individual physical therapy (PT) per week, three 60-minute sessions of individual speech-language therapy per week, two 60-minute sessions of individual vision education services per week, and one 60-minute session of parent counseling and training per month (id. at pp. 34-35). The student was also recommended to receive support from a full-time 1:1 paraprofessional and a 1:1 nurse (id. at p. 35). In addition, the iBrain IEP provided for access to assistive technology devices throughout the school day, including an eye gaze device, and recommended one 60-minute indirect/individual session of assistive technology services per week (id. at pp. 35-36).

A CSE convened on June 10, 2020 to develop an IEP for the student (see Parent Ex. F). Finding that the student was eligible for special education as a student with a traumatic brain injury, the June 2020 CSE recommended a 12-month program including a 6:1+1 special class placement in a district specialized school (id. at pp. 1, 24-26). Additionally, the CSE recommended five 60-minute sessions of individual OT per week, five 60-minute sessions of individual PT per week, five 60-minute sessions of individual speech-language therapy per week, two 60-minute sessions of individual vision education services per week, and one 60-minute session of parent counseling and training per month (id. at pp. 24-25). The June 2020 CSE further recommended the support of a full-time 1:1 health paraprofessional for safety, activities of daily living (ADLs), feeding, and ambulation and full-time 1:1 direct nursing services for the student (id. at p. 25). The CSE further included a recommendation for assistive technology, identifying an eye gaze device, with accessories, and one 60-minute session of assistive technology services per week (id.).

On June 26, 2020, the parents notified the district of their intention to enroll the student at iBrain for the 2020-21 school year and to seek district funding for the cost of the placement (Parent Ex. K at p. 1). According to the parents, "the program and placement offered" by the district could not "appropriately address [the student's] educational needs for the extended school year 2020-2021" (id.).

On July 6, 2020, the student's father executed a contract for the student to attend iBrain for the 2020-21 school year, beginning on July 6, 2020 (Parent Ex. G).[2]

"Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education." Despite the error, the decision will be cited as captioned.

[2] On September 9, 2020, the student's father executed a contract for the provision of transportation services (Parent Ex. H).

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2020, the parents asserted that the district failed to offer the student a FAPE for the 2020-21 school year (see Parent Ex. A).[3, 4] Specifically, the parents alleged that the district failed to implement the student's June 2020 IEP and failed to identify a school for the student to attend prior to the start of the 2020-21 extended school year (id. at pp. 3-4). The parents asserted that the placement recommendation would not "meet [the student's] highly intensive management needs and that [the student] would not learn in an environment with peers possessing dissimilar needs" (id. at p. 4). Further, the parents asserted that the district did not recommend all of the related services, supports, and devices as identified on the iBrain reports provided to the June 2020 CSE (id. at pp. 4-5). According to the parents, the CSE eliminated "critical supports, services, management needs, goals and the location for services (all pull-out sessions instead in push-in)" for the student (id. at p. 5). In addition, the parents asserted that the June 2020 CSE inappropriately denied the student access to assistive technology devices (id. at p. 5). According to the parents, at the June 2020 CSE meeting, "the CSE team, unjustifiably indicated the [district] would not actually provide any recommended devices and services to [the student]" (id.). As relief, the parents requested that the district directly fund the cost of the student's tuition at iBrain for the 2020-21 school year, including 1:1 paraprofessional services and related services (id. at p. 6). The parents also requested prospective payment for the cost of a 1:1 nurse during the school day and reimbursement or direct funding for the cost of transportation, including a transportation paraprofessional and nurse or porter services, as required (id.). Finally, the parents requested an order directing the CSE to reconvene an annual review meeting for the student and compelling the district to provide assistive technology services and devices for the student and identify an augmentative or alternative communication (AAC) device to assist the student with communication (id.).

B. Impartial Hearing Officer Decision

The impartial hearing convened, and the parties addressed the issue of pendency on September 16, 2020 and October 2, 2020 (Tr. pp. 1-60). On October 16, 2020, the IHO who presided over the pendency portion of the impartial hearing issued a decision finding that iBrain constituted the student's stay put placement for the pendency of this proceeding (Oct. 16, 2020 Interim IHO Decision). The pendency decision was appealed by the district and a State Review Officer issued a decision, which determined that the United State District Court for the Southern District of New York had already denied the parents' request for stay put funding at iBrain pursuant to pendency and that the District Court's decisions foreclosed further rulings on the matter in the administrative forums (Application of a Student with a Disability, Appeal No. 20-178; see Araujo

[3] As an initial matter, the parents requested that the IHO consolidate claims set forth in the July 2020 due process complaint notice related to the 2020-21 school year with the proceeding that had been commenced in July 2019 related to the 2019-20 school year, which was still pending (Parent Ex. A at pp. 1-2). In an order of consolidation dated July 22, 2020, the IHO who was appointed to hear the matter involving the 2019-20 school year denied the parent's request for consolidation (see July 22, 2020 Interim Decision on Consolidation). The merits of the proceeding regarding the 2019-20 school year were recently addressed in a State-level administrative appeal (Application of a Student with a Disability, Appeal No. 21-063).

[4] The parents also requested funding for the student's placement at iBrain based on pendency (Parent Ex. A at p. 2).

v. New York City Dep't of Educ., 2020 WL 5701828, [S.D.N.Y. Sept. 24, 2020]; F. v. New York City Dep't of Educ., 2020 WL 1158532, at *2 [S.D.N.Y. Mar. 6, 2020]).

A new IHO was appointed to hear the matter and the parties appeared for prehearing conferences on January 29, 2021 and February 23, 2021 (Tr. pp. 61-80). At the February 23, 2021 prehearing conference, the IHO recused herself due to concerns over the appearance of a conflict of interest (Tr. pp. 72-74). The IHO was who ultimately presided over the remainder of the impartial hearing was appointed, another prehearing conference was held on May 25, 2021, and the impartial hearing continued and concluded on June 8, 2021 (Tr. pp. 81-161).[5]

In a decision, dated June 21, 2021, the IHO determined that the district did not present any evidence, and, taking the parent's allegation that the district did not provide a placement for the student prior to the start of the 2020-21 school year as uncontroverted, the IHO found that the district did not provide the student with a FAPE for the 2020-21 school year (IHO Decision at p. 10). The IHO then determined that the parents met their burden of proving that iBrain "provided the Student with specific individualized instruction in a small setting specially designed to meet the Student's unique and global deficits" (id. at pp. 13-14). The IHO also found that the student made progress at iBrain during the 2020-21 school year and that iBrain was an appropriate placement for the student (id. at p. 14). Turning to equitable considerations, without elaboration, the IHO found "the Parent[s] ha[d] participated in all aspects of the special education process and communicated their concerns with the District" (id. at pp. 14-15). As relief, the IHO ordered that the district reimburse the parents or directly pay for "all tuition, related services, 1:1 paraprofessional, 1:1 nurse, transportation and fees" for the student's attendance at iBrain for the 2020-21 school year (id. at p. 15). The IHO also directed the district to provide specialized transportation between the student's home and iBrain (id.). Finally, the IHO ordered the district to immediately provide the student with a "Tobii Dynavox, Assistive Technology device, with eye gaze" (id.).

IV. Appeal for State-Level Review

The district appeals from the IHO's decision ordering the district to fund the cost of the student's attendance at iBrain for the 2020-21 school year. According to the district, the IHO erred in ordering funding because the hearing record did not include sufficient evidence to show that the parents had incurred a financial obligation with respect to iBrain. The district asserts that the parents' testimony was required to prove that they actually signed the contract that was entered into the hearing record. The district also asserts that the hearing record does not identify any amount charged by iBrain for related services. As a separate point, the district contends that the parents did not submit any evidence of their inability to front the cost of the student's tuition at iBrain, and that, therefore, direct payment was not an appropriate remedy. Finally, the district contends that the IHO erred in ordering the district to provide the student with an assistive technology device. The district asserts that the parents abandoned this claim during the hearing and that the IHO's decision did not offer any basis for supporting the award. More substantively, the district asserts that the award of an assistive technology device was improper because it added a compensatory award to the parent's request for reimbursement for iBrain. According to the district, once the parents unilaterally enrolled the student at iBrain, the district was no longer

[5] A representative from the district did not appear for the May 25, 2021 prehearing conference (Tr. p. 82).

obligated to implement any portion of the June 2020 IEP, including the assistive technology recommendation. The district contends that the award of the cost of tuition at iBrain for the 2020-21 school year remedied the denial of FAPE; additionally, as iBrain provided the student with assistive technology devices and services, this is not a case where the student should receive tuition reimbursement as well as compensatory education. Finally, the district contends that any award of an assistive technology device would necessarily apply to the 2021-22 school year and, therefore, was outside the scope of the hearing.

The parents answer. Initially, the parents note that the district has not appealed from the IHO's findings that the district denied the student a FAPE for the 2020-21 school year or that iBrain was an appropriate unilateral placement for the student for the 2020-21 school year. The parents also indicate that the district did not "raise any issues regarding parental participation or parental actions to thwart, delay, or otherwise obstruct the IEP process." According to the parents, the district did not raise "any issue that would preclude a full award of tuition and related services, including special transportation" in the request for review, and that it is, therefore, frivolous. In addressing the district's assertion that the hearing record did not include sufficient evidence of the parents' financial obligation, the parents referred to the contract executed by the student's father and noted that, at this point, the student attended iBrain and received the benefit of the services. The parents also noted that the iBrain contract identified that related services were to be billed at a rate of $99.00 per hour. As to the lack of evidence regarding the parents' ability to pay the cost of tuition, the parents contend that they are not required to demonstrate financial hardship before being eligible for an award of tuition and related costs. Finally, turning to the award of an assistive technology device, the parents note that the claim was raised in the due process complaint notice and argue that their witness testified that the student had not received the device and that the district was obligated to provide the device. The parents allege that the district was required to implement the IEP, and it was required to do so even for a unilaterally placed student. In addition, according to the parents, iBrain was not responsible for providing the student with an assistive technology device; the parents allege that the IHO acted within her authority in ordering the district to provide the device. The parents also assert that the district should not be permitted to contest this award on the basis of it affecting a subsequent school year, as it is the district's fault that the assistive technology device was not provided earlier and that the hearing to address the allegation was delayed.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir.

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 137 S. Ct. at 1001). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression, and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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. Scope of Review

Initially, in its request for review, the district does not challenge the IHO's determinations that the district denied the student a FAPE for the 2020-21 school year or that iBrain was an appropriate unilateral placement for the student. As noted by the parents, the district also does not challenge the IHO's finding that the parents cooperated in the development of the student's educational program. As such, the IHO's determinations on these issues have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; 8 NYCRR 279.8[b][4]; 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]). The district's appeal is limited to two main issues, the validity of the parents' financial obligation to iBrain, including the parents' ability to pay for the cost of the student's tuition at iBrain, and the appropriateness of the award of an assistive technology device.

B. Parents' Financial Obligation and Ability to Pay

It is well settled that parents who reject a school district's IEP and choose to unilaterally place their child at a private school without consent or referral by the local educational agency do so at their own financial risk (Burlington, 471 U.S. at 373-74; Carter, 510 U.S. at 14; Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020], cert. denied, 141 S. Ct. 1075 [2021], reh'g denied, 141 S. Ct. 1530 [2021]; see S.W. v. New York City Dep't of Educ., 646 F. Supp. 2d 346, 356-58 [S.D.N.Y. 2009] [finding the parent in that matter had no financial

standing to sue for direct retrospective payment to private placement where terms of enrollment contract absolved her of responsibility for paying tuition]). In such instances, retroactive reimbursement to parents by a school district is an available remedy under the IDEA (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). Alternatively, with regard to fashioning equitable relief, courts have determined that it is appropriate under the IDEA 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]).

With respect to the parents' financial obligation, the hearing record includes an enrollment contract signed by the student's father on July 6, 2020 for the student's attendance at iBrain for the 2020-21 school year (Parent Ex. G). The contract with iBrain set out a base tuition that included the cost of academic programming, a school nurse, and an individual paraprofessional for the student (id. at pp. 1-2). The contract further indicated that related services were not a part of the base tuition and would be billed monthly at a specified rate of $99.00 per hour (id. at p. 2). The contract also indicated that assistive technology devices were not included in the base tuition (id.). The contract provided that the parents would be responsible for the tuition and supplemental costs for the student's attendance at iBrain (see id. at pp. 2-4). The hearing record also includes a contract dated September 9, 2020 executed by the student's father for transportation services for the student to and from iBrain by Sisters Travel and Transportation Services, LLC for the 2020-21 school year (Parent Ex. H).

The district argues that because neither parent testified at the impartial hearing, the parents failed to establish that they signed the contracts or understood their legal obligation to pay. However, during the impartial hearing, the district had no objection to the contracts being entered into evidence and did not otherwise request an opportunity to voir dire a witness regarding the authenticity of the contract (see Tr. p. 95 [offering no objection to any of the parents' exhibits]). The district points to no basis for its implication that the signature on the contract was not the signature of the student's father and "[s]omething more than a bald assertion of forgery is required to create an issue of fact contesting the authenticity of a signature" (Banco Popular No. Am. v. Victory Taxi Mgt., 1 N.Y. 3d 381, 384 [2004])). Further, contrary to the district's position, there would have been little relevance to testimony or documentary evidence extrinsic to the contract itself to show the parents' understanding of their financial obligation (see E.M., 758 F.3d at 456-57 [faulting the IHO and the SRO for going beyond the written contract and relying on extrinsic documentary evidence that suggested that the parent was not obligated to pay the private school]).

The district argues that the hearing record does not establish "amounts that iBRAIN charged for the related services"; however, there is no indication that iBrain charged anything other than the hourly rate of $99 per hour set forth in the contract (see Parent Ex. G at p. 2). While the contract does not set forth the number of sessions of related services that iBrain would deliver to the student during the 2020-21 school year, the Second Circuit Court of Appeals has held that some blanks that the parties did not fill in in a written agreement would not render an entire contract void and indicated that in the case before it that "the contract's essential terms—namely, the educational services to be provided and the amount of tuition—were plainly set out in the written agreement, and we cannot agree that the contract, read as a whole, is so vague or indefinite as to make it unenforceable as a matter of law" (E.M., 758 F.3d at 458). Here, the iBrain and transportation contracts are sufficient to demonstrate that the parents incurred a financial obligation to pay the costs of the unilateral placement inclusive of related services and transportation.

With regard to the parents' ability to pay, since the parents selected iBrain as the unilateral placement and their financial status is at issue, it was the parents' burden of production and persuasion with respect to whether they had the financial resources to "front" the costs of the services (Application of a Student with a Disability, Appeal No. 12-036; Application of a Student with a Disability, Appeal No. 12-004; Application of the Dep't of Educ., Appeal No. 11-130; Application of the Dep't of Educ., Appeal No. 11-106; Application of a Student with a Disability, Appeal No. 11-041). As discussed above, the parents have established a financial obligation for the costs of the student's tuition at iBrain, as well as the costs of transportation; however, the parents have not demonstrated an inability to pay. For example, there is no evidence in the hearing record regarding the parents' financial resources, such as a copy of a recent tax return or evidence regarding the parent's assets, liabilities, income, or expenses. Given the lack of information in the hearing record regarding the parents' financial resources, the IHO erred in ordering the district to directly fund the student's tuition. Rather, tuition reimbursement upon proof of payment for services delivered is the appropriate remedy.

C. Assistive Technology

The district appeals from the IHO's order directing the district to provide the student with an assistive technology device, specifically, a Tobii Dynavox with eye gaze, in addition to funding or reimbursement for the cost of the student's attendance at iBrain.[6]

The IHO did not articulate the grounds for her order requiring the district to provide the student with assistive technology. Before turning to the district's argument about the

[6] The district argues that the parents abandoned the request for assistive technology at the impartial hearing. The parents requested in the due process complaint notice that, as relief, the district be required to provide the student with assistive technology services and devices (Parent Ex. A at p. 6). The district is correct that the parents' attorney did not reiterate the request for a device in either the opening or closing statements (Tr. pp. 99-103, 152-54). The IHO questioned the parents' attorney as to whether the assistive technology was still being sought; the parents' attorney was unsure but noted that the witness would clarify the issue (Tr. p. 104). The parents' witness testified that the student did not receive the device and described the device (Tr. pp. 141, 146-49). Despite the lack of clarity at the impartial hearing on the relief sought, it is clear from the entirety of the hearing record that the parents were seeking the assistive technology device in addition to the request for tuition reimbursement and, as such, I will entertain the parties' arguments on the matter.

appropriateness of the IHO's order as a form of relief, I will address the parents' contention that the June 2020 CSE recommended the Tobii Dynavox device for the student on the IEP and that the district was responsible to ensure the student had access to all IEP mandated services and equipment. Contrary to the parents' contention, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]; Letter to Hobson, 33 IDELR 64 [OSERS 2000]; Memorandum to Chief State Sch. Officers, 34 IDELR 263 [OSEP 2000]). The parents, in their answer, cite to Education Law § 3602-c, arguing that the obligation to provide IEP-mandated services rests with the district when a student is parentally placed (Answer ¶ 24).[7] However, here, there is no evidence in the hearing record that the parents requested equitable services from the district (see Educ. Law § 3602-c[2]). As such, there is no merit to the parents' argument that the district was required to provide services under that statute. Rather, once the parents rejected the recommended public school placement, they rejected the entire June 2020 IEP. If it becomes clear that the student will not be educated under the proposed IEP, there can be no denial of a FAPE due to the failure to implement the IEP (R.E., 694 F.3d at 186-88; see also Grim, 346 F.3d at 381-82 [holding that the district was not liable for a denial of a FAPE where the challenged IEP was determined to be appropriate, but the parents chose not to avail themselves of the public school program]).

Regarding the IHO's authority to order the assistive technology as a form of compensatory education relief in addition to the award of tuition reimbursement for the student's attendance at iBrain, some courts have held that compensatory education is not available as an additional or alternative remedy when reimbursement for the costs of a unilateral placement is also at issue for the same time period (see D.F. v. Collingswood Borough Bd. of Educ., 694 F.3d 488, 498 [3rd Cir. 2012] [holding that "[b]ecause compensatory education is at issue only when tuition reimbursement is not, it is implicated only where parents could not afford to 'front' the costs of a child's education"]; P.P. v. West Chester Area Sch. Dist., 585 F.3d 727, 739 [3rd Cir. 2009] [holding that "compensatory education is not an available remedy when a student has been unilaterally enrolled in private school"]; but see I.T. v. Dep't of Educ., State of Hawaii, 2013 WL 6665459, at *7-*8 [D. Haw. Dec. 17, 2013] [finding that the student was entitled to compensatory education for services the student received at the nonpublic school]). The Second Circuit Court of Appeals has not directly addressed this question and, generally, appears to have adopted a broader reading of the purposes of compensatory education than the Third Circuit (compare P.P., 585 F.3d

[7] Under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]). "Boards of education of all school districts of the state shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an individualized education services program [(IESP)] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district (id.). Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district for the purpose of receiving special education programming under Education Law § 3602-c, services for which a public school district may be held accountable through an impartial hearing.

at 739 [finding that "[t]he right to compensatory education arises not from the denial of an appropriate IEP, but from the denial of appropriate education"], with Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456-57 [2d Cir. 2015] [treating compensatory education as an available equitable remedy for a denial of a FAPE so as to effectuate the purposes of the IDEA and put a student in the same position he or she would have been in had the denial of a FAPE not occurred]). Accordingly, unlike the Third Circuit, the Second Circuit's approach to compensatory education may leave room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050). However, if permitted, it would be the rare case where a unilateral placement is deemed to provide instruction specially designed to meet the student's unique needs, but the student is also deemed entitled to compensatory education to fill gaps in the services provided by such unilateral placement.

Here, the student did receive some assistive technology from iBrain; however, it was uncontroverted that the student did not receive the Tobii Dynavox device with eye gaze (Tr. pp. 140-41; Parent Ex. D at p. 8). The iBrain June 2020 IEP indicated that the student's assistive technology sessions "focused on [the student's] ability to shift his gaze from one motivational concrete object or picture to another in order to make a selection to practice shifting and sustaining gaze for when" the student did receive the Tobii Dynavox device (Parent Ex. D at p. 8). The iBrain IEP indicated that the student received an iPad from the district in 2018, but that he did not have the fine motor capabilities to access icons appropriately and that recent medical issues had impacted his ability to access a switch and/or communication software on the iPad (id. at pp. 8-9). The iBrain IEP recommended one 60-minute assistive technology session per week (id. at p. 29). Further, the assistive technology goals indicated that the student would trial an AAC with mounting options for use with eye-tracking software (id.). The April 2021 progress report indicated that the student had maintained his previous level of function related to his eye gaze goal and that the student had yet to receive his device with eye gaze; therefore, that portion of the goals had not yet been targeted (Parent Ex. M at p. 3). The student demonstrated progress towards two of his other assistive technology goals (id.).

The parents could have obtained the assistive technology device and sought reimbursement from the district as part of their overall unilateral placement of the student (see C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 838-39 [2d Cir. 2014] [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). The parents did not do so but the IHO nevertheless determined that iBrain was an appropriate unilateral placement for the student and cited in her analysis of the program at iBrain the assistive technology provided by the private school (IHO Decision at pp. 13-14). Overall, there is no basis to find that this matter represents a unique or rare circumstance such that it would warrant an order requiring the district to fund the unilateral placement, as well as provide assistive technology to make-up for deficiencies in the placement chosen by and arranged for by the parent. Therefore, even though it is uncontested that student would benefit from the Tobii Dynavox device with eye gaze, it was inappropriate for the IHO to order the district to provide the device where the parents had already engaged in self help and elected to reject the proposed IEP including the assistive technology device and unilaterally place the student in a private school.

VII. Conclusion

In summary, contrary to the district's position, the evidence in the hearing record demonstrates that the parents had a financial obligation for the costs of the student's attendance at iBrain for the 2020-21 school year. However, as the parents did not present evidence that they were unable to front the costs of the student's tuition, the IHO erred in ordering the district to directly pay iBrain the costs of the student's tuition. In addition, the evidence in the hearing record does not support the IHO's order requiring the district to provide the student with the Tobii Dynavox device with eye gaze.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated June 21, 2021 is modified by reversing that portion which ordered the district to directly pay iBrain for the costs of the student's attendance at iBrain for the 2020-21 school year and to provide the student with a Tobii Dynavox with eye gaze; and

IT IS FURTHER ORDERED that, upon proof of payment shown, the district shall be required to reimburse the parents for the costs of the student's attendance at iBrain for the 2020-21 school year, including tuition and costs for related services, 1:1 paraprofessional and 1:1 nurse services, transportation, and fees.

Dated: **Albany, New York**
August 27, 2021

SARAH L. HARRINGTON
STATE REVIEW OFFICER