The University of the State of New York

The State Education Department
State Review Officer
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No. 22-062

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the New York City Department of Education

Appearances:
Brain Injury Rights Group, Ltd., attorneys for petitioners, by John Henry Olthoff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for the costs of the student's individual nursing services while she attended the International Institute for the Brain (iBrain) for the 2021-22 school year and which denied their request to order respondent (the district) to provide the student with an assistive technology device. The appeal must be dismissed.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C.

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

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

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

III. Facts and Procedural History

The student in this case has been the subject of one prior State-level administrative appeal (see Application of a Student with a Disability, Appeal No. 21-156 [concerning the 2020-21 school year]). Given the limited issues raised on appeal, a full recitation of the student's educational history is not necessary. Briefly, however, beginning in July 2018, the student has continuously

attended a 12-month school year program at iBrain through the current school year at issue (2021-22) (see Tr. p. 137; Parent Exs. P ¶ 5; R ¶ 11).[1]

A CSE convened on February 10, 2021 to conduct the student's annual review and developed an IEP with a projected implementation date of April 12, 2021 (see Parent Ex. F at pp. 1, 34).[2] Finding the student eligible for special education as a student with a traumatic brain injury, the February 2021 CSE recommended a 12-month school year program consisting of the following recommendations: a 6:1+1 special class placement in a district specialized school, four 60-minute sessions per week of individual occupational therapy (OT); full-time, individual school nurse services; five 60-minute sessions per week of individual physical therapy (PT); five 60-minute sessions per week of individual speech-language therapy; three 60-minute sessions per week of individual vision education services; full-time, individual health paraprofessional services; and one 60-minute session per month of parent counseling and training services (id. at pp. 1, 29-30).[3] In addition, the February 2021 CSE recommended the following as assistive technology devices and services: "[two] flexible mounts; large and small switches; proximity sensor; latitude mounting arm; universal mounting plates; Medium Hi/Lo Base; [and] Switch Interface Pro"; as well as one 60-minute session per week of individual assistive technology services (id. at p. 30). The February 2021 CSE also recommended supports for school personnel on behalf of the student, including "[t]wo-person transfer training," "[t]raining for vision adaptations and functioning," "[s]eizure safety training," "[t]raining for g-tube safety," and "[t]raining for assistive technology" (id.). Finally, the February 2021 CSE recommended special transportation services consisting of "[a]dult supervision—1:1 [n]ursing [s]ervices," a lift bus, air conditioning, wheelchair accessibility, limited travel time, and pick-ups from the "closest safe curb location to school" (id. at pp. 33-34).[4]

In a prior written notice dated June 1, 2021, the district informed the parents of the student's 12-month school year program recommendations (see Parent Ex G at pp. 1-2). In a separate school location letter, dated June 1, 2021, the district identified the specific public school site where the student's February 2021 IEP would be implemented (id. at p. 8).

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

[2] The hearing record contains several duplicative exhibits (compare Parent Exs. E, F, G, with Dist. Exs. 1, 3, 6). For purposes of this decision, only parent exhibits are cited in instances where both a parent and district exhibit are identical in content. The IHO is reminded that it is his responsibility to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

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

[4] As noted in the parent concerns section of the February 2021 IEP, the student's father stated at the CSE meeting that "all the recommendations [wer]e perfect and that he [wa]s in agreement" (Parent Ex. F at p. 36). At the impartial hearing, the student's father—who participated in the February 2021 CSE meeting—repeated in his testimony that he agreed with the February 2021 CSE's "recommendations, but [that he] did not agree with the placement recommendation in a . . . public District 75 school" (Parent Ex. P ¶¶ 6-7; see Dist. Ex. 2).

By letter dated June 23, 2021, the parents notified the district of their intentions to unilaterally place the student at iBrain for the 2021-22 school year (12-month school year program) and to seek reimbursement for the costs of the student's tuition at iBrain (see Parent Ex. H).[5]

A. Due Process Complaint Notice

By due process complaint notice dated July 6, 2021, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2021-22 school year (12-month school year program) (see Parent Ex. A at p. 1).[6, 7] As relevant to this appeal, the parents alleged that the district failed to recommend "adequate and appropriate" assistive technology devices—such as "jellybean and BigMack switches," "a computer with a switch interface, software like HelpKidzLearn and Tarheel Reader, [and] adaptive seating"—for the student, who was nonverbal and dependent on assistive technology to communicate (id. at p. 3). As relief, the parents sought, in part, an order directing the district to directly fund the costs of the student's tuition at iBrain (12-month school year program, "plus the costs of related services, nurse services, and . . . a 1:1 paraprofessional"); reimbursement or prospective funding for the costs of special education transportation with "limited travel time, ventilator, air conditioning, lift bus/wheelchair accessibility, a travel nurse, travel paraprofessional, and related services as required"; an order directing the district to provide the student with assistive technology services and devices, as well as an augmentative or alternative communication (AAC) device to assist with communication; an order directing the district to reimburse the parents for the costs of assistive technology devices, including required service hours and accessories; and an order directing the district to fund an independent educational evaluation (IEE) of the student in all areas of need (id. at p. 6).

[5] The evidence in the hearing record indicates that, for the 2021-22 school year at iBrain, the student attended a 6:1+1 special class placement and received the following as related services on a "weekly, push in/pull out basis:" four 60-minute sessions per week of OT, five 60-minute sessions per week of PT, five 60-minute sessions per week of speech-language therapy, three 60-minute sessions per week of vision education services, one 60-minute session per week of assistive technology services, and two 60-minute sessions of music therapy (Parent Ex. R ¶ 12). The evidence in the hearing record further reflects that the student had an assistive technology device and "related supports and devices for use throughout the day across all school environments" (id.; see Parent Ex. P ¶ 10 [reflecting that the student received "assistive technology devices and services" at iBrain during 2021-22 school year]). During the 2021-22 school year, the student also received the services of a "1:1 paraprofessional all day, every day, to support her needs, as well as a 1:1 nurse" (Parent Ex. R ¶ 13). The parents received one 60-minute session per month of parent counseling and training services, and the student received the following special education transportation accommodations: "a 1:1 nurse, limited travel time, air conditioning, a lift bus, and wheelchair accessibility" (id. ¶ 14). According to the evidence in the hearing record, the student's "classmates receive[d] similar related services" during the 2021-22 school year, and "[s]everal [of her classmates] also ha[d] 1:1 nurses" (id. ¶ 15).

[6] On July 8, 2021, the parents executed an enrollment contract with iBrain for the student's attendance in a 12-month school year program for the 2021-22 school year (see Parent Ex. I at pp. 1, 9; see generally Parent Ex. J).

[7] In the due process complaint notice, the parents invoked the student's right to pendency services at iBrain, which included the direct payment of tuition and related services' costs and the direct payment of round-trip transportation services, based upon an unappealed IHO decision, dated December 30, 2020 (see Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

On August 19, 2021, the parties proceeded to an impartial hearing, which concluded on February 16, 2022, after six total days of proceedings (see Tr. pp. 1-169).[8, 9] In a decision dated April 4, 2022, the IHO found that the district failed to offer the student a FAPE for the 2021-22 school year, that iBrain was an appropriate unilateral placement for the student, and that equitable considerations weighed in favor of the parents' requested relief of direct funding for the costs of the unilateral placement (see IHO Decision at pp. 6-15). However, the IHO found that, because the base tuition cost at iBrain included a "school nurse," the parents were not entitled to the "additional nursing fees being sought for nursing 'during school hours,'" "absent any evidence by the [p]arents that two nurses [wer]e required" for the student (id. at p. 14). According to the IHO, it was "implausible that the significant tuition cost for this [s]tudent would specifically include a school nurse if the school nurse was not designated for this [s]tudent" (id.). Consequently, the IHO ordered the district to directly pay iBrain for the costs of the student's base tuition for the 2021-22 school year and for the costs of "supplemental tuition" for the 2021-22 school year; and to provide special education transportation with the appropriate accommodations (i.e., transport the student from the "closest curb location to school, 1:1 nursing services, a lift bus, air conditioning, a regular wheelchair, and limited travel time") (id. at p. 15).[10] The IHO denied all other relief (id.).[11]

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[8] In an interim decision dated August 20, 2021, the IHO ordered the district to provide the following as the student's pendency services: "funding for the cost of the [s]tudent's attendance at iBrain for the 12-month 2021-2022 school year, including nursing costs and related services, and including the costs of specialized transportation to and from iBrain" (Parent Ex. C at p. 5). The IHO found that the student's pendency services arose from the unappealed IHO decision, dated December 30, 2020 (id. at pp. 2-4; see generally Parent Ex. B).

[9] Both parties submitted closing briefs to the IHO following the final day of the impartial hearing; however, the closing briefs were not entered into the hearing record as evidence (see generally Tr. pp. 1-169; Parent Exs. A-S; Dist. Exs. 1-9). Nevertheless, consistent with State regulations, the district provided the district's and the parents' closing briefs to the Office of State Review as part of the administrative hearing record on appeal (see 8 NYCRR 279.9[a]). For the sake of clarity, the parents' closing brief will be referred to in citations as "Parent Post-Hr'g Br.," and the district's closing brief will be referred to in citations as "Dist. Post-Hr'g Br." Upon review, it appears that both the district and the parents mistakenly directed their respective arguments in the closing briefs to the 2020-21 school year, rather than the 2021-22 school year (see, e.g., Parent Post-Hr'g Br. at pp. 16, 21; Dist. Post-Hr'g Br. at pp. 2-3).

[10] According to the terms of the iBrain enrollment contract for the 2021-22 school year, iBrain's "base tuition" did not include the "cost of related services, transportation paraprofessional, any individual nursing services or assistive technology devices and equipment" (Parent Ex. J at p. 2). Instead, "[s]upplemental tuition" included additional costs for the following that were not included in iBrain's base tuition: "related services, transportation paraprofessional, any individual nursing services or assistive technology devices and equipment" (id. at pp. 1-2). The enrollment contract reflected an hourly rate for the costs of related services including individual OT, individual PT, individual speech-language therapy, individual vision education services, individual assistive technology services, individual music therapy, and parent counseling and training services, along with a total for "supplemental tuition" based on the student's programming (id. at p. 2). In contrast, iBrain's base tuition included the cost of "an individual paraprofessional, and school nurse as well as the academic programming outlined" therein (id. at p. 1).

[11] The IHO's decision did not include an evidence list (see generally IHO Decision). As a reminder, State

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by failing to order the district to fund the costs of the student's individual nursing services during the 2021-22 school year. The parents also argue that the IHO erred by failing to direct the district to provide the student with the assistive technology device recommended in the student's IEP.[12]

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety.[13, 14]

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.

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regulation requires that the IHO "shall attach to the decision a list identifying each exhibit admitted into evidence," and the list "shall identify each exhibit by date, number of pages and exhibit number or letter" (8 NYCRR 200.5[j][5][v]). The same State regulation requires the IHO's decision to "include an identification of all other items the [IHO] has entered into the record" (id.).

[12] The parents do not appeal the IHO's failure to award reimbursement for the costs of assistive technology devices, including required service hours and accessories, or the IHO's failure to award an IEE to evaluate the student in all areas of need (compare Parent Ex. A at p. 6, with Req. for Rev. ¶¶ 17-34). In addition, the parents do not seek the same as relief on appeal (see Req. for Rev. ¶ 35). As a result, the IHO's failure to address these portions of the parents' requested relief has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

[13] The district affirmatively asserts in its answer that the district does not appeal the IHO's finding that the district failed to offer the student a FAPE, but otherwise contends that the parents abandoned their request for an IEE (see Answer ¶¶ 5-6).

[14] The parents prepared, served, and filed a reply—with additional documentary evidence for consideration on appeal—to the district's answer in this case. However, State regulation limits the scope of the parents' reply to "any claims raised for review by the answer . . . that were not addressed in the request for review, to any procedural defenses interposed in an answer . . . or to any additional documentary evidence served with the answer" (8 NYCRR 279.6[a]). In this instance, the district's answer does not include any of the necessary conditions precedent triggering the parents' right to compose a reply. As such, the parents' reply fails to comply with the practice regulations and thus, neither the reply, nor the additional documentary evidence, will be considered.

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 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; 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).

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

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

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. Nursing Services

The parents argue that the student's need for individual nursing services—separate and apart from school nurse services—was set forth in her iBrain IEP, which documented the student's

complex medical needs. The parents also argue that the student's needs have remained consistent over several school years, and she has "always had the services of a 1:1 nurse to ensure her health and safety during the day." Relatedly, the parents assert that the district has funded individual nursing services for the student, without objection, for the 2018-19, 2019-20, and 2020-21 school years. The parents also assert that the IHO erred by sua sponte raising the student's need for, and cost of, individual nursing services as an issue, and if the IHO required more information about the student's need for individual nursing services, it was well within the IHO's authority to complete the hearing record with the necessary information.

In response to the parents' contentions, the district argues that the parents failed to sustain their burden to establish that the student required individual nursing services over and above those services provided by a school nurse, whose cost was covered by iBrain's base tuition. In addition, the district argues that witness testimony failed to describe how the individual nursing services the student received at iBrain met her special education needs or how the student's individual paraprofessional could not provide the individual attention the student required. The district also argues that, to the extent that the parents assert that the student's need for individual nursing services is corroborated by the district's IEP, this contention is without merit as the IEP included a recommendation for "full-time individual school nurse services"—a service that was separate and distinct from a recommendation for individual nursing services. Finally, the district asserts that it is not required to maximize the potential of students with disabilities.

As explained herein, while the hearing record contains sufficient evidence to find that the student required full-time, individual nursing services, upon different grounds, the IHO's finding that the parents were not entitled to an award of reimbursement for the costs of nursing services as relief will be upheld.

Initially, it is undisputed that iBrain did not deliver nursing services to the student but that instead, the services were delivered by a separate agency (see Parent Ex. N). A parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "'private placement furnishes every special service necessary'" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). Here, the IHO found that the parents met their burden to prove that the student's unilateral placement for the 2021-22 school year—including the nursing services—was appropriate (IHO Decision at pp. 9-12), and the district has not appealed this finding. The IHO also found that that: "there was no evidence or claim made that the tuition or any costs associated with the unilateral placement, including the cost of special transportation, were excessive or otherwise improper" and that equitable factors supported the parents' claim for relief (id. at pp. 13-14). In light of these determinations, it is difficult to discern the legal basis for the IHO's conclusion the district should not be responsible for the costs of the unilaterally-obtained nursing services. It seems that, notwithstanding his determination that there was no allegation of excessiveness with respect to cost of the student's unilateral placement, the IHO found the services to be excessive in terms of their cost and/or given the student's level of need.

While parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K. v. New York City Dep't of Educ., 674 Fed. App'x at 101 [2d Cir. Jan. 19, 2017]; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, the proposition that the nursing services were in excess of the requirements of a FAPE are belied by the district's own IEP. As noted previously, the student's February 2021 IEP included a recommendation for full-time, individual school nurse services (see Parent Ex. F at p. 29). At the impartial hearing, the district school psychologist who participated in the February 2021 CSE meeting testified that, after considering all of the information presented to the CSE about the student's present levels of performance—which included the student's iBrain IEP dated February 9, 2021—the CSE recommended a "nurse" as a part of the program recommendation (see Tr. pp. 66, 75-76; Parent Ex. F at p. 29; Dist. Ex. 9 ¶¶ 5, 9-13). While the hearing record is devoid of evidence concerning the CSE's rationale for, or the CSE's discussion about, the recommendation for full-time, individual school nurse services for the student or whether the CSE considered and rejected other options, such as a shared nurse, the hearing record is equally devoid of evidence that the CSE's recommendation was—as the district now argues on appeal—a service that was separate and distinct from a recommendation for individual nursing services (see generally Tr. pp. 1-169; Parent Exs. A-S; Dist. Exs. 1-9; Answer). As such, the district's argument merits little, if any, weight, especially when the February 2021 IEP did not include any further explanation or clarification of the school nurse services recommended in the IEP and the district has not provided any evidence to support this assertion (see generally Tr. pp. 1-169; Dist. Exs. 1-9; Answer). Having recommended individual nursing services for the student and having defended the same as part of its offer of a FAPE to the student, the district is hard-pressed to now argue that the unilaterally-obtained nursing services represented a service that exceeded the student's level of need. Further, as to the cost of the nursing services, the IHO correctly noted that the district made no such argument during the impartial hearing.

In addition to the foregoing, a review of the student's 2020-21 iBrain IEP dated February 9, 2021 reflects multiple references to the student's need for individual nursing services (see Parent Ex. E at pp. 1, 2-3, 7, 8, 9, 12, 14, 21-25). According to the iBrain IEP, the student "require[d] a private duty nurse to attend to her significant medical needs"; she had received diagnoses that included "focal epilepsy"; and she received all "nutrition, hydration and medications via g-tube" (id. at pp. 1, 2, 7, 14). Specific to her swallowing needs, the iBrain IEP indicated that the student was "not able to produce a volitional swallow when directed and presente[d] with difficulties managing her secretions bilaterally" (id. at p. 7). As no current "swallow study" was on file, iBrain staff opined that an "updated" study would provide "important information regarding [the student's] secretion management and risk for aspiration/penetration" (id.). The iBrain IEP reflected reports from the occupational therapist that the student "require[d] 1:1 nursing throughout the school day, particularly to attend to [the student's] g-tube feeds," as such, "[w]hen [the student's OT sessions coincided with [her] feeding, it [was] necessary to collaborate with [the student's] nurse regarding optimal positioning" (id. at pp. 8, 47).

Additionally, information included in the iBrain IEP from the physical therapist revealed that the student was "accompanied by [her] 1:1 paraprofessional and 1:1 nurse for all [her] therapy sessions," both of whom "assist[ed] throughout the session" (Parent Ex. E at p. 9). According to the iBrain IEP, during PT sessions the "nurse attend[ed] to [the student's] safety during positioning and handling and intervene[d] when [she] cough[ed] and choke[d] on her secretions" (id.). The iBrain IEP alluded that the private duty nurse was present during assistive technology sessions to attend to the student's medical needs and that 60-minute music therapy sessions were required, in part, to allow adequate time for "medical assistance via 1:1 nurse" (id. at p. 12).

The iBrain IEP included an individualized health plan (IHP) imbedded within the IEP, itself, which provided additional information about the student's health needs (see Parent Ex. E at pp. 21-25). Specifically, the assessment data and "[n]ursing [d]iagnosis" in the IHP indicated that, due to the student's acquired brain injury and associated diagnoses—including seizure disorder, scoliosis, and dysphagia with g-tube for nutrition—she was at "[r]isk for aspiration related to seizure activity and physical disability" (id. at p. 22). Nursing interventions provided for in the IHP included the "use of 1:1 nurse and paraprofessional for close monitoring"; "observe aspiration precaution"; "obtain non-medication form for g-tube feeding"; "monitor g-tube feeding and tolerance"; "refer for and coordinate occupational, and speech and language therapy services"; and "assess need for assistance with assistive technology" (id.). The IHP also indicated that the student was at "[r]isk for injury related to seizure activity, physical disability, neuromuscular, perceptual, cognitive, and visual impairment" (id.). Nursing interventions related to the needs identified in the IHP were to "develop and implement an emergency evacuation plan (EEP)"; "refer for and coordinate physical, occupational and vision therapy services"; "assess need for assistance with assistive technology"; "use of 1:1 nurse and paraprofessional"; "observe fall (esp[ecially] during transfer and transport) and seizure precautions"; and "obtain seizure action plan" (id. at pp. 22-23).

According to the IHP, the student was fully dependent in all activities of daily living skills (ADLs) and had issues with bladder and bowel incontinence (see Parent Ex. E at p. 23). As such, she had "[r]isk for impaired skin integrity"; "[h]ygiene, grooming and toileting self-care deficit"; "impaired urination"; and "[r]isk for constipation" (id. at pp. 23-24). Nursing interventions in the IHP specific to those needs included "use of 1:1 nurse and paraprofessional," "observe

incontinence precaution," "frequent skin check and repositioning," "continue toilet training," "monitor food and fluid intake," and "monitor bowel movement" (id. at p. 23). Additional nursing interventions identified in the IHP related to the student's disability not previously indicated included: "utilize[d] wheelchair to travel," "use[d] elevator to access 1st and 2nd floors," "determin[ing] use of coping skills that affect[ed] her ability to be involved in social interactions," "allow[ing] ample time to accomplish task," "ensur[ing] that IHP and IEP include[d] appropriate transition planning activities," and "assist[ing] and educat[ing] family with special education process and implementation of interventions while in the home setting" (id. at pp. 24-25).

In testimony, the director of special education at iBrain (director) stated that, at iBrain "[m]any students require[d] a 1:1 nurse to attend to their medical needs" and that during the 2021-22 school year, this student "ha[d] a 1:1 paraprofessional all day, every day, to support her needs, as well as a 1:1 nurse" (Parent Ex. R ¶¶ 1, 13).[15] During cross-examination, the director testified that "the paraprofessional and the nurse [wer]e the two primary people carrying out those activities of daily living" with the student (Tr. p. 125).

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

To the extent a parent cannot afford to front the costs of the services, the district may be required to directly fund the services, but only if it is shown that the parent was legally obligated to pay for the services but, due to a lack of financial resources, had not made payments (see Mr. & Mrs. A. v. New York City Dep't of Educ., 769 F. Supp. 2d 403, 406 [S.D.N.Y. 2011] [finding it appropriate to order a school district to make retroactive tuition payment directly to a private school where equitable considerations favor an award of the costs of private school tuition but the parents, although legally obligated to make tuition payments, have not done so due to a lack of financial resources]). The Second Circuit Court of Appeals has held that a direct payment remedy is an appropriate form of relief in some circumstances, and that "[i]ndeed, where the equities call for it, direct payment fits comfortably within the Burlington–Carter framework" (E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]). However, unlike the E.M. case, the hearing record in this matter is devoid of evidence that the parents are legally obligated to pay the third-party agency for the nursing services delivered to the student.

[15] Three out of six students in the student's class at iBrain received 1:1 nursing services (see Tr. pp. 134-35).

The evidence in the hearing record includes an affidavit from the general manager of B&H Healthcare Services Inc. (B&H), which indicated that the parents entered into a contract with B&H—not iBrain—to provide the student with full-time, individual nursing services at iBrain for the 2021-22 school year (see Parent Ex. N). According to the affidavit, the student's nursing services for the 2021-22 school year consisted of the following: individual nursing services during the school day for 218 school days, 8 hours per day, at a specified hourly rate; and individual nursing services for round-trip transportation for 218 school days, 60 minutes each way, at a specified hourly rate (id.). The affidavit further sets forth a balance due for the nursing services (id.). The general manager from B&H was not called to testify as a witness during the impartial hearing. Further, the hearing record does not include a copy of the parents' contract with B&H, nor did the parents present any other documentary or testimonial evidence concerning the terms of their contract with the agency or that they paid for the nursing services delivered to the student during the 2021-22 school year pursuant to said contract (see generally Tr. pp. 1-169; Parent Exs. A-S; Dist. Exs. 1-9).[16] As there is insufficient evidence in the hearing record, such as a written contract between the parents and the third-party agency or an invoice directed to the parents revealing a legal obligation to pay, it is not possible to find that the parents incurred a financial obligation for the nursing services delivered to the student that would support an award of reimbursement or direct payment relief.

As there is inadequate proof that the parents have expended any funds to pay for nursing services for the 2021-22 school year or are legally obligated to do so, it is not appropriate equitable relief in this due process proceeding to require the district to either reimburse the parents for the costs of nursing services or to directly fund the nursing services under the relevant legal standards discussed above. However, as the district was already required to fund the student's nursing services pursuant to the IHO's unappealed interim order on pendency in this matter—which included payment of the student's full-time, individual nursing services (see Parent Ex. C)—the dispute concerning the funding of these services may be moot.

B. Assistive Technology Device

The parents argue that the IHO erred, initially, by finding that they abandoned their request for the district to provide the student with an assistive technology device. In addition, the parents contend that the IHO has broad authority to fashion relief, and moreover, State law (Education law §3602-c) obligates the district to provide the student with assistive technology devices and services that are necessary to offer the student a FAPE. Next, the parents argue that the district's own policies obligates it to provide the student with an assistive technology device, "even if the student is unilaterally placed." The parents also contend that, contrary to the district's argument in its closing brief, assistive technology devices are not covered by iBrain's base tuition costs. Finally, the parents argue that the IHO should have awarded the assistive technology device as relief

[16] I accord the affidavit of the general manager of B&H limited weight given that the statements about the agreement between the parents and B&H do not represent the best evidence of a written contract, were not made by the party to be bound (i.e., the parents), and were not subject to cross-examination (cf. 8 NYCRR 200.5[j][3][xii][f]).

because it was raised the issue in the due process complaint notice and was unrebutted by the district.

In response, the district contends that, contrary to the parents' position, once the parents rejected the February 2021 IEP and unilaterally placed the student at iBrain, the district had no obligation to implement any portions of the student's IEP, including the recommendation for an assistive technology device.

Here, there is no dispute that the student required the use of assistive technology devices and services, and according to the evidence in the hearing record, iBrain provided those services and devices (i.e., she "uses a small, single button speech output device, such as a LITTLEmack, and a Jellybean switch to communicate, activate cause-and-effect toys, and play computer games") to the student during the 2021-22 school year (see Parent Exs. E at pp. 1-6, 11-12, 18, 20-21, 25-26, 28, 31, 37-38; F at pp. 24-27, 30; P ¶ 10; R ¶¶ 5, 12; see, e.g., Tr. pp. 9-10, 126-29, 143 [reflecting that the student currently had an assistive technology device, as well as the student's use of a "switch" for communication during therapy sessions, "morning meeting," greeting others more independently, and expanding her ability to use her "switch" for a wider range of things]; see also IHO Decision at pp. 10-11).[17] It also appears that iBrain provided the student with assistive technology devices and services regardless of whether these services were covered under iBrain's base tuition costs, as the hearing record is devoid of evidence that either iBrain or the parents contracted with a third party to provide the devices or services to the student, or that iBrain or a third party invoiced the parents for additional costs for providing the student with assistive technology devices and services during the 2021-22 school year (see generally Tr. pp. 1-169; Parent Exs. A-S; Dist. Exs. 1-9).[18]

Next, with respect to the parents' contention that the district was required to provide the student with an assistive technology device, as recommended in the February 2021 IEP, 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 "even if a student is unilaterally placed in a private school" (Answer ¶ 30).[19] However, here, there is no

[17] At the impartial hearing, the director testified that, throughout the student's placement at iBrain since 2018, the district has not provided the student with an assistive technology device, such as a switch (see Tr. p. 143).

[18] In addition, as noted previously, the parents have not appealed that portion of the IHO's decision that denied their request for all other relief, which included the parents' request to be reimbursed for the costs of assistive technology devices, including required service hours and accessories (compare Req. for Rev., with Parent Ex. A at p. 6, and IHO Decision at p. 15).

[19] The parents' attorneys made the same argument in a previous appeal involving another student at iBrain, and the argument was rejected (see Application of the Dep't of Educ., Appeal No. 21-163). 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

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 February 2021 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]). Consequently, the district was not required to provide the student, who was unilaterally placed at iBrain, with an assistive technology device even if the district recommended the same in her 2021-22 IEP.

VII. Conclusion

In summary, the hearing record does not contain sufficient evidence to disturb those portions of the IHO's decision denying the parents' request to be reimbursed for the costs of the nursing services provided to the student during her attendance at iBrain for the 2021-22 school year and denying the parents' request for an order directing the district to provide the student with an assistive technology device.

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

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 23, 2022

SARAH L. HARRINGTON
STATE REVIEW OFFICER

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.