The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 23-133

Application of a STUDENT WITH A DISABILITY, by his 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:
Law Offices of Lauren A. Baum, P.C., attorneys for petitioners, by Matthew Finizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian Davenport, 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 fully reimbursed for their son's tuition costs at the Irving Montak SINAI School at SAR Academy (SINAI School) for the 2022-23 school year. The appeal must be sustained.

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 parties' familiarity with this matter is presumed and, therefore, the detailed facts and procedural history of the case and the IHO's decision will not be recited here. The CSE convened on April 5, 2022, to formulate the student's IEP for the 2022-23 school year (see generally Dist. Ex. 3). In a letter dated August 15, 2022, the parents disagreed with the recommendations contained in the April 2022 IEP, alleging that the CSE failed to consider appropriate evaluative information, that the recommended classroom with the support of integrated coteaching (ICT) services was too large, and that the IEP failed to contain measurable annual goals, and, therefore, notified the district of their intent to unilaterally place the student at SINAI School for the 2022-23 school year (see Parent Ex. C).

In a due process complaint notice, dated March 24, 2023, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year, specifically raising allegations related to the class size of the recommended program; a lack of individualized instruction; a failure to consider appropriate evaluative information in developing the IEP; a failure to adequately describe the student's present levels of performance; concerns regarding the recommended related services; a lack of plan for transitioning the student to a larger class setting; a failure to provide the parents with a meaningful opportunity to participate in the development of the student's IEP; and concerns related to the assigned public school (see Parent Ex. A).

The matter was assigned to an IHO with the Office of Administrative Trials and Hearings (OATH). After a prehearing conference on May 1, 2023, an impartial hearing convened on May 22, 2023 and concluded the same day (May 1, 2023 Tr. pp. 1-14; May 22, 2023 Tr. pp. 1-72). In a decision dated May 31, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year, that SINAI School was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parents' request for an award of tuition reimbursement (IHO Decision at pp. 4-5, 7-8). As relief, the IHO ordered the district to reimburse the parents for the cost of the student's tuition at SINAI School minus the portion of the program the IHO determined was devoted to nonsecular instruction for the 2022-23 school year (id. at pp. 8-10).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parents' request for review and the district's answer thereto, and the parents' reply to the answer is also presumed and, therefore, the allegations and arguments will not be recited here. The main issue presented by the parents on appeal is whether the IHO erred in reducing the award of tuition reimbursement for the portion of the school day the student received religious instruction at SINAI School. More specifically, the parents contend that the IHO failed to consider the finding in Carson as next friend of O. C. v Makin, 596 U.S. ___, 142 S. Ct. 1987 [2022], which held that a district's refusal to fund religious instruction could constitute a violation of the Free Exercise Clause of the First Amendment of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment under the circumstances present in that case, and, as an additional argument, the parent asserts that the IHO failed to consider the secular benefit of the student's Judaic studies class.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

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

The primary issue presented on appeal is whether the IHO erred in reducing the reimbursement for the cost of the student's tuition at SINAI School for the portion of the school day the student received instruction in a Judaic studies class. In their arguments, the parents rely heavily on the United States Supreme Court case of Carson, 596 U.S. ___, 142 S. Ct. 1987 [2022] to support their claim for full tuition reimbursement. They contend that the district "could have avoided funding a religious school program merely by providing FAPE" to the student for the 2022-23 school year (Req. for Rev. at p. 5). The parents further contend that reducing the tuition because of "some religious instruction . . . restrains the [p]arents' free exercise of religion, and

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

coerces the parents into choosing either an inappropriate public program, or an alternative nonsectarian program merely based upon its religious component" (id.).

Next, the parents assert that the IHO was required to consider the full hearing record when rendering a decision. The parents assert that the IHO's decision was issued on the same day that the hearing transcript was issued (the transcript was issued nine days after the May 22, 2023 hearing date) and, therefore, the IHO did not adequately consider the full hearing record in the decision (Req. for Rev. at p. 5). Additionally, the parents argue that the IHO's decision was silent on and failed to reference Carson in the decision, and as such the IHO failed to thoroughly consider the total hearing record including the May 22, 2023 hearing transcript (id. at pp. 5-6).[2]

The parents then argue that the IHO failed to consider the secular benefit of the student's Judaic studies class at SINAI School. Mixed within the parents' discussion on that point, the parents cite to Zobrest v. Calatina Foothills School District, 509 U.S. 1 [1993] for the proposition that courts have allowed tuition reimbursement for a unilateral placement at a private religious school (Req. for Rev. at p. 8).

In this case, the district does not cross-appeal from the IHO's order to fund the student's unilateral placement at SINAI School and instead argues for upholding the IHO's limitation on reimbursement (Answer ¶ 14). The district does not "deny funding for the [s]tudent's entire curriculum at [SINAI School] simply because the curriculum contains a specific component of religious instruction" (id.). The only dispute asserted by the district is funding of those courses that are "strictly religious-based instruction," is that funding same would violate the federal regulations regarding IDEA funding, the Establishment Clause of the First Amendment, and the Blaine Amendment to the State Constitution and, additionally, funding for them is not required under the Free Exercise clause (id. at ¶¶ 8, 14-15, 19).

The IHO cited no legal basis for his reduction in the amount of tuition awarded and concluded that tuition reimbursement would not be appropriate for the Judaic studies class that was a part of the student's schedule at SINAI School (IHO Decision at p. 9). Neither the IHO, nor the parties, questioned the jurisdiction or authority of an IHO or an SRO to make determinations of constitutional law. The IDEA provides for impartial hearings and State-level reviews in matters relating to the identification, evaluation, or educational placement of students, or the provision of a FAPE (20 U.S.C. § 1415[b][6][A]; 34 CFR 300.507[a][1]; 8 NYCRR 200.5[i][1], [j][1]). Indeed,

[2] State regulations provide in relevant part that the "decision of the [IHO] shall set forth the reasons and the factual basis for the determination" and "shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). State regulations further require that an IHO "possess knowledge of, and the ability to conduct hearings in accordance with appropriate legal practice and to render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). While not defined by regulation, citations to the hearing record and to applicable law and application of that law to the facts of the case are generally considered to be the norm in "appropriate standard legal practice" and should be included in any IHO decision. In drafting an appropriate decision, an IHO should cite to relevant facts in the hearing record with specificity and provide a reasoned analysis of those facts that references applicable law in support of the conclusions drawn. Contrary to the parents' contention, while State regulations call for IHOs to draft decisions in conformity with "appropriate standard legal practice," the regulations do not require IHOs to include citations to every exhibit, a minimum number of transcript pages, or that a decision must be a certain page length in order to meet this mandate (see 8 NYCRR 200.1[x][4][v]). Here, although the IHO did not cite to any case law with respect to the tuition reduction for religious instruction, the IHO did reference the hearing record to support the conclusion (see IHO Decision at p. 9).

issues of this nature are more appropriately resolved by the courts. However, the parties have not raised a jurisdictional issue and it appears that other SROs have, from time to time, reviewed the constitutionality of a remedy before ordering such remedy (see Application of Child with a Disability, Appeal No. 06-013; Application of the Bd. of Educ., Appeal No. 96-041; Application of the Bd. of Educ., Appeal No. 96-014). Accordingly, I will consider and make determinations on the questions raised by the parties with respect to whether or not the IHO's reduction of tuition reimbursement is supported by the relevant federal authority on the issue.

It is useful as an initial matter to review the relevant statutory and case law related to the issue of direct government funding or reimbursement of funding to parents for religious schools. The Establishment Clause of the First Amendment to the United States Constitution prohibits Congress from making any law respecting the establishment of religion (U.S. Const. amend. I).[3] As noted above, although the IHO did not provide legal support for his reduction in the amount of tuition awarded, the district asserts a proportionate reduction related to the amount of time the student spent in religious studies is necessarily based in federal regulation governing IDEA funding and the Blaine Amendment to the State Constitution (Answer ¶ 8). The federal regulation states in relevant part that "No State or subgrantee may use its grant or subgrant to pay for any . . . Religious worship, instruction, or proselytization" (34 CFR 76.532). It has been held that such federal regulation is not a separate limitation on the IDEA but is merely coextensive with the requirements of the Establishment Clause (Zobrest v Catalina Foothills Sch. Dist., 509 U.S. 1, 7 n.7 [1993]).[4]

In reviewing applicable case law, the Supreme Court and lower courts have determined that, in certain situations, federal or state governments must provide reimbursement or payment to religious institutions under federal or state programs.

In Lemon v. Kurtzman, 403 U.S. 602 [1971], which has since been abandoned, the Supreme Court set a three-part test to determine whether a government action violates the Establishment Clause.[5] The Court determined that a violation will be found unless the government action (1) has a secular purpose, (2) does not have a primary effect of advancing or inhibiting

[3] The Establishment Clause applies to states through the Due Process Clause of the 14th Amendment (U.S. Const. amend. XIV).

[4] Further, the district asserts that the Blaine Amendment of the New York State Constitution prohibits reimbursement in that it states that: "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (N.Y. Const. art. XI, § 3). Notwithstanding this language, the State Constitution also provides that: "nothing in this constitution contained shall prevent the legislature from providing for the . . . education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded . . . as it may deem proper" (N.Y. Const. art. VII, § 8[2]; see Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 96-036).

[5] In more recent cases, the Supreme Court has held that it "long ago abandoned Lemon and its endorsement test offshoot." (Kennedy v Bremerton School Dist., 597 U.S. _, 142 S. Ct. 2407, 2411 [2022] [citations omitted]).

religion, and (3) does not foster excessive government entanglement with religion (Lemon, 403 U.S. at 612-13).[6] Although the programs reviewed in Lemon (government payment of sectarian schoolteachers' salaries) afforded parents a choice as to whether to send their children to private or public school, the Court found that the direct aid to church-related schools outweighed such choice and distinguished supplemental aid programs upheld in the prior cases of Everson v. Board of Education of Ewing Township, 330 U.S. 1 [1947] and Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 [1968], wherein "state aid was provided to the student and his parents—not to the church-related school" (Lemon, 403 U.S. at 621). Subsequent to Lemon, the Court struck down several government programs offering direct, divertible aid to sectarian schools (Wolman v. Walter, 433 U.S. 229 [1977]; Meek v. Pittenger, 421 U.S. 349 [1975]; Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756 [1973]).

Following this line of cases, however, the Supreme Court upheld government programs in instances where it was the private choices of individuals that resulted in aid to sectarian schools. In Mueller v. Allen, 463 U.S. 388 [1983], the Supreme Court found that the Establishment Clause was not violated by a Minnesota tax law that authorized deductions for educational expenses even though the great majority of the program's beneficiaries were parents of children in religious schools. The Court held it was irrelevant to the constitutional inquiry that the majority of beneficiaries were parents of children in religious schools because the law was facially neutral and generally applicable and, further, that the private choices of individual parents dictated how the aid was allotted (Mueller, 463 U.S. at 398-99, 401). In Witters v. Washington Department of Services for the Blind, 474 U.S. 481, 489 [1986], the Supreme Court held that the petitioner was able to use the Washington State vocational rehabilitation program to finance his training at a Christian College to become a pastor. The Court found that any aid flowing to a religious institution under the neutral government program was due to the "genuinely independent and private choices of [the] aid recipients" (Witters, 474 U.S. at 488). In Zobrest v. Catalina Foothills School District, 509 U.S. 1, 13-14 [1993], the Supreme Court held that the Establishment Clause did not prevent a school district from furnishing a sign-language interpreter under the IDEA, as the IDEA is a neutral government program that dispenses aid to individual handicap children. Because the aid recipient independently chose to attend the religious school and the interpreter only entered the school as a result of the private decision of the student's parents, the Court upheld the program (Zobrest, 509 U.S. at 10-11).

In Agostini v. Felton, 521 U.S. 203, 235 [1997], the Supreme Court reversed a prior finding and held that a federally funded program allowing public school teachers to provide remedial assistance in parochial school classrooms did not "run afoul" of any of the three criteria used to evaluate whether government aid has the effect of advancing religion. In so finding, the Court departed from its previous rule that "all government aid that directly assists the educational function of religious schools is invalid" (Agostini, 521 U.S. at 225, citing Witters, 474 U.S. 481).

[6] The Court in Lemon described the type of sectarian schools ineligible to receive program benefits at issue as those in which: religion pervades the curriculum and the environment; religious instruction is mandatory for all students; the schools are often located close to churches; the school buildings, classrooms and hallways "contain identifying religious symbols;" teachers conduct "direct religious instruction" and "religiously oriented extracurricular activities;" a majority of the teachers are nuns; and the overall atmosphere is one in which "religious instruction and religious vocations are natural and proper parts of life in such schools" (Lemon, 403 U.S. at 615).

However, the Court noted the importance of safeguards guaranteeing the use of public funds for purely secular purposes and that the funds from the program never "reach[ed] the coffers of religious schools" and were provided to eligible students on an individual basis for supplemental, instruction rather than to religious schools generally (Agostini, 521 U.S. at 228-29, 234-35). In Mitchell v. Helms, 530 U.S. 793, 829-30 [2000], the Supreme Court overturned its earlier decisions in Meek and Wolman, and upheld the constitutionality of a program providing aid to both public and sectarian schools in the form of educational equipment including books and computers, finding that the program was neutral and supplemental and, as the aid was allotted based on enrollment, the private choice of parents determined how much money went to the private school. In the plurality opinion, the Court observed that the safeguards of the program were insufficient for the purpose of preventing the diversion of aid to religious purposes but indicated that "the evidence of actual diversion and the weakness of the safeguards against actual diversion [we]re not relevant to the constitutional inquiry" (id. at 832 n.14, 834).

In Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 [2002], the Supreme Court determined that Ohio's school voucher program was constitutional.[7] The Court emphasized the importance of the aid recipient's private choice and summarized its findings from its prior cases regarding government aid programs and the Establishment Clause as follows:

> Mueller, Witters, and Zobrest thus make clear that where a government aid program is neutral with respect to religion, and provides assistance directly to a broad class of citizens who, in turn, direct government aid to religious schools wholly as a result of their own genuine and independent private choice, the program is not readily subject to challenge under the Establishment Clause. A program that shares these features permits government aid to reach religious institutions only by way of the deliberate choices of numerous individual recipients. The incidental advancement of a religious mission, or the perceived endorsement of a religious message, is reasonably attributable to the individual recipient, not to the government, whose role ends with the disbursement of benefits.

(Zelman, 536 U.S. at 652). The Court also found it crucial that private sectarian schools were only one of the many options available to parents under the voucher program (id. at 655-56, 662-63). In addition, the Court distinguished the program found unconstitutional in Nyquist, which provided tuition reimbursements only to parents of private school students (id. at 661-62).[8]

More recently, the Supreme Court has found the test applied in Lemon had been long abandoned, noting that while Lemon required "an examination of a law's purposes, effects, and potential for entanglement with religion," the Court instead instructed that "the Establishment Clause must be interpreted by 'reference to historical practices and understandings'" (Kennedy v.

[7] Although the Court in Zelman did not mention the Lemon test, in a concurring option, Justice O'Connor indicated that the Court had applied a refined version of the test (Zelman, 536 U.S. at 2476 [O'Connor, J., concurring]).

[8] Although the Ohio voucher program contained no safeguards against diversion of public funds for aid to religious purposes, the Court in Zelman did not address this factor.

Bremerton Sch. Dist., 142 S. Ct. 2407, 2428 [2022], citing Town of Greece, New York v. Galloway, 572 U.S. 565, 576 [2014]).

Related to the Establishment Clause line of cases discussed above, there are recent cases regarding the Free Exercise Clause, in which the Supreme Court has noted a religious institution has a right to participate in a government benefit program without having to disavow the institution's religious character (Trinity Lutheran Church of Columbia, Inc. v Comer, 582 U.S. 449, 464 [2017]). In Trinity Lutheran Church of Columbia, Inc., the Church applied for a grant administered by the Missouri Department of Natural Resources to use recycled tire materials to rubberize the surfaces of its preschool and daycare center playground (Trinity Lutheran, 582 U.S. at 453-454). The state denied the application as part of its policy of disqualifying religious organizations from receiving the grants (id. at 455). Missouri's policy was ultimately found to be unconstitutional, with the majority opinion declaring the policy of disqualification was discriminatory and violated the Free Exercise Clause of the First Amendment (id. at 466-467).

Later, in Espinoza v Montana Dept. of Revenue, 591 U.S. _, 140 S. Ct. 2246 [2020], Montana created a tax-credit scholarship program allowing individuals and businesses to contribute to qualified scholarship organizations. However, Montana's state constitution prohibited "any direct or indirect appropriation or payment … for any sectarian purpose or to aid any church, school, academy …" (Espinoza, 140 S. Ct. at 2252). In light of this state constitutional prohibition, the Montana Department of Revenue created a regulation specifying that the scholarships could not be used at religious schools (Id.). A group of parents claimed that the regulation discriminated against their children in violation of the U.S. Constitution's ban on laws that prohibit the free exercise of religion (Id.). The Supreme Court ruled against the Montana Department of Revenue regulation, stating that "[a] State need not subsidize private education. But once a State decides to do so, it cannot disqualify some private schools solely because they are religious." (Espinoza, 140 S. Ct. at 2261).

Both Trinity Lutheran and Espinoza were discussed in detail in Carson (see Carson, 142 S. Ct. at 1989, 1994, 1996, 1998, 2001-2002). In Carson, the Supreme Court annulled a Maine law that gave parents tuition assistance to enroll their children at a public or private nonreligious school of their choosing because their town did not operate its own public high school (Carson, 142 S. Ct. at 2002). The program in Maine allowed parents who live in school districts that did not have their own high school or did not have a contract with a school in another district, to send their student to a public or private high school of their selection (Carson, 142 S. Ct. at 1989). The student's home district then forwards tuition to the chosen public or private school (Id.). However, the Maine law creating the program barred funds from going to any private religious school (Id.). The parents in this case lived in school districts that did not operate public high schools, and challenged the tuition assistance program requirements which they felt would not award them assistance to send their children to religious private schools (Id.). The parents sued the Maine education commissioner in federal district court, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment (Id.). Ultimately, the Supreme Court found the law to be unconstitutional on the grounds that it violated the Free Exercise Clause of the First Amendment by excluding religious private schools (Carson, 142 S. Ct. at 2002).

The Court in Carson further distinguished a case relied on by the district (see Answer 12-14, 16). In Locke v Davey, 540 U.S. 712 [2004] the state of Washington had a "[s]cholarship [p]rogram to assist academically gifted students with postsecondary education expenses" (Locke v Davey, 540 U.S. 712, 715). The program excluded the use of the funds for "pursuing a degree in devotional theology" (Id.). The Supreme Court upheld this restriction reasoning that the State had "merely chosen not to fund a distinct category of instruction." (Locke v Davey, 540 US at 725). As explained in Carson, the reasoning in Locke was based upon the "'historic and substantial state interest' against using 'taxpayer funds to support church leaders.'" (Carson, 142 S. Ct. at 2001-2002). Further, the Court in Carson held that "Locke cannot be read beyond its narrow focus on vocational religious degrees to generally authorize the State to exclude religious persons from the enjoyment of public benefits on the basis of their anticipated religious use of the benefits." (Carson, 142 S. Ct. at 2002).

Lastly, as raised by the parties, Kennedy involved a public high school football coach who prayed on the field after football games. As a result, the district suspended the coach for failing to stop this activity (Kennedy, 142 S. Ct. at 2411, 2415). The Supreme Court held that the Free Exercise and Free Speech Clauses of the First Amendment protect an individual engaging in a personal religious observance from government reprisal and the Constitution neither mandates nor permits the government to suppress such religious expression (Kennedy, 142 S. Ct. at 2432-2433). Accordingly, the Supreme Court held that the district's discipline of the football coach for praying after football games violated his rights of Free Exercise and Free Speech under the First Amendment (Kennedy, 142 S. Ct. at 2433).

Although, none of these cases deal directly with the issue of tuition reimbursement for the hours of religious instruction at a unilateral placement, the principles can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest, 509 U.S. at 10). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[9] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v.

[9] In L.M. v. Evesham Tp. Bd. Of Educ., the district court did not decide whether the parent was eligible for tuition reimbursement because the court remanded the case to determine whether the student was offered a FAPE and if the unilateral placement was appropriate (256 F. Supp. 2d at 305).

Jeff S., 184 F. Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at 818). Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases summarized above, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J., 989 F. Supp. at 392-93, citing Witters, 474 U.S. at 488).

It is uncontroverted on appeal that the district failed to offer the student a FAPE for the 2022-23 school year. Based on this, the parents had no choice but to find an alternative placement for the student. Also, the parents under the IDEA have the ability to place the student at any school of their choosing, provided that it is appropriate to meet the student's needs. As noted above, the IHO found that SINAI School was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition reimbursement, and these determinations have not been challenged on appeal. Accordingly, the parents are entitled to reimbursement. The authority summarized above presents no basis pursuant to the Establishment Clause for preventing the parents from obtaining full reimbursement for the services based on their individual choice to place the student at a parochial school.

Furthermore, the parents did present arguments on appeal as to whether or not a reduction of tuition pertaining to the amount of religious instruction incorporated into the program at the unilateral placement could be premised on the appropriateness of the unilateral placement arguing that the skills taught in the student's Judaic studies class were "transferable to his secular subjects" (e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012], adopted as mod at, 2012 WL 4344301 [D Conn Sept. 21, 2012], affd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]).

The student attended SINAI School in a kindergarten program for the 2022-23 school year (May 22, 2023 Tr. pp. 21, 38). According to a description of SINAI School, the core curriculum included "language arts, mathematics, science, social studies, Hebrew language, and adaptive physical education" (Parent Ex. E). The SINAI School director testified that the program includes religious instruction in which the students learn about Jewish holidays and the Bible (May 22, 2023 Tr. pp. 18, 27). The SINAI School director testified that there are a lot of stories being presented and the teacher "work[s] on the reading comprehension and his expressive and receptive language," as well as story sequencing and comprehension skills (May 22, 2023 Tr. p. 27). The SINAI School director also testified that the skills taught during Judaic studies transferred to the English portion of the school day because "when we do with read aloud,…. it's the same type of

reading comprehension skills, whether it's about a Jewish holiday, or the weekly Bible portion, or whether it's a story that we read" (id.).

The student's schedule at SINAI School for the 2022-23 school year reflected that he had Judaic studies on Tuesday (9:32 a.m. – 10:10 a.m.), Wednesday (9:02 a.m. – 9:43 a.m.), Thursday (9:32 a.m. – 10:10 a.m.), and Friday (11:02 a.m. – 12:00 p.m.) (Parent Ex. G). The SINAI School director testified that unless noted on the student's schedule there were no other portions of the student's day that were religious, for example, she testified that the student's English Language Arts (ELA) class did not include religious text (May 22, 2023 Tr. p. 41).

I find that under the particular facts of this case as supported by the hearing record the reimbursement to the parents for their expenditures for the student's tuition at SINAI School is not precluded by the Establishment Clause of the First Amendment according to the most applicable case law, statutes and regulations addressing the issue in the context of the availability of federal funding for religious private schools generally and the IDEA in particular. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a free appropriate public education. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it. The remedy is available to all parents who otherwise meet the criteria set forth in those decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Tuition reimbursement does not involve the imprimatur of State approval upon the school selected by the parents, nor does it have as its primary effect the advancement of religion. Tuition reimbursement does not create a financial incentive for children to undertake religious education. It simply makes parents whole, by reimbursing them for expenditures which they would not have been compelled to make had the boards of education in question offered their children appropriate educational placements in the first instance, upon a showing by the parents that the selected unilateral placement provides specialized instruction appropriate to meet their child's unique special education needs.

Based on the foregoing, the IHO's determination to reduce the amount of tuition to which the parents were entitled is unsupported by the foregoing legal principals and therefore, is reversed.

VII. Conclusion

Based upon the foregoing, the parents are entitled to full tuition reimbursement for the student's attendance at SINAI School for the 2022-23 school year.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated May 31, 2023, is hereby modified by reversing that portion which found that tuition reimbursement should be reduced for a portion of the school day; and

IT IS FURTHER ORDERED that the IHO's decision, dated May 31, 2023, is modified to require the district to reimburse the parents for the total cost of the student's tuition at SINAI School for the 2022-23 school year.

Dated: **Albany, New York**
October 16, 2023

CAROL H. HAUGE
STATE REVIEW OFFICER