The University of the State of New York

The State Education Department
State Review Officer
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No. 24-078

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:
The Law Office of Steven Alizio, PLLC, attorneys for petitioners, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Daniel A. Costigan, 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 the costs of their daughter's tuition at the Shefa School (Shefa) 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[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

Given the limited issues to be resolved on appeal, a full recitation of the student's educational history is unwarranted. Briefly, the student, who is eligible to receive special education as a student with a learning disability, has attended Shefa—a religious, nonpublic school—from first grade (the 2020-21 school year), through the 2022-23 school year (see Parent Exs. J at p. 1; Q ¶ 8; R ¶ 5; Dist. Ex. 1 at p. 1).[1] The evidence in the hearing record reflects that

[1] The student's eligibility for special education and related services as a student with a learning disability is not in dispute (see 34 CFR 300.8[a][10]; 8 NYCRR 200.1[zz][6]). Additionally, the Commissioner of Education has not approved Shefa as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

although classes in Shefa's "lower school" were ungraded, the student would have chronologically been considered as attending a third grade classroom during the 2022-23 school year at issue (Parent Ex. P ¶ 7; see Tr. p. 322).

The evidence reflects that on February 6, 2022, the parents executed a reenrollment contract with Shefa for the student's attendance during the 2022-23 school year beginning on or about September 7, 2022 (see Parent Ex. I at pp. 1, 4).

In a letter dated August 23, 2022, the parents notified the district of their intentions to unilaterally place the student at Shefa and to seek reimbursement or direct funding for the costs of the student's tuition at Shefa for the 2022-23 school year from the district (see Parent Ex. F at pp. 1, 3). The parents also requested that the district provide the student with "round-trip, door-to-door special transportation" for the 2022-23 school year (id. at p. 3).

By due process complaint notice, dated December 12, 2022, the parents alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year (see Parent Ex. A at pp. 1, 4).[2] On December 20, 2022, the district executed a pendency implementation form, which indicated that an October 2021 IHO decision formed the basis for pendency services, which consisted of the district funding 90 percent of the costs of the student's tuition (via reimbursement and direct funding) at Shefa, as well as fully funding the costs of the student's round-trip transportation (see Parent Ex. D at pp. 1-2).

On January 12, 2023, the parties proceeded to an impartial hearing, which concluded on November 16, 2023, after 13 total days of proceedings (see Tr. pp. 1-532). The first seven impartial hearing dates consisted primarily of status updates concerning whether the parties would ultimately settle the matter (see Tr. pp. 1-94). However, by the seventh day of the impartial hearing, held on September 14, 2023, the parties began discussing the student's pendency services, which, at that time, had not yet been paid by the district pursuant to the pendency implementation form (see Tr. pp. 57-94; Parent Ex. D at pp. 1-2). Ultimately, the IHO had the parties present their arguments with respect to the student's pendency services over approximately two subsequent impartial hearing dates, September 19 and September 22, 2023, and thereafter, the IHO issued an interim decision on pendency, dated September 23, 2023, ordering the district to fund the costs of

[2] The evidence in the hearing record indicates that the parents had similarly challenged the district's special education program recommendations for the 2018-19, 2019-20, 2020-21, and 2021-22 school years and filed due process complaint notices alleging that the district had failed to offer the student a FAPE for those school years (see Parent Exs. B at p. 3; C at p. 3). In an order of termination, dated January 20, 2023, the IHO dismissed the parents' due process complaint notice, dated September 9, 2021, challenging the district's special education program offered to the student for the 2021-22 school year with prejudice, based on the parents' request to withdraw the matter with prejudice (see Parents Exs. C at p. 3; E at p. 1). The same IHO has presided over all of the parents' administrative proceedings, including the instant matter (see Parent Exs. B at p. 1; C at p. 1; E at p. 1; IHO Decision at p. 1). With respect to the prior administrative proceedings, the IHO issued a decision, dated October 5, 2021 (October 2021 IHO decision), finding that the district failed to offer the student a FAPE for the 2018-19, 2019-20, and 2020-21 school years (district conceded it failed to offer a FAPE), and that Shefa was an appropriate unilateral placement for the student for the 2020-21 school year; as relief, the IHO ordered the district to reimburse the parents for 90 percent of the costs of the student's tuition at Shefa for the 2020-21 school year, and reduced the tuition awarded by 10 percent due to the religious instruction component (see Parent Ex. B at pp. 14-16, 19). The evidence reflects that neither party appealed the October 2021 IHO decision (see IHO Ex. III at pp. 8-10).

the student's tuition at Shefa consistent with the October 2021 IHO decision—i.e., 90 percent of tuition costs—and to fund the costs of the student's transportation services (100 percent) from December 12, 2022 (the date of the due process complaint notice) through the conclusion of the administrative proceedings (see Tr. pp. 95-185; IHO Ex. III at pp. 3-4, 10-11).

In a final decision dated January 27, 2024, the IHO initially noted that the parties narrowed the issues to be resolved at the impartial hearing to an examination of whether Shefa was an appropriate unilateral placement for the student and whether equitable considerations weighed in favor of the parents' requested relief (see IHO Decision at p. 9). More specifically, the IHO indicated that the parties disputed whether the parents were entitled to reimbursement or funding for the religious components of the student's program at Shefa, with the parents emphasizing that the Supreme Court's decision in Carson v. Makin, 596 U.S. 767 (2022), was controlling law on this issue, as well as its interpretation and application in recent decisions issued by SROs; the IHO further indicated, however, that the district vigorously disagreed on this point (id.). According to the district, neither Carson nor previous SRO decisions were binding precedent on this issue, and the district argued that any award of tuition reimbursement or funding to the parents should be reduced by an amount that ranged between 14.39 percent and 18.49 percent due to the "religious instruction and nature of certain classes and programming" at Shefa (id.). In further support of its position, the district pointed, in part, to the First Amendment and, in particular, the Establishment Clause of the First Amendment (id. at p. 12). The IHO noted, however, that the district had not taken a position with respect to whether Shefa was an appropriate unilateral placement for the student for the 2022-23 school year (id.).[3]

After a lengthy recitation of the findings of fact, the IHO initially turned to an analysis of whether she had jurisdiction to reduce an award of tuition reimbursement due to religious instruction on the basis of equitable considerations in this matter, as such question necessarily concerned a Constitutional claim under the First Amendment (see IHO Decision at pp. 14-32). Ultimately, the IHO concluded that neither previously issued SRO decisions, nor her analysis of the Carson case—together with its related line of cases—were applicable to the parents' entitlement to tuition reimbursement; as a result, the IHO found that she had the "full authority to hear and decide the issues" (id. at pp. 32-33).

Next, the IHO determined that the district failed to offer the student a FAPE for the 2022-23 school year (as conceded by the district at the impartial hearing) and that Shefa was an appropriate unilateral placement for the student for the 2022-23 school year (see IHO Decision at pp. 11-12, 33-37, 50). With regard to equitable considerations, the IHO determined that, consistent with the district's arguments, although the parents were entitled to reimbursement or direct funding of the student's tuition costs at Shefa, the tuition award must be reduced by 18.49 percent of the total tuition costs to account for the religious instruction delivered to the student through various courses (id. at pp. 37-46). In particular, the IHO determined that the parents failed to sustain their burden to establish that the student's "Judaic Studies Class, Prayer, Oneg Shabbat, or Hebrew Language advanced any of the student's special education needs" or were "appropriate for the

[3] The IHO relied heavily on the arguments in the closing briefs submitted by each party when reciting their respective positions concerning reimbursement for the religious instruction at Shefa (compare IHO Decision at pp. 9-14, with IHO Ex. I at pp. 1, 8-21, and IHO Ex. II at pp. 1, 15-23).

student" (id. at pp. 46-47).[4] Finally, the IHO found that the parents failed to sustain their burden to establish that the student required "door-to-door special transportation," and denied the parents' request for reimbursement of transportation costs (id. at pp. 47-49).

IV. Appeal for State-Level Review

The parents appeal, arguing that the IHO erred by reducing the tuition awarded for the student's unilateral placement at Shefa for the 2022-23 school year, which carved out a percentage of the tuition costs the IHO attributed to religious instruction based on equitable considerations. The parents also argue that the IHO erred by denying their request to be reimbursed for the costs of the student's round-trip transportation. The parents contend that the IHO exceeded the scope of her jurisdiction by addressing the Constitutional claims related to the First Amendment Establishment Clause. Next, the parents assert that the IHO improperly shifted the burden of proof to them with regard to equitable considerations by requiring the parents to establish that each class Shefa offered to the student was "appropriate" and "met [the student's] unique needs," which conflated standards concerning the appropriateness of Shefa as a unilateral placement and equitable considerations.

Related to equitable considerations, the parents contend that the circumstances of this case do not support a reduction of the tuition costs based on segregable services. The parents assert that the evidence in the hearing record reflects that they cooperated with the district and timely notified the district of their intention to unilaterally place the student at Shefa for the 2022-23 school year. The parents also assert that the IHO failed to reference any standard upon which to assess whether a particular course at Shefa had a "'religious purpose' or involve[d] 'religious worship,'" and the hearing record was devoid of evidence on this issue. The parents argue that the IHO also erred by finding their witnesses—specifically, Shefa's head of innovation and integration, and the student's mother—lacked credibility; relying on sources outside of the hearing record; allowing the district to present a rebuttal witness; admitting the district's subpoena into the hearing record as evidence; allowing cross-examination beyond the scope of the direct examination and on irrelevant issues; calculating the reduction of the student's tuition costs without an evidentiary basis; conducting the impartial hearing in a biased and unprofessional manner, which prejudiced the parents; limiting the parents' ability to fully develop the hearing record; refusing to recuse herself as the IHO; and failing to conduct a timely hearing with repeated extensions to the compliance date. As relief, the parents seek an order directing the district to fully fund the costs of the student's tuition at Shefa for the 2022-23 school year and to find that the student was entitled to round-trip, door-to-door transportation.

In an answer, the district responds to the parents' allegations and generally argues to uphold the IHO's decision in its entirety. The district asserts various grounds upon which to uphold the IHO's reduction of the student's tuition costs, including that the student's schedule included "periods of pure religious instruction"; the IDEA, federal, and State regulations prohibit the use of federal funds to fund religious instruction, and previous SRO decisions ordered districts to reimburse for only the nonsecular portion of the school day; the student's religious instruction constituted segregable services, which were not necessary to meet the student's needs; the State

[4] Although the IHO referred to one course as "Oneg Shabbat," the course is actually referred to as "Oneg/Assembly" in the student's schedule (compare IHO Decision at pp. 46-47, with Parent Ex. K).

Constitution prohibits reimbursement for "'religious denomination'"; and equitable considerations warrant the reduction of tuition costs awarded because the religious instruction provided services to the student beyond those required to address the student's educational needs and for the student to receive a FAPE.[5] In addition, the district contends that the cost of the segregable services can be reasonably determined by reviewing the student's schedule and, moreover, this type of analysis constitutes the type of pro rata reductions of tuition used to account for religious instruction. Additionally, the district contends that the IHO properly concluded that the parents' witnesses lacked credibility, the district was entitled to present a rebuttal witness, the use of outside sources—such as the Encyclopedia Brittanica—did not constitute reversible error, the IHO did not exhibit bias toward the parents and fully allowed both parties to present their respective cases, the parents did not complain about the requested extensions to the compliance date, and the hearing record does not support an award of special transportation.

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

[5] The district inaccurately points to the decisions in Application of a Student with a Disability, Appeal Nos. 23-156 & 23-160, Application of the New York City Dept. of Educ., Appeal No. 22-035, and Application of the New York City Dept. of Educ., Appeal No. 14-082 as support for its assertion that the parents' award of tuition reimbursement must be reduced to account for the religious instruction component of the student's unilateral placement at Shefa. In those decisions, neither party appealed the IHO's reductions of the tuition reimbursement awarded for religious instruction; thus, the SROs in those appeals were without jurisdiction to address the issue (see Application of a Student with a Disability, Appeal Nos. 23-156 & 23-160; Application of the New York City Dep't of Educ., Appeal No. 22-035; Application of the New York City Dept. of Educ., Appeal No. 14-082 at p. 7, n. 8).

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]).[6]

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

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

VI. Discussion

A. Credibility Determinations

The parents argue that the IHO erred by finding that portions of the testimony elicited from Shefa's head of innovation and integration, as well as the student's mother, were not credible. In the decision, the IHO described the testimony by Shefa's head of innovation and integration as "often contradictory, evasive and circular" (IHO Decision at p. 21). The IHO also noted that the witness "would not answer questions as to whether the Prayer period was 'religious worship'" and "attempted to characterize the Prayer period as 'religious practice' without explaining how that would be different from worship" (id. at p. 22). As a result, the IHO concluded that the witness's testimony "on the subjects related to Judaic Studies, Prayer, Oneg Assembly and Hebrew Language undercut her credibility and evidenced she took cues from Parent's counsel who constantly objected and interrupted proceedings with needless objections and statements that telegraphed the position that these subjects and periods were not religious instruction or worship" (id.). With regard to the same witness's testimony by affidavit, the IHO assessed the information contained therein against evidence in the hearing record, including testimony from Shefa's comptroller, and found that the "descriptions related to religious content in [the witness's] affidavit appear[ed] coached and c[ould] only be described as misleading and an attempt to describe the class as other than the purpose it is offered for, religious instruction and worship" (id. at p. 23; see generally Parent Ex. P). Given these determinations, the IHO found that the witness's "attempt to

[6] 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).

support this language regarding the purpose or academic nature of the Judaic Studies class [wa]s not credible and taint[ed] [the witness's] testimony" (IHO Decision at p. 23).

With respect to the testimony elicited from the student's mother on cross-examination, the IHO found that it, too, was "marked by a similar evasiveness" and was similarly "hampered by her counsel's constant objections to relevant areas of cross examination" (IHO Decision at p. 23). The IHO indicated that the parent avoided answering a question regarding whether she "considered any school other than Shefa for unilateral placement" given her counsel's "many interruptions" (id.).

Generally, an SRO gives due deference to the credibility findings of an IHO unless non-testimonial evidence in the hearing record justifies a contrary conclusion or the hearing record, read in its entirety, compels a contrary conclusion (see Carlisle Area Sch. v. Scott P., 62 F.3d 520, 524, 528-29 [3d Cir. 1995]; P.G. v City Sch. Dist. of New York, 2015 WL 787008, at *16 [S.D.N.Y. Feb. 25, 2015]; M.W. v. New York City Dep't of Educ., 869 F. Supp. 2d 320, 330 [E.D.N.Y. 2012], aff'd, 725 F.3d 131 [2d Cir. 2013]; Bd. of Educ. of Hicksville Union Free Sch. Dist. v. Schaefer, 84 A.D.3d 795, 796 [2d Dep't 2011]). Here, the parents do not point to any non-testimonial evidence in the hearing record that would justify a conclusion contrary to the IHO's credibility determinations regarding the witnesses in question, or that the hearing record, when read as a whole, compelled a contrary conclusion (see generally Req. for Rev.). An independent review of the hearing record reveals no evidence upon which to reverse the credibility findings of the IHO. The IHO explained the basis of her limited credibility findings and supported those findings with reference to specific examples in the hearing record. While the parents disagree with these findings, they have not identified any non-testimonial information in the hearing record which refutes the IHO's conclusions let alone "compel[s] a contrary conclusion" (Carlisle, 62 F.3d at 528). It would be improper to second-guess the IHO's determinations, which were based on her personal observations of the witnesses (see In re Claim of Suchocki, 132 A.D.3d 1222, 1224, 18 N.Y.S.3d 773, 775 [N.Y. App. Div. 2015]). However, as noted by the parents in their appeal, the IHO did afford some weight to each witnesses' testimony where it was not refuted by other evidence, and those portions of the witnesses' testimony will be afforded similar weight herein.

B. Equitable Considerations

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"]).

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year and that Shefa was an appropriate unilateral placement for the student for the 2022-23 school year. Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only issue presented on appeal is whether the IHO erred in reducing the amount of tuition awarded for the student's attendance at Shefa for the portions of the school day the IHO determined to be religious instruction.

In reaching the conclusion that equitable considerations warranted a reduction of the amount of tuition awarded to the parents, the IHO explained that the "issue of [the student's] placement at Shefa [wa]s not a question that the overall unilateral placement at the sectarian school [wa]s violative of the Establishment Clause," but rather, whether it was "appropriate to examine the program for any programming that [wa]s religious worship or instruction and not fund that portion as violative of the Constitution's Establishment Clause" since the parents, by "utilizing the remedy of unilateral placement must have agreed to place their child in public school and [we]re availing themselves of a direct public school funding scheme" (IHO Decision at p. 39). The IHO reasoned that this was so because the parents were pursuing a "remedy under the IDEA," meaning that any "funds paid out under any relief awarded in the case herein or similar unilateral placement cases [we]re simply a substitute for the public education, [and] it [wa]s appropriate to limit the payment of tuition only to exclude religious instruction or religious worship" (id. at pp. 39, 43).

In this case, the IHO noted that, based on the evidence in the hearing record, Shefa's comptroller credibly testified that Shefa, itself, deemed "Judaic Studies, Prayer, and Oneg Shabbat Assembly" as religious instruction and that Shefa's program description supported this testimony (IHO Decision at p. 44). As to Hebrew language, the IHO indicated that it also had a "religious purpose even though there could be a secular purpose to learning a second language" (id. at pp. 44-45). However, the IHO noted that "Hebrew [wa]s offered due to Shefa's goal of indoctrinating students with religious instruction in the Torah, prayer in Hebrew, and other religious practices" (id. at p. 45).

Thus, having found that the four courses in the student's schedule—Judaic Studies, prayer, Oneg/Assembly, and Hebrew language—were 100 percent religious instruction and that the parents failed to establish that these courses "advanced any of the student's special education needs," the IHO reduced the amount of tuition awarded to the parents by 18.49 percent, which the IHO attributed to the four courses at Shefa (IHO Decision at p. 46).[7] Ultimately, the IHO rejected

[7] The IHO relied, in part, on the district's calculations to arrive at the 18.49 percent reduction of the tuition awarded to the parents (see IHO Decision at pp. 9, 47; see also Tr. pp. 229-30). Notably, the district opined in its closing brief to the IHO that, based on the student's class schedule, "prayer, Judaic Studies and Oneg Assembly . . . represented a total of 315 minutes, weekly, versus 2,190 minutes total, or 14.38 percent of the weekly total" (IHO Ex. I at p. 2; see generally Parent Ex. K). The district did not assert that the student's Hebrew language class was

the parents' argument that an award of tuition reimbursement or direct funding should not be prorated because of the recent Supreme Court decision in Carson, instead the IHO determined that Carson—as well as the holding in Espinoza v Montana Dept. of Revenue, 591 U.S. _, 140 S. Ct. 2246 (2020)—did not apply to the facts of this case because in Carson and Espinoza, the Supreme Court sanctioned indirect payments of government funds from school districts to private and/or secular schools, which did not result in an entanglement violative of the Establishment Clause "as the choice for directing the subsidy [wa]s made by parents" (IHO Decision at pp. 38-40). In addition, the IHO concluded that she was not bound by previous SRO decisions interpreting a litany of Supreme Court decisions leading up to, and including Carson, to find that parents were not barred from obtaining reimbursement or direct funding for the costs of religious instruction at unilateral placements as relief (id. at pp. 32-33).

With this as a backdrop, the first issue to be addressed on appeal involves whether an IHO, and now an SRO, has jurisdiction to resolve the Constitutional claims raised. While the parents contend that constitutional matters should not be addressed in this administrative process and should be reserved for the courts, the district—without specifically agreeing with the parents' position—relatedly contends that the IHO's decision to reduce tuition was justified based on federal regulation, which prevents school districts from using IDEA funding for religious instruction (see Req. for Rev. at pp. 3-4 [identifying issue 2]; Answer ¶¶ 3-5).[8] The pertinent federal regulation cited by the district states that "[n]o State or subgrantee may use its grant or subgrant to pay for any . . . [r]eligious worship, instruction, or proselytization" (34 CFR 76.532; see Answer ¶ 4).

The parties' arguments are flawed in several respects. First the party seeking equitable relief for the denial of a FAPE and who incurred the liability for the student's unilateral placement as a result is the parents and they are neither the State nor a subgrantee within the meaning of 34 CFR 76.532. Instead it was the subgrantee, namely the district, who caused the denial of a FAPE and left the parents to fix it with a self-help remedy and bear the risk that they might not succeed in their Burlington/Carter claims. Accordingly, the regulation does not apply to the facts of this case. Furthermore, the Supreme Court has held the federal regulation in question 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]). Accordingly, in asking for interpretation of this particular federal regulation as part of this administrative proceeding, the

religious instruction or not eligible for reimbursement (IHO Ex. I at p. 2).

[8] The district also asserts that the New York State Constitution prohibits district payment for the portion of the school day attributed to religious instruction in that it states that: "[n]either 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; Answer ¶ 5). 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 [developmentally or intellectually disabled] . . . as it may deem proper" (N.Y. Const. art. VII, § 8[2]; see Application of a Student with a Disability, Appeal No. 24-056; Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 96-036).

district is, in all practicality, asking the administrative due process tribunal to draw conclusions based upon constitutional law principles; therefore, I will provide the analysis below out of an abundance of caution while acknowledging that a federal or state court is the appropriate forum in which to resolve such disputes.

Turning to the constitutional law issue, and as explained in previous decisions involving the same question, the current trend in case law on the issue of public funding for religious instruction permits district funding of nonpublic school tuition without reduction for aspects of religious instruction (see, e.g., Application of a Student with a Disability, Appeal No. 24-056; Application of a Student with a Disability, Appeal No. 23-133 [laying out the relevant caselaw through the Supreme Court's decision in Carson v Makin, 596 U.S. 767 (2022)])

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 (596 U.S. at 789). 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 (id. at 773). The student's home district then forwarded 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 the Carson 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 from receiving funding (id. at 789).

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement in a Burlington/Carter analysis, there are some principles that 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. 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, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[10] 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. v. Mass. Dep't of Educ., 989 F. Supp. 380, 392-93 [D. Mass. 1998], citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this matter, it is uncontroverted 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 seek remedial relief, and the parents, under the IDEA, had the right to place the student at a school of their choosing and seek funding for it, provided that it was appropriate to meet the student's needs. In this instance, as noted above, the district has not appealed from the IHO's determination that Shefa was, in fact, an appropriate unilateral placement for the student for the 2022-23 school year. Contrary to the IHO's determinations and the district's arguments on appeal, direct funding for the cost of the student's attendance at Shefa is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution—according to the 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 as discussed above. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a FAPE. 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.[11] The remedy is available to all parents who otherwise meet the criteria set forth in those

[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).

[10] I note that the second prong of the test set forth in Lemon v. Kurtzman, which has since been abandoned, was that the government action could not have a primary effect of advancing or inhibiting religion (403 U.S. 602, 612-13; see (Kennedy v Bremerton School Dist., 597 U.S. _, 142 S. Ct. 2407, 2411 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"]).

[11] A recent district court explained that in analyzing a matter under Burlington and Carter there is little difference between reimbursement and direct payment as a remedy as both "'merely requires [the school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a

decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

Turning to the district's argument to uphold the portion of the IHO's decision, which found, that the classes devoted to Judaic Studies, prayer, Oneg/Assembly, and Hebrew language constituted segregable services that exceeded the level required under the IDEA for a FAPE, it is well settled that among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding the reasonableness of the costs of the program or whether any segregable costs exceeded the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, 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., 674 Fed. App'x at 101; 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"]).

Notwithstanding the district's arguments on appeal, neither the IHO nor the district provide any viable support for the proposition that the subject matter of a particular class period could cause the class to be treated as a segregable special education service for these purposes, rather than as the type of feature that is "inextricably linked to the substitution" of a private program for a public one (Bd. of Educ. of City Sch. Dist. of City of New York v. Gustafson, 2002 WL 313798, at *7 [S.D.N.Y. Feb. 27, 2002] [finding features such as small class size or greater personal attention were not segregable]). With regard to the degree to which the services are segregable,

proper IEP'" (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023], citing E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).

the authority relating to excessive services applies most frequently when the services are delivered in a separate location or by a provider not affiliated with the main tuition-based program and/or where the costs of the services are itemized or separately billed (see, e.g., Application of a Student with a Disability, 23-130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071).

In this instance, the IHO reduced the student's tuition at Shefa for the 2022-23 school year by adopting an amount based on the district's interpretation of the student's schedule—in addition to the testimony of Shefa's comptroller—finding that portions of the school day identified as prayer, Judaic Studies, Oneg/Assembly, and Hebrew language constituted religious instruction (IHO Decision at pp. 34-37, 40, 46-47). While the district argued for a reduction based solely on the amount of time spent in each class, it is worth noting that there is no indication in the hearing record that costs for any of the student's classes, regardless of whether those classes are characterized as 100 percent religious in content, equates to funding for any other class—especially, where one class is identified as Oneg/Assembly which, in itself, implies a larger class setting. Additionally, as the hearing record provides no concrete information as to the school's method for financing its activities, there was no reasoned way for the IHO to know what portion of the student's tuition, if any, were actually used to pay for the portions of the school day devoted to religious instruction. Moreover, as noted in a previous decision involving the same unilateral placement, even if the proportion of the student's schedule devoted to Judaic Studies, prayer, Oneg/Assembly, and Hebrew language could plausibly be calculated based solely on the student's schedule, this would raise still more questions regarding the incorporation of religion in other aspects of the day and/or the educational benefits that the student may have received through the periods devoted to Judaic Studies, prayer, Oneg/Assembly, and Hebrew language beyond the religious aspect (see Application of a Student with a Disability, Appeal No. 24-056). Rather, "the situation does not permit a fair approximation of the value of the services received" compared to the program overall and, therefore, equity supports full reimbursement (Gustafson, 2002 WL 313798, at *7).[12]

In fact, in reviewing the student's schedule, the student's school day included 10 minutes per day for prayer, five 45-minute periods per week of Judaic Studies, two 45-minute periods per week of Hebrew language, and one 35-minute period per week identified as Oneg/Assembly (Parent Ex. K).[13] Based on the comptroller's testimony, Shefa's "education team" determined that prayer, Oneg/Assembly, and Judaic Studies were considered to be "100 percent religious in content" (Tr. p. 498). The comptroller's knowledge on this point arose from his experience at Shefa preparing letters for attorneys representing families with due process claims or seeking monies for tuition from the district and that Shefa's business office maintained a "form template" for the purpose of drafting such letters for attorneys (Tr. pp. 491-92, 496-98, 501, 514, 517, 520-21). The comptroller testified that the "education team" at Shefa had advised the business office that prayer, Judaic studies, and Oneg/Assembly would be included on the letter template for a "student in the lower school" when describing what would be considered by Shefa as "100

[12] Shefa's comptroller testified that Shefa charged "one price for tuition" regardless of whether the student was or was not Jewish (Tr. p. 504).

[13] Evidence in the hearing record reflects that an individual acting as the Head of Judaic Studies at Shefa developed the curriculum for both the Hebrew language course and the Judaic studies course (see Tr. pp. 370-71, 443).

[percent] religious in content" (Tr. pp. 498-500). During cross-examination, however, the comptroller admitted that, as "someone not trained in education," it was not "appropriate for [him] to opine" on whether these courses—meaning, those identified as 100 percent religious content—could be used to "help the students meeting their academic, social and emotional needs" (Tr. p. 501).

The only other reliable evidence in the hearing record regarding what occurred during the classes at issue is the Shefa program description, which included a description of Judaic Studies and provided as follows:

> Students engage with Jewish learning and traditions through interactive learning experiences, such as joyous morning tefillah (prayer), explorations of Shabbat and holidays, and the study of Torah. Students also learn about Jewish life around the world, Jewish history, and the State of Israel. The Judaic Studies curriculum is enhanced by the integration of music and the arts. As English language remediation is our priority and second languages can be especially challenging for students with language-based learning disabilities, Judaic Studies is taught primarily in English. Students gain exposure to key Hebrew vocabulary orally, through prayer and from the Judaic Studies curriculum.

(Parent Ex. J at pp. 2-3). The Hebrew language class is also described in the Shefa program description as follows:

> As students' English language skills progress, we introduce Hebrew language instruction according to student ability. Students received individualized Hebrew decoding and comprehension instruction based on their readiness. Hebrew language is taught using the same principles and techniques that are effective for teaching English to students with language-based learning disabilities.

(Parent Ex. J at p. 3).

Notwithstanding the comptroller's testimony, it was error, based on the information in Shefa's program description, for the IHO to outright adopt the district's position that the student's Judaic studies class was entirely religious in nature. As identified in the program description, the classes incorporated cultural education and history and at least some consideration was given to students' special education needs (see Parent Ex. J at pp. 2-3). In addition, it was error for the IHO to find that the Hebrew language class was entirely religious in nature, especially where, as here, the program description does not reflect religious content and, as with Judaic Studies, gives at least some consideration to students' special education needs and abilities (id. at p. 3).[14] Although there was very little evidence regarding what occurs during the periods described as prayer and Oneg/Assembly, it is worth noting that those periods constituted a total of 85 minutes per week,

[14] Notably, the comptroller did not identify Hebrew language as a class that was deemed to be 100 percent religious in content.

while Judaic Studies constituted a total of 225 minutes (3.75 hours) per week and Hebrew language constituted a total of 90 minutes (1.5 hours) per week (see Parent Ex. K). Overall, based on the limited evidence in the hearing record, the amount of time the student spent at school receiving instruction that could be described as solely religious was limited to at most approximately 14 percent of the student's school day as argued by the district—if Judaic Studies is included—but, more likely falls around approximately four percent of the student's school day or less—as Judaic Studies does not appear to consist solely of religious instruction based on the brief description included in the record (see Parent Exs. J at pp. 2-3; K). Additionally, rather than weighing this as an equitable consideration, the amount of time the student spent receiving religious instruction should be weighed as a factor regarding the appropriateness of the unilateral placement (see e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012] [finding a unilateral placement inappropriate because the school did not provide special education supports and the student spent a substantial amount of time receiving religious education], adopted as mod at, 2012 WL 4344301 [D Conn Sept. 21, 2012], aff'd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]).

VII. Conclusion

Having reviewed the evidence in the hearing record, there is no basis for finding that federal regulation or the Establishment Clause bars the district from funding the portions of the student's educational program characterized as "religious instruction" at Shefa and there is no evidence in the hearing record to support the IHO's finding that the time the student spent in Judaic Studies, prayer, Oneg/Assembly, and Hebrew language was segregable from the student's overall educational program, such that a specific direction could be made for reducing the costs of the student's tuition at Shefa for the 2022-23 school year.

I have considered the parties' remaining contentions and find them to be without merit.[15]

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 27, 2024, is modified by vacating that portion which determined that equitable considerations warranted a reduction in the amount of tuition reimbursement awarded to the parents by 18.49 percent; and,

IT IS FURTHER ORDERED that the district shall fully reimburse the parents for the costs of the student's tuition at Shefa for the 2022-23 school year.

Dated: **Albany, New York**
May 3, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER

[15] This includes the parents' request for reimbursement for transportation expenses as the hearing record does not include any evidence to support awarding the cost of transportation for the 2022-23 school year as, although the student's mother testified that she had to pay for private transportation for the student during the 2022-23 school year, there is no description as to how the student was transported or the cost of such transportation (see Parent Ex. R at ¶12).