The University of the State of New York

The State Education Department
State Review Officer
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No. 24-153

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:
MSR Legal & Consulting Services, PLLC, attorneys for petitioners, by Oroma Mpi-Reynolds, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Siobhan O'Brien, 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 a decision of an impartial hearing officer (IHO) which denied their request to be fully reimbursed for their daughter's tuition at the Shefa School (Shefa) for the 2023-24 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 student was eligible for special education while attending preschool during the 2021-22 school year (Parent Ex. N at ¶ 3). During the 2022-2023 the student transferred to a nonpublic religious school and the parents had concerns that the student had difficulty focusing and could not "sit still" (Parent Ex. C at p.1). A private neuropsychological evaluation of the student was conducted over three dates in March and April 2023 (Parent Ex. C at p. 1). At the time of the evaluation, the student was attending kindergarten in the nonpublic school and receiving speech-language therapy and occupational therapy (OT) in accordance with an Individualized Education Services Program (ISEP) (id.; Parent Ex. N at 5). The private evaluator diagnosed the student with an attention deficit hyperactivity disorder (ADHD)-combined type, a developmental coordination disorder (graphomotor), and significant weakness-retrieval fluency (Parent Ex. C at p. 7).

In an email dated June 14, 2023, the parent indicated that she had concerns regarding her daughter and that her school "strongly" believed the student "needed a para[professional]" for the upcoming school year (Parent Ex. D).[1] The parent noted that the student was receiving OT and speech-language therapy and that she had recently obtained a neuropsychological evaluation (id.). The parent asked the district "how to go about this process" and what information the district may need from her (id.).

In an email thread also dated June 14, 2023, the district asked the parent to "forward any documents that may help with [the student's] concerns" (Parent Ex. E at p. 1). The parent responded that she would "send over documents as soon as" she had them and that she was "wondering if [she] could also apply" the student for SETSS as SETSS were recommended by the neuropsychological evaluation (id.).[2]

On July 25, 2023, the parents signed a contract with Shefa for the student to attend for the 2023-24 school year (see Parent Ex. I).[3]

In a 10-day notice dated August 25, 2023, the parents, through their attorney, notified the district of their intent to unilaterally place the student at Shefa for the 2023-24 school year and seek funding/reimbursement, inclusive of special transportation services (see Parent Ex. B).[4]

A. Due Process Complaint Notice & Facts Subsequent

In a due process complaint notice dated September 11, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A). The parents asserted that they requested an evaluation of the student in June 2023; however, they were told that an evaluation could not take place until September 2023 (id. at p. 2). The parents argued that the district failed to evaluate the student in all areas of suspected disability and failed to develop an IEP for the student (id.). Due to the lack of placement, the parents contended that they were forced to unilaterally place the student at Shefa for the 2023-24 school year (id.). The parents requested funding/reimbursement for the full cost of Shefa, inclusive of special transportation with limited travel time (id. at p. 3). The parents also requested that the CSE convene after conducting evaluations and assessments to develop an appropriate IEP for the student (id.).

[1] While the parents both appear on the student's behalf in this State-level review, references to "the parent" in the singular are to the student's mother, who was the parent in communication with the district throughout the underlying CSE process and also testified at the impartial hearing (see Tr. pp. 89-109; Parent Exs. D; E; N).

[2] Although not specified in the email, SETSS stands for Special Education Teacher Support Services.

[3] On August 29, 2023, the parents signed a contract addendum which indicated that the student would attend Shefa for the 10-month school year and modified the payment plan (see Parent Ex. J).

[4] The exhibit list identified the incorrect year for this exhibit (see IHO Decision at p. 51).

An impartial hearing convened on October 23, 2023 during which the parent indicated that a CSE meeting had been scheduled for October 25, 2023 and the impartial hearing was scheduled to reconvene on October 26, 2023 (Tr. pp. 6, 11).

B. Events Subsequent to the Due Process Complaint Notice

The CSE convened on October 25, 2023 in order to create an IEP to be implemented on November 8, 2023 (Dist. Ex. 2 at pp. 1, 23). The CSE found the student eligible for special education services as a student with a speech or language impairment (id. at pp. 1, 21).[5] In the resulting October 2023 IEP, the CSE indicated that progress reports had not been made available and "all academic information and related service updates were taken from teacher and parent report in the IEP meeting" (id. at p. 1). The CSE recommended that the student receive integrated co-teaching (ICT) services in English-language arts, math, social studies, and sciences with related services of two 30-minute sessions of individual OT per week and two 30-minute sessions of individual speech-language therapy per week (id. at p. 16). The CSE did not recommend a 12-month program and indicated that the student would be placed in a district non-specialized school (id. at pp. 17, 21). Lastly, the CSE recommended special transportation services from the closest safe curb and limited travel time (id. at pp. 20-21).

C. Impartial Hearing Officer Decision

The impartial hearing reconvened on October 25, 2023 and concluded on January 23, 2024 after four additional days of proceedings (Tr. pp. 1-115). In a decision dated March 24, 2024, the IHO found that the district conceded the issue of FAPE and that the district failed to meet its burden that it offered the student a FAPE for the 2023-24 school (IHO Decision at pp. 3, 8, 33, 46).

The IHO held that Shefa was an appropriate unilateral placement and that the program met the student's needs (IHO Decision at p. 33). Regarding equitable considerations, the IHO found that the communications from the parent in June 2023 did not provide the district notice that they were seeking either an IEP or a public-school placement (id. at pp. 36-37). The IHO found that the parent made it clear that she was seeking continuation of the private school placement and that the parent testified that at no time did she want the student to attend public school (id. at p. 37). The IHO determined that the 10-day notice was misleading, because the parents were not seeking a public-school placement, which is a precursor for FAPE (id. at pp 37-38). The IHO found that the district did not delay in scheduling "'an initial IEP evaluation'" as the parent only sought an increase in IESP services (id. at pp. 37-38).[6] The IHO held that the CSE was waiting for the parent to submit her documentation that supported an increase in the student's services and the parent failed to provide a reason as to why she did not contact the district (id. at p. 38). The IHO noted that the district's "hands [we]re not completely clean" because it failed to conduct an IESP meeting (id.). The IHO determined that the hearing record did not demonstrate that a paraprofessional was recommended by anyone or that the failure to convene a CSE was the reason the parents

[5] The CSE was comprised of a related services provider/special education teacher, the parent, a district representative and a teacher from Shefa (Dist. Ex. 2 at p. 23).

[6] The IHO did not credit the parent's account of her conversation with the district about when evaluations could take place (IHO Decision at p. 39).

unilaterally placed the student at Shefa (id. at pp. 38-39). The IHO found that the parent did not cooperate with the creation of an IEP (id. at p. 39). Based on these findings, the IHO determined that equities supported a reduction in funding since the parents never intended to place the student in a public school (id. at p. 47). The IHO reduced reimbursement for tuition by 50 percent (id. at p. 47).

Next, the IHO held that the parents were not able to obtain funding for the religious aspect of the Shefa program (IHO Decision at pp. 40-43, 46-47). Additionally, the IHO found that the hearing record did not support a finding that the religious aspect of Shefa was created as part of the student's program to meet her unique needs (id. at pp. 46-47). Based on this, the IHO reduced reimbursement for tuition by an additional 13 percent (id. at pp. 47). In sum, the IHO ordered the district to reimburse or fund partial tuition at Shefa in the amount of $27,565.00, a reduction of 63 percent of the total tuition for the 2023-24 school year (IHO Decision at p. 48). The IHO also ordered that the student was entitled to door-to-door limited travel time special transportation services (id. at p. 49).

On April 22, 2024, the IHO sent an email to the parties noting that the March 24, 2024 decision contained errors and should be "wholly excised" (IHO Written Clarification at p. 4), and the IHO issued a "corrected decision" dated April 22, 2024. It appears that the IHO did so because approximately three pages of material in the March 2024 decision was from another due process proceeding involving Shefa and a different witness who did not offer testimony in this proceeding (IHO Decision at pp. 33-36).[7]

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in reducing the district's obligation to fund the costs of tuition at Shefa for the 2023-24 school year. The parents argue that the IHO "effectively shifted the burden of proof" by blaming the parent for not sharing the private neuropsychological evaluation with the district while at the same time absolving the district of its "affirmative obligation to evaluate the [s]tudent upon the [p]arent's request" for more intensive

[7] The parents allege in the request for review that the IHO demonstrated bias in the March 24, 2024 decision is without merit. It is well settled that an IHO must be fair and impartial and must avoid even the appearance of impropriety or prejudice (see, e.g., Application of a Student with a Disability, Appeal No. 12-066). Moreover, an IHO, like a judge, must be patient, dignified, and courteous in dealings with litigants and others with whom the IHO interacts in an official capacity and must perform all duties without bias or prejudice against or in favor of any person, according each party the right to be heard, and shall not, by words or conduct, manifest bias or prejudice (e.g., Application of a Student with a Disability, Appeal No. 12-064). An IHO may not be an employee of the district that is involved in the education or care of the child, may not have any personal or professional interest that conflicts with the IHO's objectivity, must be knowledgeable of the provisions of the IDEA and State and federal regulations and the legal interpretations of the IDEA and its implementing regulations, and must possess the knowledge and ability to conduct hearings and render and write decisions in accordance with appropriate, standard legal practice (20 U.S.C. § 1415[f][3][A]; 34 CFR 300.511[c][1]; 8 NYCRR 200.1[x]). The parents note in their request for review that the corrected decision continues to reflect evidence from the other proceeding describing how Shefa provides letters to attorneys of families that clarifies the percentage of the school day devoted to religious instruction. The IHO attempted to correct the apparent inadvertent inclusion of information from another matter that is or was before her by issuing the "corrected decision" to remove most of the material, but the parent points to another statement that still remained from the other proceeding (Req. for Rev. at pp. 9-10). The hearing record does not support a finding that any errors contained in the March 24, 2024 decision that were related to the IHO's confusion of the two cases warrants a finding that the IHO was either unfair or lacked impartiality in her conduct toward the parent.

services. The parents contend that the CSE was required to develop an IEP with adequate evaluative information. The parents argue that when a parent does not seek public funding for an independent educational evaluation, the parent is not obligated to share the report with the district, and as such, they never impermissibly withheld information from the district. The parents contend that the IHO "drew conclusions far beyond what the hearing record showed" as the district did not convene a CSE to create either an IESP or an IEP and the district offered no explanation or defense.[8] Thus, the parents contend that the IHO erred by reducing the tuition recovery by 50 percent as it was "incredibly harsh" when the parents did nothing to impede the CSE from developing an IEP.

Furthermore, the parents argue that the IHO erred by reducing the district's obligation for the tuition at Shefa by an additional 13 percent due to the nonsecular nature of some portions of Shefa's educational programming. The parents contend that case law establishes that the nonsecular nature of a unilateral placement does not warrant a reduction in tuition funding/reimbursement when the district failed to offer a FAPE. Moreover, the parents argue that the hearing record demonstrates that the religious aspect of the unilateral placement met the student's unique needs. The parents request the IHO decision be modified to order full tuition for the 2023-24 school year at Shefa.

In its answer, the district argues that the IHO correctly determined that the parents' failure to cooperate warranted a reduction in the tuition award. Further, the district asserts that the IHO properly reduced the award as it is not obligated to provide payment for religious instruction.

In reply, the parents again assert that equitable considerations weigh in their favor and that full tuition should be granted, inclusive of the religious education portion.

V. Applicable Standards

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85[2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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).

[8] Specifically, the parents assert that the IHO improperly addressed the June 1 deadline for an IESP when the district had waived the defense. The parents assert that the IHO improperly expanded the scope of the issues without consent from the parties regarding the June 1 deadline.

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"]).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

VI. Discussion

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year or that Shefa was an appropriate unilateral placement. 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 on equitable grounds.

First, the IHO held that the parents' actions warranted a 50 percent reduction in funding for Shefa. Specifically, the IHO held that the parents did not cooperate with the IEP development

process (IHO Decision at p. 47). However, the IHO erred in that determination for several reasons. First, the evidence in the hearing record demonstrates that the last IESP meeting, prior to the filing of the due process complaint, was held in May 2022 (Parent Ex. N at ¶ 5).[9] Based on that date, the CSE should have reconvened by May 2023 and invited the parents to seek their input; however, the district did neither. Next, the district failed to create a program for the student until after the due process complaint was filed in this case (see Parent. Ex. A; Dist. Ex. 2). This failure left the student without any services at all at the start of the 2023-24 school year as neither an IEP nor an IESP had been developed by the district prior to the first day of school and the May 2022 IESP had expired. Third, after the district failed to convene the CSE, the parent initiated two emails to the district in June 2023 and shared that she had concerns as well as the SETSS and paraprofessional services she believed would alleviate those concerns (Parents Ex. D; E). Next the parent had the student's physician complete medical forms in August 2023 to assist the district in limiting the duration of the student's transportation (Parent Ex. F). The parent is correct that when having a private evaluation conducted at parental expense, there is no legal obligation under IDEA requiring the parent to provide such an evaluation to the public school district;[10] however, the parent in this case was making references to the neuropsychological evaluation to the district, indicated that she would "send the documents over as soon as I have them," but then did not carry through on her commitment to send the documents (Parent Ex. D; E). Referencing and committing to forward a private evaluation to a CSE then failing to do so could be viewed as an act of uncooperativeness because that behavior will tend to mystify public school staff who would understandably be under the impression that the parent wants the CSE to consider the privately obtained evaluation; however, when balancing the equitable factors and the parties' respective conduct in this particular case, they nevertheless weigh decidedly in favor of the parent. The parent's failure to follow through and send the private evaluation did not excuse or explain why the district failed to convene the CSE in the first place or have an IEP (or an IESP for that matter) in effect at the beginning of the school year, and the parents in this case were left to craft their own remedy and went on to provide the district with a 10-day notice of their intent to enroll the student at Shefa on August 25, 2023 (see Parent Ex. B). Lastly, to the extent that the IHO held that the parent "testified they never considered placing Student in a public school placement, [and that] it was unreasonable and not in keeping with the Parents obligation to cooperate with the District", I note that the fact that the parents never intended to place the student in the district public school is not itself a legally sufficient reason for the IHO to reduce or deny reimbursement a parent's request for tuition reimbursement because it is inconsistent with the controlling law of this circuit. The Second Circuit has held that when weighing equitable considerations, even when parents have no intention of placing a student in the recommended program, it is not a basis to deny a request for tuition reimbursement absent a finding that the parents also "obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA" (C.L. v. Scarsdale Union Free

[9] There is nothing in the hearing record from the district to contradict this statement by the parent and neither party entered this IESP into the hearing record.

[10] The CSE would not have been chargeable with the evaluation's contents and/or recommendations in terms of the appropriateness of its recommendations for the student since it was not provided the evaluation by the parents and therefore would have been unable to consider it. However, since the CSE failed to convene to develop an educational program for the student, the CSE's knowledge or lack thereof of the evaluation is of little relevance. I express no opinion regarding the persuasiveness of the contents of the evaluation or whether the CSE would have to accept any of its findings or recommendations in relation to a public school placement.

Sch. Dist., 744 F.3d 826, 840 [2d Cir. 2014]). In this case, the hearing record lacks evidence that the parent impeded the CSE's process; rather, the evidence reflects that the parent affirmatively reached out to the district seeking information on specific special education services she believed the student needed. Accordingly, I find equitable considerations in this case weigh in favor of the parent, and the IHO erred in finding that the parent failed to cooperate with the development of the IEP.

Turning next to the question of whether tuition should have been reduced by a percentage reflecting the portion of Shefa's education that could be construed as nonsecular and religious in nature, it must be noted that while the district agrees with the parents that constitutional matters should not be addressed in this administrative process and should be reserved for the courts, the district also contends that the IHO's decision to reduce tuition was justified based on a federal regulation which prevents school districts from using IDEA funding for religious instruction (Answer with Cross Appeal ¶¶ 18, 19, 22). The pertinent federal regulation 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).

The district's argument is 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 district is, in all practicality, nevertheless asking the administrative due process tribunal to draw conclusions based upon constitutional law principles, I will therefore 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 raised by implication by the district, 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 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 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 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 v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). 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];[11] 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]).[12] 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

[11] 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).

[12] 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"]).

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 2023-24 school year. Based on this, 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 2023-24 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 as remedial relief for the district's failure to offer the student a placement 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. 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. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

VII. Conclusion

Having found that equitable considerations favor full tuition reimbursement/funding, the portion of the IHO's March 24, 2024 decision that reduced funding by 63 percent must be reversed. The parents are entitled to full funding of Shefa for the 2023-24 school year and the district's arguments to the contrary are without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision dated March 24, 2024 is modified by reversing that portion which reduced funding by 63 percent; and

IT IS FURTHER ORDERED that the district shall fund the full cost of Shefa for the 2023-24 school year.

Dated: **Albany, New York**
July 1, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER