The University of the State of New York

The State Education Department
State Review Officer
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No. 24-156

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

Appearances:
The Law Firm of Tamara Roff, PC, attorneys for petitioner, by Tuneria R. Taylor, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied, in part, the parent's request for respondent (the district) to fund his son's full tuition costs at Darchai Menachem for the 2023-24 school year. The district cross-appeals from those portions of the IHO's decision which ordered it to fund a portion of the student's tuition at Darchai Menachem for the 2023-24 school year. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). 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

According to the parent, the student received special education services as a preschool student consisting of special education itinerant teacher (SEIT) services, speech-language therapy, and counseling (Parent Ex. J at pp. 2-3). In May 2022, the district conducted evaluations of the student as part of the "Turning 5 process" and, at that time, he exhibited "high levels of distractibility and non-compliance" and met the criteria for a diagnosis of autism spectrum disorder (ASD) (id. at p. 3). For the 2022-23 school year, the CSE determined the student was eligible for special education as a student with autism and recommended that the student receive integrated

co-teaching (ICT) services, counseling, and speech-language therapy (id. at pp. 1, 3).[1] The parent disagreed with the services the district offered, unilaterally enrolled the student at Darchai Menachem, a nonpublic school, and filed a due process complaint notice regarding the 2022-23 school year (Parent Ex. C).[2, 3]

The parent requested a psychological evaluation of the student due to concerns regarding his behavioral, social, and communicative functioning; the evaluation was conducted during January and February 2023 and the results set forth in a report dated April 23, 2023 (Parent Ex. J at p. 10). During this evaluation the evaluators confirmed the student's diagnosis of ASD and recommended that diagnoses of attention deficit hyperactivity disorder (ADHD) and reactive attachment disorder (RAD) "be explored if maladaptive behaviors and high levels of inattentiveness persist despite intervention" (id. at p. 11).

On June 13, 2023, a CSE convened to develop the student's IEP and, for the 2023-24 school year, recommended a 12:1+1 special class placement for core academic subjects with counseling and speech-language therapy (Parent Ex. Q ¶¶ 8, 9). According to the parent, he did not "receive any placement offer or school location letter from the district for the 2023-2024 school year" (id. ¶ 13). In a letter dated August 21, 2023, the parent informed the district of his concerns with the student's June 2023 IEP and with the lack of notice of a public school location for the student to attend; therefore, the parent notified the district that he was unilaterally placing the student at Darchai Menachem and would seek public funding for that placement (Parent Ex. B).

A. Due Process Complaint Notice

In a due process complaint notice dated January 3, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A at p 1). The parent asserted the June 2023 IEP was procedurally and substantively invalid as it did not go far enough to address the student's individualized attention, support, and instruction needs and the CSE failed to conduct and consider adequate evaluations, failed to provide adequate prior written notice, and prevented the parents from fully participating in the educational decision-making process (see id. at p. 2). The parent also challenged the June 2023 IEP on the basis that the CSE failed to evaluate the student prior to the June 2023 CSE meeting and failed to evaluate in all areas of suspected disability (id.). The parent further asserted the present levels of performance and annual goals included in the June 2023 IEP were inappropriate, vague, and unmeasurable (id.). For relief, the parent requested a finding that the district failed to offer the

[1] The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1][i]; 8 NYCRR [zz][1]).

[2] The Commissioner of Education has not approved Darchai Menachem as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

[3] On October 26, 2023, the IHO in that matter found that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 school year and that Darchai Menachem was an appropriate unilateral placement and addressed the student's needs (IHO Decision at p. 17).

student a FAPE and sought as relief either direct funding or reimbursement for the student's tuition for the 10-month school year at Darchai Menachem (id. at pp. 3-4.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on March 7, 2024 (Tr. pp. 17-57). During the impartial hearing, the district conceded that it denied the student a FAPE for the 2023-24 school year and that it would not be offering any evidence or testimony (Tr. p. 18). In a decision dated March 15, 2024, the IHO found that the district failed to meet its burden at the hearing noting specifically that the district conceded that it denied the student a FAPE (IHO Decision p. 16.). However, the IHO held that the parent's evidence was contradictory with regards to the appropriateness of the unilateral placement at Darchai Menachem (id.). Specifically, the IHO found the student had either stagnated or regressed in reading and math, and that based on the 2023 psychoeducational evaluation report, the private program was not meeting the student's needs (id. p. 17). The IHO found it particularly concerning that the parent sought a psychological evaluation due to "significant concerns" the student was not making progress while attending Darchai Menachem (id.). The IHO found that the 2023 psychological report and progress reports corroborated the parent's concerns that the unilateral placement was not meeting the student's social/emotional and behavioral regulation needs (id.). In sum, the IHO concluded that there was no objective evidence of progress in the record and that there was insufficient evidence of how Darchai Menachem met the student's unique needs (id. at p. 18). The IHO further noted that, while no analysis of equitable considerations was necessary given her finding that Darchai Menachem was not an appropriate unilateral placement for the student, "were tuition funding otherwise warranted," she would reduce reimbursement to the parent "by 10% due to the portion of religious instruction that ha[d] no academic value and [went] beyond what was required for a FAPE" (id.). The IHO fund that equitable considerations otherwise favored the parent (id.).

While denying substantive relief sought by the parent, the IHO noted that that the student's pendency placement was at Darchai Menachem based on a prior unappealed IHO decision (IHO Decision at p. 16). Therefore, for pendency purposes, the IHO directed the district "from the date the [due process complaint notice] was filed in this case to the date of this Order" to fund "the student's Private School tuition, less the portion of religious instruction" which she found was 10 percent of the total program (id.). The IHO also opined that the student was "entitled to receive an education until the CSE reconvenes, develops, and implements an appropriate program (id. at p. 18). Therefore, as relief, the IHO ordered the district "to fund the student's placement at [the] Private School until the new placement is implemented [and] [i]f no such placement is implemented before the end of the 2023-24 school year, funding will end on June 30, 2024, and the [district] must offer an appropriate placement for the following school year" (id.). The IHO further ordered the CSE to reconvene and consider all available evaluative material and any updated teacher and service provider progress reports/input and develop an appropriate IEP based on those materials within 15 days of the decision date and to offer a school location to implement the new within 45 days of the date of the decision (id. at p. 19).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that the parent's unilateral placement of the student at Darchai Menachem was not appropriate and, in so finding, held the parent to a higher burden that what is required. The parent further argues that the IHO improperly compared the student's unilateral placement with the programming included in the student's IEP. The parent contends that the IHO failed to properly credit the progress the student had made as indicated in the hearing record and placed too much weight on the 2023 psychological evaluation report. The parent contends that the IHO did not understand the program the student was receiving or misunderstood the services he was receiving at Darchai Menachem and how they addressed his particular needs. The parent also contends that equitable considerations favor an award of direct funding for the student's tuition at Darchai Menachem with no reduction in tuition due to religious instruction. As relief, the parent requests direct funding of the cost of the student's tuition at Darchai Menachem for the 2023-24 school year.

In its answer and cross-appeal, the district argues that the IHO was correct in determining the unilateral placement at Darchai Menachem was inappropriate. The district first argues that the student was placed in a mainstream classroom despite the allegations in the parent's due process complaint notice that the student required a special class. Next, the district contends that the testimony and evidence in the hearing record fails to explain why the unilateral placement was not providing services consistent with the IEP. Specifically, the district argues that the unilateral placement was only providing individual counseling and not group counseling consistent with the recommended services in the IEP. The district contends further that testimonial evidence in the hearing record, which indicated the student was making significant progress, was belied by information in the progress reports reflecting his continued educational struggles despite receiving services provided at Darchai Menachem. Finally, the district cross-appeals that portion of the IHO's decision directing the district to reconvene and to continue to fund the unilateral placement until it recommended an appropriate placement for the student.

In an answer to the district's cross-appeal the parent alleges that the IHO properly exercised her broad authority to fashion the appropriate relief and did not extend pendency under the IDEA.[4]

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

[4] The parent concedes that an extension of pendency beyond the conclusion of the case would "not be proper."

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

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc],

200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[5]

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

At the outset, the district has not appealed from the IHO's adverse finding that it failed to offer the student a FAPE for the 2023-24 school year. Accordingly, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Unilateral Placement

As for Darchai Menachem, a private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has

[5] 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).

explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (id. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. Student's Needs

Although not in dispute on appeal, a brief discussion of the student's needs provides context to resolve the issue of whether Darchai Menachem was an appropriate unilateral placement for the student for the 2023-24 school year. The evidence in the hearing record that describes the student includes the April 2023 psychological evaluation report, a November 2023 speech-language therapy progress report, a January 2024 progress report, a February 2024 counseling progress report, and undated math performance indicators (Parent Exs. J-N).[6]

According to the April 2023 psychological evaluation the student exhibited physically aggressive, self-directed, defiant, impulsive, and destructive behaviors (Parent Ex. J at pp. 3, 10-11). The evaluators reported the student also demonstrated difficulty sustaining attention to non-preferred activities, made eye contact inconsistently, exhibited restrictive interests, and had difficulty with play skills, social interaction, and emotional regulation (id. at p. 10). Cognitively, although the student did not complete formal testing, the evaluators reported that his strengths were in visual spatial and fluid reasoning skills and that he struggled with verbal abilities (id. at pp. 4-5, 10). The evaluators recommended that the student receive intensive 1:1 intervention consisting of a minimum of 20 hours per week of applied behavior analysis (ABA) instruction, implementation of a highly consistent behavior plan, social skills training in a small group, a trauma informed therapeutic approach, speech-language therapy, repetition and indirect services for generalization of skills, and parent training on a 12-month basis (id. at pp. 12-13).

The November 2023 speech-language therapy progress report indicated that the student had challenges with both receptive and expressive language skills (Parent Ex. M at p. 1). He had difficulty following multistep directions and needed steps broken down into small parts (id.). The student had difficulty identifying the main idea, recalling information, and sequencing events when presented with age-appropriate texts, and he needed support in answering "wh" questions appropriately and effectively (id.).

According to the January 2024 progress report, the student presented with deficits in reading, writing, social/emotional behavior, language, attention/focusing, and in executive functioning skills (Parent Ex. K at p. 1). The student demonstrated proficiency in identifying and reading consonant vowel consonant (CVC) words; however, he had difficulty distinguishing some upper and lower case letters during writing tasks, and was at the initial stages of identifying words (id.). The progress report indicated that the student struggled with some aspects of reading comprehension and that he had been working on writing with directionality (id.). Math was a relative strength for the student, but he needed to work on developing addition and subtraction concepts and math word problem skills (id. at p. 2).

The student's February 2024 counseling progress report, prepared by his licensed mental health counselor, stated that the student's impulse control in class, social interactions, and anxiety negatively affected his classroom behavior and participation (Parent Ex. L). His pragmatic difficulties and communication difficulties hindered his ability to participate and interact with

[6] The student's June 2023 IEP was not submitted into evidence (see Parent Exs. A-Q).

peers (id.). The counseling report indicated that the student had difficulty regulating his feelings and emotions and often would withdraw when frustrated or overwhelmed (id.).

According to the parent's affidavit, when the student became angry or upset, he tended to yell or act out, and found it difficult to interact peacefully with peers (Parent Ex. Q ¶¶ 1, 4). The parent testified that the student struggled with impulsive behaviors, was easily distracted, and had difficulty maintaining focus, and in order to progress the student needed a small, supportive nurturing environment with lots of individualized instruction and behavioral support (id. ¶ 4).

2. Specially Designed Instruction and Progress

The evidence in the hearing record describes Darchai Menachem as a mainstream day school that served students in grades "[p]re1 A – 12" with a maximum class size of 14 students (Tr. p. 33; Parent Ex. D at p. 1). During the 2023-24 school year the student was enrolled in the Tomim Program at Darchai Menachem, which was described as a special education program for students who "struggle[ed] with behavior issues, learning disabilities, communication and/or social challenges" (Parent Exs. D at p. 1; H). Students in the Tomim Program had received diagnoses including ASD, ADHD, dyslexia, dysregulation syndrome, bipolar disorder, and/or emotional dysregulation (Parent Ex. R ¶ 8). According to a program description, students in the Tomim Program were mainstreamed with peers in general education classes and received instruction tailored to each student's needs in small groups called "pods" (Parent Ex. D at pp. 1, 2).

Darchai Menachem implemented a school-wide positive behavior modification system that used consistent data collection and feedback, and personal behavior plans developed by a team to improve students' social skills (Parent Exs. D at p. 1; O). According to the director, Darchai Menachem was not "a full ABA program" but some of the students received "ABA support," and the school adopted a structured tiered approach to address classroom behaviors which negatively affected individual students and their peers (Tr. p. 31; Parent Ex. R ¶¶ 1, 9). The school-wide behavior program categorized behaviors into four distinct groups by level of severity: behaviors impacting the student and classmates, behaviors impacting the student and disrupting others' learning, behaviors compromising an orderly environment, and behaviors posing a threat to the safety of oneself or others (Parent Exs. O; R ¶ 9). The school behavior management plan provided examples of the types of behaviors observed at each level, potential immediate interventions to be used, possible consequences to modify the behaviors, and the staff responsible (Parent Ex. O). Behavior interventions were specifically tailored to fit the type of behavior, frequency, and level of seriousness (Parent Ex. R ¶ 10). Strategies staff used included behavior charts to track progress, rearranged seating, reflection exercises, behavior contracts for consistent expectations, breaks, and in-class timeouts (id. ¶ 10).

For the 2023-24 school year the student attended first grade in a class of eight students, one teacher, and one assistant teacher (Parent Ex. R ¶¶ 12, 13). The lead teacher of the classroom had a master's degree in special education and held a "license" for students with disabilities birth to grade 2 (Tr. p. 34; Parent Ex. R ¶ 5). The director testified that students in the Tomim Program received instruction in the "Tomim group" for "quite a large amount of the day" (Tr. p. 35). The director further testified that students in the Tomim group were pulled to the side within the general education class and staff provided instruction in English language arts (ELA), math, and science to the "pod" (Tr. pp. 35, 38). The student's 2023-24 school year Tomim group consisted of three

students and one instructor, with 1:1 instruction provided when needed, and differentiated instruction at their own pace with fewer distractions (Tr. pp. 33-34, 38; Parent Ex. R ¶ 13). The student's Tomim instructor was not certified in special education (Tr. pp. 34-35; Parent Ex. R ¶ 5).

The Darchai Menachem 2023-24 first grade weekly schedule included: six 30-minute sessions per week of second language (reading), two 25-minute sessions per week of language – writing & worksheet, one 30-minute session per week of listening and speaking skills, four 30-minute sessions per week of ELA, four 30-minute sessions per week of math, one 60-minute session per week of STEAM, two 30-minute sessions per week of science, one 30-minute session per week of history, and four 40-minute sessions per week of social skills (Parent Ex. F). The student's schedule also indicated that he received two 30-minute sessions per week of speech - language therapy (id.). According to the director, the student also received one 30-minute session per week of individual counseling (Tr. pp. 30, 36).

Turning to the specially designed instruction provided to the student by his instructors, to address the student's reading and writing needs, the director testified that the student received instruction on an individual basis or in a small group with an ELA "specialist" (Parent Ex. R ¶ 15). The student's English class used the "Readbright Curriculum," which the director testified focused heavily on phonics and phonological awareness and benefitted students with language delays (id. ¶ 16). Additionally, instructors used positive reinforcement through tokens and verbal commendations and incorporated interactive whiteboard games, timed reading sessions, and tactile learning aides (Parent Exs. K at p. 1; R ¶ 17). To support the student's independent writing skills, his instructors used Theraputty and "Grippers" to enhance the student's hand/palm strength and dexterity (Parent Ex. R ¶ 17). Staff also enhanced the learning experience with physical activity through modified games like "Red Light, Green Light," which required students to move based on letter recognition and promoted active participation (id. at ¶ 17).

According to the director's affidavit the student's class used "Mindful Math," which provided hands-on learning and visuals aides (Parent Ex. R ¶ 20). To address the student's math needs, instructors used sensory materials like moon sand, beads, dry erase boards and smartboards, and manipulatives to help the student with his math abilities (Tr. p. 39; Parent Ex. K at p. 2). More specifically, the director testified that the student received instruction using various exercises, interactive games, hands-on materials, and manipulatives such as beads, blocks, pegs, and "IXL assessments" (Parent Ex. R ¶ 20). The progress report indicated that the student was beginning to represent addition and subtraction with objects, fingers, mental images, drawings, sounds, acting out situation verbal explanations or equations with guidance from the instructor (Parent Ex. K at p. 2).

To address the student's executive functioning needs, staff used breathing techniques and a "Get Ready, Do, Done" strategy to maintain the student's focus (Parent Exs. K at p. 3; R ¶ 23). The instructors used a positive reinforcement program for the student where he checked a box for each completed task to earn increasing reinforcements (Parent Ex. K at pp. 3-4; see Parent Ex. R ¶ 23). A positive reinforcement chart was used to encourage the student to adhere to classroom rules and develop smoother transitions between activities (Parent Ex. K at p. 4).

According to the director, the student received two 30-minute sessions per week of speech-language therapy, which focused on improving his expressive language skills and comprehension,

responding to 'wh' questions, and following directions with visual cues and verbal prompting (Parent Ex. R ¶ 25). The speech-language therapy progress report indicated that the student required redirection, verbal prompting, multi-step directions broken down into smaller directions, clinician modeling (Parent Ex. M at p. 1).

In addition to the school-wide behavior plan described above, the director testified that the student worked individually with a "specialist" who used differential reinforcement to reinforce positive behaviors when the student was faced with social and emotional challenges (Parent Exs. O; R ¶ 22). The student received one 30-minute session per week of counseling and interventions included helping the student develop positive thinking patterns and using age-appropriate cognitive-behavior therapy (CBT) and rational-emotive behavior therapy (REBT) techniques to help him distinguish between feelings and thoughts, identify erroneous thinking patterns, and develop social interactive skills, with an emphasis on slowing down the responses and reactions and avoiding maladaptive reactions (Parent Exs. L; R ¶ 24). According to the director, the counseling sessions were geared to help the student understand his feelings, correct mistaken thought patterns, improve social skills, and avoid negative reactions (Parent Ex. R ¶ 24). To provide support in improving the student's behavior during group activities, staff used several strategies such as actively engaging with the student and reinforcing the student to raise his hand before calling out (Parent Ex. K at p. 4). Additionally, the director testified that if the student became dysregulated within the group, staff pulled the student out for one-to-one support (Tr. pp. 35-36).

Regarding progress, the director testified that during the 2023-24 school year the student had "shown steady improvement in reading and writing" and was then-currently "at a reading and writing level typical for a 5-year-old," and he had also exhibited improved math skills (Parent Ex. R ¶¶ 18, 21). According to the director, the student had "shown improvement in his ability to participate in social activities, indicating a growing capability to form positive relationships with peers," and that he "continue[d] to progress in managing his impulsivity and enhancing his social skills" (id. at ¶ 22). The progress report indicated that, although the student continued to exhibit social/emotional needs, he demonstrated improvement in identifying and expressing his emotions, and made "significant progress" maintaining peer relationships (Parent Ex. K at pp. 2-3). Further, the evidence shows that the student was improving his ability to maintain attention with supports, and he had made "marked progress in his self-control and emotional regulation skills" (Parent Exs. L; R ¶¶ 23, 24). Additionally, the director testified that the student had "made significant improvements in his speech skills over the 2023-24 school year, including his ability to engage in classroom activities and follow multi-step instructions" (Parent Ex. R ¶ 25).

According to the parent's affidavit, the structure of Darchai Menachem was "perfect" for the student's learning style and ensured he received "highly individualized attention and support, which he need[ed] to make progress" (Parent Ex. Q ¶15). The parent testified that the student had made "tremendous progress during the 2023-2024 school year" with the behavioral supports provided and was beginning to read, work on higher level math skills, and better identify his emotions (id.).

Based on the foregoing, the parent and the director provided evidence about the student's progress at Darchai Menachem, which was not refuted by the district (see Parent Exs. K; Q; R). A finding of progress is not required for a determination that a student's unilateral placement is

adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Although the IHO characterized the parent's evidence as contradictory and the parent's witnesses as lacking credibility (IHO Decision at pp. 16-17), the IHO's determination in this regard was based largely on her weighing of the 2023 psychological evaluation report against the other evidence relied on by the parent at the impartial hearing to meet his burden that Darchai Menachem was an appropriate unilateral placement.[7] Specifically, the IHO found that "the 2023 Psychological shows that the student's Private School placement is not meeting his needs" and it was "especially concerning that [the] Parent sought out that private evaluation due to his and the Private School's 'significant concerns' that the student was not making appropriate progress, despite the supports provided by the Private School" (IHO Decision at p. 18). The IHO further found that "[t]he characterization of those concerns as 'significant' to the evaluator undercuts the contrary (and more favorable) picture [the parent] attempted to paint at the hearing" and "the 2023 Psychological evaluator concluded that the student's Private School setting was not sufficiently addressing his social- emotional and behavioral regulation concerns, which were preventing him from functioning appropriately in the classroom" (id.). Notably, however, the 2023 psychological evaluation report is dated April 23, 2023 and the underlying evaluation was conducted during the 2022-23 school year in January and February 2023 and, therefore, does not speak to how the student fared during the 2023-24 school year at issue (Parent Ex. J at p. 1). While the 2023

[7] 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]; Application of a Student with a Disability, Appeal No. 12-076). Review of the IHO's decision demonstrates that, while the IHO used language to imply that she was assessing the credibility of the evidence, in context it is clear that the IHO identified different representations in the hearing record and explained the weight she afforded the evidence presented (see, e.g., IHO Decision at pp. 5 n.10, 8 n.17, 9, 16; see also S.W. v. New York Dep't of Educ., 2015 WL 1097368, at *15 n.6 [S.D.N.Y. Mar. 12, 2015] [noting that an IHO's decision to discredit portions of a document was not based on a credibility determination of a witness and that the SRO had the same ability to weigh the evidence]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 429 [S.D.N.Y. 2007], aff'd, 293 Fed. App'x 20 [2d Cir. Aug. 19, 2008]). Accordingly, to the extent that I agree or disagree with IHO's findings of fact, it is based on the weight accorded to the evidence, not the credibility of the witnesses' testimony (see L.K. v. Ne Sch. Dist., 932 F. Supp. 2d 467, 487-88 [S.D.N.Y. 2013]; E.C. v. Bd. of Educ. of City Sch. Dist. of New Rochelle, 2013 WL 1091321, at *18 [S.D.N.Y. Mar. 15, 2013]; J.L. v. City Sch. Dist. of New York, 2013 WL 625064, at *9-*10 [S.D.N.Y. Feb. 20, 2013]; F.B. v. New York City Dep't of Educ., 923 F. Supp. 2d 570, 581 [S.D.N.Y. 2013]).

psychological evaluation report noted the student was attending Darchai Menachem when the evaluation was conducted (id.), the specific programming recommendations it appeared to critique were the supports or recommendations offered by the district for that school year and not the educational programming provided to the student at his private school. For example, the 2023 psychological evaluation report stated that the student was then "currently mandated for special support services through the district under the disability classification of Autism" but that both the parent and the private school were "concerned that [the] approved supports [we]re not appropriate for his needs and for skill generalization purposes" (id.). The 2023 psychological evaluation report also noted that, at that time the student was "mandated for an ICT class through the [district] and related services," but that those "services d[id] not seem to be sufficiently addressing the social-emotional and behavioral regulation concerns that [we]re impairing his ability to function appropriately across settings" (id. at p. 10). The psychological evaluation does not offer a similar specific critique of the appropriateness of the student's educational programming at Darchai Menachem. While the 2023 psychological evaluation report includes some observations of the student at the private school and reflects interviews with staff members (id. at pp. 4-5), it does not contain a detailed description of the student's educational program during the 2022-23 school year or any information at all concerning the 2023-24 school year at issue. On my independent review of the hearing record, the evidence does not support the IHO's conclusion that an evaluation conducted during the prior school year should be accorded more weight than the testimony and documentary evidence reflecting the student's needs and the educational programming provided to him at Darchai Menachem during the 2023-24 school year as recounted by staff who worked directly with the student and by his parent. Rather, the hearing record supports a finding that Darchai Menachem provided the student with specially designed instruction tailored to address his unique special education needs.

Further, a parent need not show that a unilateral placement meets State education standards or requirements and need not show that it furnishes every special service necessary to maximize a student's potential, in order to qualify for reimbursement under the IDEA; rather a parent has the burden to establish that the unilateral placement provides specially designed instruction to meet the student's unique needs, as well as support services as necessary to allow the student to benefit from instruction (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016] [reversing the administrative hearing officers who found that the related services at a unilateral placement were inadequate when the totality of the evidence demonstrated it was appropriate and would enable the student to make progress]; Frank G., 459 F.3d at 364). Review of the hearing record establishes that the parents' unilateral placement—in its totality—designed an educational plan that would provide the student with instruction specially designed to meet his educational needs. Accordingly, to the extent the IHO faulted the unilateral placement for failing to, for example, provide the student with a full-time special class and social skills training, conduct an FBA, and develop an individual behavior plan and annual goals (IHO Decision at p. 17), she appeared to impose specific requirements on the unilateral placement that would perhaps be relevant when assessing a district program and whether it offered the student a FAPE but would not necessarily render a private placement inappropriate where, as here, ample evidence otherwise exists that Darchai Menachem addressed the student's areas of need with specially designed instruction.

Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that Darchai Menachem was not an appropriate unilateral

placement when viewed under the totality of the circumstances. As discussed above, Darchai Menachem provided the student with specially designed instruction in his areas of need, individualized behavior intervention supports, and related services. Further, the evidence in the hearing record shows that the student made social, academic, behavioral, and communication progress at Darchai Menachem. Together, these factors all support the appropriateness of the parent's unilateral placement of the student and indicate that it was reasonably calculated to enable the student to receive educational benefits.

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"]).

The IHO stated that, while no analysis of equitable considerations was warranted, as an alternative finding for "purposes of appeal," a reduction of 10 percent from any award of tuition funding would have been warranted, representing the portion of instruction provided at the unilateral placement which was religious in nature, bereft of "academic value" and went beyond what was required for a FAPE (IHO Decision at p. 18). The parent argues that the IHO improperly reduced any potential tuition award for Darchai Menachem by a percentage based on its provision of religious instruction because the relevant legal authority "clearly allows for funding of a unilateral placement for all portions of the school day."

The IHO acknowledged previous administrative State-level decisions involving the same question, which discussed the current trend in case law on the issue of public funding for religious instruction (IHO Decision at p. 12; 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)]). However, the IHO opined that Carson did not hold "that full public tuition funding must be ordered for an appropriate sectarian unilateral placement, including any portions that are purely religious and not academic in nature" (IHO Decision at p. 12).

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, 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];[8] 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

[8] 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).

education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[9] 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 2023-24 school year. Based on this, the parents could seek remedial relief and, 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. While, as the IHO indicated, Carson may not prohibit a reduction for religious instruction (IHO Decision at p. 12), it does support the proposition an award of public funding for the full tuition would not be prohibited on Constitutional grounds. The State and federal law cited by the IHO operates to preclude the district from choosing sectarian methods to carry out its public education functions, but those authorities do not impede parents from seeking remedial relief by means of a sectarian institution when the district has failed in its public education responsibilities (see IHO Decision at p. 12, citing 34 CFR 76.532[a][1]; M. L. v. Smith, 867 F.3d 487, 499 [4th Cir. 2017]). Instead, if the district feels strongly in circumstances such as this that sectarian activities should not be funded as remedial relief, the district should ensure that it complies with the IDEA in the first place.

As far as the equitable grounds the IHO cited for reduction in tuition, i.e., because the religious aspects of the class were segregable (see IHO Decision at p. 12), 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., 758 F.3d at 461 [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 any segregable costs charged by the private school or agency that exceed 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

[9] 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"]).

[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"]).

Contrary to the IHO's determination, I find no support in the hearing record 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, 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).

The IHO engaged in an analysis of aspects of the student's program at Darchai Menachem, including time set aside for daily prayer and Jewish law and customs, Bible study, and Shabbos Party, considering whether each course involved any academic aspect (IHO Decision at pp. 9-10, citing Tr. pp. 31-33; Parent Exs. E; R ¶ 26). However, there is no indication in the hearing record that costs for any of the student's classes equates to funding for any other class. Additionally, as the hearing record provides no concrete information as to the school's method for financing its activities, there is no reasoned way to know what portion of the student's tuition, if any, was actually used to pay for the portions of the school day devoted to religious instruction. Even if the proportion of the student's schedule devoted to Judaic studies and prayer 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 instruction and prayer beyond the religious aspect. 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). As a result, the IHO erred by finding that any award of tuition funding to the parent should be reduced on equitable grounds by 10 percent based on an approximation of the amount of time the private placement dedicated to religious instruction.

VII. Conclusion

Contrary to the IHO's findings, the parent met his burden to prove that Darchai Menachem was an appropriate unilateral placement for the student for the 2023-24 school year and equitable considerations do not warrant a reduction in the amount of tuition funding. In light of these determinations, I need not address the parties' remaining contentions, including the district's cross-appeal regarding the IHO's finding that the student was entitled to continue to attend Darchai Menachem at public expense until the CSE reconvened or until the end of the 2023-24 school year.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated March 15, 2024 is modified by reversing those portions which found that the parent's unilateral placement of the student at Darchai Menachem was not appropriate for the 2023-24 school year and that equitable considerations did not support a full award of tuition funding; and

IT IS FURTHER ORDERED that the district shall directly fund the student's full tuition at Darchai Menachem for the 2023-24 school year.

Dated: **Albany, New York**
July 22, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER