



# The University of the State of New York

## The State Education Department

State Review Officer

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No. 24-160

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

### **Appearances:**

The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tamara Roff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Darchai Menachem for the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's decision on equitable grounds. 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 has received diagnoses of a tracheal esophageal fistula, hypoplastic callosus (cyst on the brain), and a hearing impairment in both ears (Parent Ex. Y ¶¶ 1, 2; Dist. Ex. 3 at pp. 3-4). He attended a "center based special instruction group" and received occupational therapy (OT), physical therapy (PT), and speech-language therapy as a young child (Dist. Ex. 12 at p. 1). The student began attending "a small special education private program" for

the 2019-20 school year, where he remained through the 2021-22 school year (second grade) (Parent Ex. Y ¶¶ 3-5; Dist. Ex. 3 at p. 1).<sup>1</sup>

A CSE convened on March 29, 2022, and, finding the student was eligible for special education as a student with an other health-impairment, developed an IEP for the 2022-23 school year (third grade) with an implementation date of July 6, 2022 (Dist. Ex. 3 at pp. 1, 27, 33).<sup>2</sup> The March 2022 CSE recommended 12-month services consisting of a 12:1+1 special class in a specialized school along with the related services of two 30-minute sessions per week of individual hearing education services; two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, two 30-minute sessions per week of individual speech-language therapy, individual daily assistive technology services, and daily, shared paraprofessional services for health and feeding (*id.* at pp. 27-29, 33-34). The CSE also recommended four 60-minute sessions per year of individual parent counseling and training (*id.* at p. 28).

In a prior written notice dated April 28 2022, the district summarized the special education and related services recommended by the March CSE for the 2022-23 school year (Dist. Ex. 2 at pp. 1-2). The prior written notice reflected the same information as noted in the March 2022 IEP regarding what other placement options the March 2022 CSE considered and rejected (compare Dist. Ex. 2 at p. 2, with Dist. Ex. 3 at p. 35). In a school location letter dated April 28, 2022, the district identified the public school site to which the student had been assigned to implement his IEP (Dist. Ex. 2 at p. 5).

According to the parent, by correspondence from her attorney dated June 17, 2022, she provided the district with 10-day written notice of her intention to enroll the student at the Jewish Center for Special Education for summer 2022 and seek public funding for the cost of his attendance (Parent Ex. Y ¶ 9). The hearing record includes a June 17, 2022 automatic email response from a 10 day notice email account belonging to the district that acknowledged receipt of an email communication from the parent's attorney (Parent Ex. B). By letter dated August 22, 2022 and sent via email, the parents provided 10-day written notice to the district of their disagreement with the recommendations of the March 2022 CSE and of their intention to unilaterally enroll the student at Darchai Menachem for the 2022-23 school year and to seek public funding for the costs of the student's attendance (see Parent Ex. C at pp. 2-3).

On August 24, 2022, the parents executed an enrollment contract with Darchai Menachem for the student's attendance during the 2022-23 school year (Parent Ex. O).

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<sup>1</sup> In written testimony the parent indicated that for the 2019-20, 2020-21, and 2021-22 school years she "asked the [district] to pay for [the student's] tuition" and that for all three years the IHOs in those proceedings "found in [the parents'] favor" (Parent Ex. Y ¶¶ 3-5).

<sup>2</sup> The student's eligibility for special education as a student with an other health-impairment is not in dispute (see 8 NYCRR 200.1[zz][10]).

## **A. Due Process Complaint Notice**

In an amended due process complaint notice dated October 28, 2022, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. T at p. 1).<sup>3</sup> The parents further asserted that the March 2022 IEP was procedurally and substantively inadequate and that the March 2022 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 (*id.* at pp. 1, 2).<sup>4</sup> The parents also contended that the March 2022 IEP was not sufficient or appropriate to address the student's needs insofar as it did not speak to his needs and contain 1:1 and small group instruction, and that it provided inappropriate participation in assessments and lacked sufficient promotional criteria (*id.* at p. 2). As relief, the parents requested funding/tuition reimbursement for summer 2022 at the Jewish Center for Special Education and for funding/tuition reimbursement for the 10-month school year at Darchai Menachem (*id.* at p. 3).

## **B. Impartial Hearing Officer Decision**

The parties convened on November 29, 2022, following the acceptance of the parents' amended due process complaint notice (Tr. pp. 1-9). A prehearing conference was held on February 1, 2023 (Tr. pp. 10-15).<sup>5</sup> An impartial hearing convened on December 21, 2023, and concluded on February 5, 2024, after three days of proceedings (Tr. pp. 40-173). In a decision dated March 18, 2024, the IHO found that the district did not present adequate evidence to sustain its burden that its recommended program and placement "would be designed to offer the student educational benefit for the" 2022-23 school year and failed to demonstrate that the IEP was reasonably calculated to confer educational benefit (IHO Decision at p. 13). The IHO next stated that the parents acknowledged that the student's attendance at the Jewish Center for Special Education for summer 2022 "had been paid for through their pendency agreement with the [district]" (*id.* at p. 14). Turning to the student's unilateral placement at Darchai Menachem, the IHO found that the evidence did not "truly support a finding that the student was receiving a program appropriate to his needs ...the student was placed in a class with students functioning on a kindergarten and first grade level based on his age, and functioned only as a result of being provided a 1:1 paraprofessional" (*id.* at p. 22). The IHO further noted that the student "was eight years [] old and most of the other students appeared to be six years of age" (*id.*). The IHO found that the parents did not sustain their burden of demonstrating that the student's program at Darchai Menachem was appropriate to meet his needs (*id.*). The IHO stated that "[i]t appear[ed] as if the parent desired that the student be placed with 'higher functioning' students and opted to place [the

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<sup>3</sup> The parents filed an initial due process complaint notice on July 5, 2022 (Parent Ex. A at p. 1).

<sup>4</sup> The parents also claimed that the district violated Section 504 of the Rehabilitation Act of 1973 (section 504), 29 U.S.C. § 794(a) (Parent Ex. A at p. 1).

<sup>5</sup> Status conferences were held on March 13, 2023, July 20, 2023, October 12, 2023, November 9, 2023 (Tr. pp. 16-39). The IHO's decision and certification of the hearing record reflected that additional status conferences were held on August 19, 2023, and on December 8, 2023 (IHO Decision at p. 1). In a written clarification, the IHO indicated that the December 8, 2023 date was an error. There was no explanation provided for the August 19, 2023 date and no transcript for August 19, 2023 was submitted with the certified hearing record.

student] at Darchai Menachem," that the student was placed with students functioning on a kindergarten to first grade level who were two years younger than the student, and that the student "appeared to have great difficulty attending to tasks in the class and failed to be appropriately engaged with other students" (*id.* at pp. 22-23). The IHO found that the student "was in the class with higher functioning students but it [wa]s not at all evident that he benefited from that other than sitting in the room with a paraprofessional" (*id.* at p. 23). Having found that the parents did not meet their burden of demonstrating the appropriateness of Darchai Menachem, the IHO denied their requested relief (*id.* at p. 23).

#### **IV. Appeal for State-Level Review**

The parents appeal, alleging that the IHO erred in finding that the parents' unilateral placement of the student at Darchai Menachem was not appropriate. The parents further argued that the IHO failed to consider the totality of the circumstances, which demonstrated that the student was receiving specially designed instruction to meet his unique educational needs. The parents also contend that equitable considerations favor direct funding of the parents' unilateral placement. As relief, the parents request direct funding of the cost of the student's attendance at Darchai Menachem for the 2022-23 school year.

In an answer and cross-appeal the district denies the parents material allegations and requests that the IHO's determination that the parents' unilateral placement of the student at Darchai Menachem was not appropriate be upheld. As a cross-appeal, the district acknowledges that the IHO did not make any findings related to equitable considerations, however, if the parents' unilateral placement is found to be appropriate on appeal, the district asserts that equitable considerations weigh against the parents. Specifically, the district asserts that the parents did not incur a financial obligation to Darchai Menachem because the contract was not countersigned, that the amount of time the student spent receiving religious instruction should be deducted from any award, that the religious portion of instruction was segregable and not necessary for the provision of a FAPE.

In an answer to the district's cross-appeal the parents allege that the district did not raise any issues related to equitable considerations at the impartial hearing and if considered are also without merit.

#### **V. Applicable Standards**

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits

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

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

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

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>6</sup>

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 2022-23 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**

The parents claim that the IHO made numerous errors in her analysis of the hearing record and gave undue weight to the student's grouping at Darchai Menachem, the role of the paraprofessional, and the amount of religious instruction that the student received at Darchai Menachem. As discussed more fully below, the legal standard for determining the appropriateness

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<sup>6</sup> 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).

of a unilateral placement pursuant to a Burlington/Carter analysis is whether the unilateral placement provided instruction specially designed to meet the unique needs of the student. Additionally, the program provided by the parents' unilateral placement must be reasonably calculated to enable the student to receive educational benefit. The IHO articulated the correct legal standards in her decision; however, upon application of those standards her analysis of the appropriateness of the parents' unilateral placement appeared to hold Darchai Menachem to the same procedural requirements a district must follow in the provision of a FAPE, and further improperly focused on the amount of religious instruction the student received rather than whether the evidence tended to show that the special education programming provided by Darchai Menachem constituted instruction specially designed to address the student's needs when viewed in light of the totality the circumstances.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). Citing the Rowley standard, the Supreme Court has 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 Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 203-04 [1982]). 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. The Student's Needs**

While the student's needs are not in dispute, a discussion thereof provides context for the issue to be resolved on appeal, namely, whether the student's unilateral placement at Darchai Menachem, was appropriate to meet his special education needs.

In June 2017, administration of the Stanford-Binet Intelligence Scales-Fifth Edition (SB-5) to the student yielded a full-scale intelligence quotient (FSIQ) in the deficient range and administration of the Vineland Adaptive Behavior Scales-II (Vineland-II) to the parent yielded an adaptive behavior composite in the second percentile (Dist. Ex. 12 at pp. 3-4). A district psychoeducational evaluation of the student conducted during the 2022-23 school year reflected that administration of the Wechsler Intelligence Scale for Children-Fifth Edition (WISC-V) to the student yielded a standard score of 72 (borderline) and on the Kaufman Test of Educational Achievement-Third Edition (KTEA-3), he achieved subtest standard scores of 68 (letter and word recognition), 71 (reading comprehension), 63 (math concepts and applications), and 40 (written expression) (Dist. Ex. 11 at pp. 4-5). A February 2022 teacher progress report indicated that the student presented with hearing impairment, wore "hearing aids along with a[n] FM unit operated by the teacher," and exhibited "significant delays in expressive, receptive, and pragmatic language skills, poor articulation and reduced vocabulary" (Dist. Ex. 4 at p. 1). According to the teacher report, the student was "fidgety, easily distracted and ha[d] difficulty sitting in his chair and focusing on a lesson" (id.). The student was reported to have a short attention span, required frequent breaks, and had difficulty completing tasks and working independently (id.). In addition, the student presented with poor memory skills, reduced intelligibility, and poor auditory processing (id.). The February 2022 teacher report noted that the student required modified instruction with review and reinforcement to acquire skills (id.).

Academically, the February 2022 teacher progress report stated that the student was then-currently reading at a beginning first grade level and was able to "decode and encode CVC words for all vowel sounds" (Dist. Ex. 4 at p. 1). The student used picture cards to sequence three parts of stories and answer "wh" questions (id. at pp. 1-2). His teacher noted that the student used visual

aids, multisensory materials, and positive reinforcement to learn new material and a "variety of games and activities [we]re necessary to keep him focused and motivated" (id. at p. 2). In math, the student was at the beginning of first grade level and was able to identify numerals one to 100, sequence the numbers, and tell which number was greater or less (id.). The February 2022 teacher report indicated that the student had difficulty writing, could trace letters and numbers, and was learning to write his first name independently (id.).

Socially, the February 2022 teacher report noted that the student was "well-liked" by his peers but that his communication was "limited" due to articulation deficits (Dist. Ex. 4 at p. 1). He was able to initiate and maintain a conversation but became frustrated when peers were unable to understand his speech (id.). The February 2022 teacher report noted that the student was learning to play games and display appropriate turn taking skills (id.).

With regard to the student's speech-language development, a February 2022 progress report complete by his speech-language pathologist indicated that the student presented with "significant receptive and expressive language delays, with oral-sensory-motor and feeding deficits, with severely compromised speech intelligibility, and with social-emotional, pragmatic, and behavioral concerns" (Dist. Ex. 5 at p. 1). She described the student as presenting with a "mild sloping to severe sensorineural hearing loss bilaterally," and reported that he wore "bilateral hearing aids, and an FM unit [wa]s used within the classroom and therapy settings to improve the signal-to-noise ratio" (id.). The speech-language pathologist noted that the student had difficulty with remaining seated and attentive during tasks "due to a high level of activity and distractibility" (id.). Further, she noted that he was mostly a self-directed and resisted "following specific commands and directions" (id.). Receptively, the speech-language pathologist indicated that the student showed difficulty with all auditory tasks such as "basic sentence imitation and word discrimination" (id.). Expressively, the student's speech-language pathologist stated that the student struggled with using "tenses, omission of possessive /s/ and of auxiliary verbs," correct pronouns, and with "age-appropriate picture description and early narrative skills" (id.). The speech-language pathologist indicated that the student's speech intelligibility was poor "on the single word level," which she attributed to his hearing impairment and his "severe oral-motor and motor planning difficulties" (id.). According to the February 2022 report, the student was resistant to oral motor activities during sessions, specifically, those involving "dissociating his articulators from his head and from each other" (id. at p. 2). Further, the student's speech-language pathologist stated that counseling was provided to both his parents and teachers regarding the student's deficient feeding and oral-sensory skills as his cooperation was limited and there had been minimal progress (id.).

Turning to the student's physical development, a February 2022 PT progress note indicated that the student received PT to address balance, strength, motor planning, coordination, and gross motor skill delays, and that he presented with muscle weakness in his trunk, upper and lower extremities and that he had difficulty completing a motor plan (Dist. Ex. 7). The student's physical therapist noted that the student presented with "overall weakness, low balance, body awareness, spatial awareness, and self-regulation skills, affecting his social skills and academic performance" (id.). According to the progress report prepared by the student's occupational therapist in February 2022, the student received OT to address delays in attention span, fine and graphomotor skills, motor planning, and sensory processing (Dist. Ex. 8). In addition to difficulty with "various aspects of attention" and self-regulation skills, the student exhibited "limitations with scissor

skills," an immature pencil grasp, excessive pressure on a pencil when writing, and difficulty copying simple shapes (*id.*). The student's occupational therapist also noted that the student had poor body and spatial awareness and frequently stumbled or bumped into objects in his surroundings (*id.*). The March 2022 IEP included parent concerns regarding the student's balance and his ability to "catch himself with coordination" (Dist. Ex. 3 at p. 7).

The hearing record included a February 2022 hearing education services progress report that indicated in addition to the student having a "mild to moderate sensory neural bilateral hearing loss," the student had received a diagnosis of hypoplastic corpus callosum, which could "severely impact his development in areas of cognition, motor acquisition and sensory integration" (Dist. Ex. 6). The student's hearing education teacher noted that he could be very distracted by visual or auditory sensory stimuli and had difficulty comprehending short paragraphs or stories auditorily and with high level thinking skills (*id.*). According to the progress report, the student worked on developing auditory listening skills, following directions with multiple elements and building higher level comprehension by encouraging visualization of auditory information (*id.*). The March 2022 IEP stated that the student had an FM unit and hearing aids in both ears "to be used at all times" (Dist. Ex. 3 at p. 7).

## **2. Specially Designed Instruction and Progress**

An administrator at Darchai Menachem (administrator) provided direct testimony by affidavit stating that the student attended Darchai Menachem for the 10-month 2022-23 school year (Parent Ex. W ¶¶ 1, 5).

The 2022-23 program description of Darchai Menachem entered into evidence by the parents indicated that the school provided a special education program for children struggling with behavior issues, learning disabilities, communication and/or social challenges (Parent Ex. L at p. 1). The program's stated mission was to provide core academic, social, and life skills through individual and group instruction tailored to each child's needs (*id.*). The program description also indicated that Darchai Menachem enrolled approximately 140 students in grades K-12 and generally served students with behavioral/social issues such as autism spectrum disorder (ASD), attention deficit hyperactivity disorder (ADHD), dyslexia, dysregulation syndrome, pediatric bipolar disorder, and emotional dysregulation (*id.*). Services provided to students included OT, PT, speech-language therapy, counseling, SETSS, and 1:1 paraprofessional support if needed (*id.*). The program used a school-wide behavior modification system that included individual student goals, data collection, and consistent feedback (*id.*). Additionally, the program supported parents with regular group counseling and training sessions as well as offering 1:1 support as needed (*id.* at p. 2). The Darchai Menachem first grade syllabus and standard description stated that the standards were "based off the NYS Common Core standards at one grade below [S]tate level" (Parent Ex. D at p. 1). The Darchai Menachem 2022-23 general daily schedule showed that the school operated Sunday through Friday, with both Sunday and Friday being a half-day of program (Parent Ex. M). The administrator indicated that the school had a wellness director who held a master's degree in special education, was a "[l]icensed" special education teacher, and that his role was to "oversee all services and ensure the students' well-being" including academics, social/emotional development, and related services (Parent Ex. W ¶ 3). The administrator also stated that the school had a Board Certified Behavior Analyst (BCBA) on staff during the 2022-23 school year who served as an academic and behavior supervisor (*id.* ¶ 4).

The hearing record shows that during the 2022-23 school year the student was enrolled in a 12:1+1 first grade class composed of 11 other students ranging in age from five to eight years old, one teacher and two assistants (Parent Exs. W ¶¶ 6, 9; X ¶ 2). The student's teacher testified that he had a bachelor's degree in liberal arts and sciences and was pursuing a master's degree in applied behavior analysis (ABA) (Parent Ex. X ¶ 1).<sup>7</sup> The student was also provided with full-time 1:1 paraprofessional services that provided him with ongoing hearing and academic support, and 1:1 English language arts (ELA) literacy and math specialist support "in such academic areas each day" (Parent Ex. W ¶ 6). The student's schedule reflected, among other activities, that the student received twice weekly OT and speech-language therapy respectively, four sessions each per week of math and ELA literacy skills instruction with a specialist, six sessions of second language instruction per week, four sessions of handwriting per week, science twice per week, and art and history once per week (Parent Ex. M).<sup>8, 9</sup>

An undated report prepared by the student's "[r]eading and [m]ath specialist" indicated that the student's delays in these areas were "addressed by a [s]pecial [e]ducation provider trained in [the] ABA methodology" (Parent Ex. F at p. 1).<sup>10</sup> To address the student's reading and writing needs, the report indicated that the "provider" used picture cue cards for word association and graphic organizers as repeated practice for the student's reading and phonics skills (*id.* at p. 2). The student's classroom teacher stated that during literacy instruction, the student worked on skills such as basic phonics, CVC words, digraphs, vowels, and consonant blends using the ReadBright curriculum and he "had the support of his 1:1 paraprofessional and his 1:1 ELA specialist" who would either "assist him in the classroom, or would teach him outside of the classroom, if necessary, to ensure that he was benefiting from the instruction" (Parent Ex. X ¶ 10).

To address the student's math needs, his teacher indicated that the student worked on recognizing and counting numbers to 100 and rote counting to 100, counting by twos, fives, and 10s, addition problems with and without math manipulatives, subtraction problems, place value, and money using the Spectrum Math curriculum (Parent Ex. X at ¶11). His teacher stated that the student's 1:1 math specialist was present during math instruction to provide redirection as needed in the classroom and would also teach him outside of the classroom if necessary to benefit the student's math learning (*id.* ¶¶ 6, 11).

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<sup>7</sup> The administrator testified that although the student's teacher was not certified in special education, he worked under the program's supervisors and that the first grade supervisor during the 2022-23 school year had a master's degree in early childhood education and held NYS certifications in students with disabilities (birth to second grade and first to sixth grade) and early childhood (birth to second grade) (Tr. p. 112; Parent Ex. W ¶ 7).

<sup>8</sup> The hearing record also included a 2022-23 Darchai Menachem schedule for fifth grade, which the administrator testified was not the correct schedule for the student (Tr. pp. 105-06; Dist. Ex. 10).

<sup>9</sup> In his affidavit, the student's teacher indicated that the student's schedule inaccurately listed history during the class period when the student received direct social skills instruction, and history instruction for the student occurred during morning meeting (Parent Exs. X ¶ 5; *see* Tr. p. 132).

<sup>10</sup> Based upon the age of the student as listed in the progress report as well as other dated assessments with the student's age that were described in his IEP, it can be deduced that the report was prepared the near the middle of the 2022-23 school year (*see e.g.*, Parent Ex. F at p. 1; Dist. Ex. 3 at p. 2).

Turning to the student's social/emotional needs, the hearing record included an individualized behavior intervention plan (BIP) created by Darchai Menachem to address the student's targeted behaviors of noncompliance, putting his hand in his mouth, and undressing (Parent Exs. G at p. 1; W ¶ 11). The student's BIP included hypotheses of influencing factors, which included difficulty regulating sensory input needs due to extended periods of direct instructions, an inability to express his needs, request attention, or state his emotions, and environments or conditions that restricted the student's movements (Parent Ex. G at pp. 1-2). Interventions listed within the BIP included creating an inclusive, movement-friendly environment, fostering a supportive classroom culture, providing regular sensory breaks, tools, and movement activities, improving the student's ability to communicate, teaching appropriate methods to gain attention, encouraging the use of words, and using a differential reinforcement system and planned ignoring (id. at p. 2). Further, Darchai Menachem provided the student with direct social skills instruction weekly, a structured recess daily where social skills were practiced, taught, and reinforced, visuals, and a 1:1 paraprofessional who could prompt and redirect him (Parent Exs. W ¶ 13; X ¶ 5). The student's teacher described that he was generally present in the classroom observing and assisting during the student's weekly social skills instruction which used the Social Thinking Curriculum to address numerous social skills (Parent Ex. X ¶ 5). He indicated that the curriculum also "involved using books and social stories, with, for instance, the following themes: body language, thinking with eyes, problem solving, and group plan" (id.). The teacher explained that the problem solving book helped address the students' ability to play games, and the group plan book helped the student to learn to follow rules (id.). During the student's daily structured recess, the teacher stated that he and "the assistants" supervised the student and his peers playing games with each other to ensure that they were following the rules and taking turns properly, to reinforce appropriate interactions, and to intervene if needed to redirect students when acting inappropriately (id.). The student's teacher indicated that he met with the classroom BCBA to discuss and review the student's progress, to review strategies and interventions to use with the student, and ABA based strategies that he could incorporate into the classroom itself as well (id. ¶ 7). According to the student's teacher, the BCBA also met with the student's 1:1 paraprofessional to aid with implementation of the school wide and individual behavior strategies (id.).

Next, regarding related services, the administrator at Darchai Menachem stated that the student received speech-language therapy twice per week at school and once per week at home from licensed speech-language pathologists, and OT twice per week at school from a licensed occupational therapist (Parent Ex. W ¶ 10). The student's speech-language pathologist during the 2022-23 school year indicated that the student presented with "significant receptive and expressive language deficits including low intelligibility, pragmatic and behav[ioral] concerns" (Parent Ex. I at p. 1). The speech-language pathologist stated that the student benefitted from intervention strategies targeting articulation and opined that the student would "benefit tremendously from extensive articulation therapy to increase his intelligibility due to lack of sounds in his repertoire" (id.). According to the speech-language pathologist, the student "displayed a high level of distractibility and lack of cooperation that significantly impacted integration of both lessons in therapy and in class," and she "commenced" intervention strategies targeting task completion and lesson retention (id.).

As noted above, the student received OT weekly and the occupational therapist reported that during the 2022-23 school year, the student worked on sensory integration skills by using various textures, sounds, and movements for increased participation in classroom activities (Parent

Ex. H). The occupational therapist worked on improving the student's fine motor skills including developing hand strength, bilateral coordination, and precise hand movements through activities such as cutting, handwriting, and manipulating small objects (*id.*). To improve the student's visual motor integration skills, the occupational therapist used activities that coordinated visual perception with motor skills such as using puzzles, tracing, and coloring within the lines (*id.*). The occupational therapist and the student worked on improving the student's independence in daily living activities by practicing skills such as dressing and personal hygiene (*id.*).

Regarding progress, the student's teacher stated that he measured the student's progress informally on a weekly basis by reviewing the individual skills that he was working on and then conducted a formal assessment, the Achieve Test, at the end of the year (Parent Ex. X ¶ 3). Results from the June 2023 administration of the Achieve Test to the student indicated that he had mastered the following benchmarks: author's purpose and plot, main idea, making inferences, number sense, statistics and probability, and supporting details (Parent Ex. J at pp. 1-2). The student achieved partial mastery on benchmarks measuring cause and effect, drawing conclusions, sequencing, spatial sense, and summarizing (*id.*). His teacher stated that the student had improved in ELA literacy, handwriting, and math (Parent Ex. X ¶¶ 9-11). Further, his teacher indicated that by the end of the 2022-23 school year, there was a decrease in all of the behaviors identified in the BIP and that the student had a "noticeable reduction in putting his hands in his mouth and his noncompliance also decreased" (Parent Ex. X ¶ 7; *see* Tr. pp. 134-35).

The parent, in her affidavit, testified that that the student had "benefited greatly" at Darchai Menachem during the 2022-23 school year (Parent Ex. Y ¶ 14). She noted improvements in his writing, sight word recognition, vocabulary, use of a number line when doing math and completing addition/subtraction problems, and his ability to interact appropriately with others (*id.*). The student's speech-language pathologist indicated that the student made moderate gains in task completion, auditory discrimination, and articulation skills between February and June 2023 (Parent Ex. I at p. 1). An end of year June 2023 OT progress report stated that the student had made "significant" progress in developing sensory integration skills, improved control and accuracy in fine motor tasks, hand-eye coordination, and self-care skills, and had made strides in the area of social interactions with peers (Parent Ex. H at p. 1).

Although the IHO characterized the testimony of the parents' witnesses as "at odds" with each other or as "vague," (IHO Decision at pp. 20, 21), the parent, the student's teacher, and related services providers provided evidence about the student's progress at Darchai Menachem, which was not refuted by the district (*see* Parent Exs. H; I; X; Y). Moreover, 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]).

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 parents' unilateral placement of the student and indicate that it was reasonably calculated to enable the student to receive educational benefits. Although the omission of hearing education services and PT was less than ideal,<sup>11</sup> 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).<sup>12</sup> 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.

### **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

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<sup>11</sup> I have also factored in that Darchai Menachem staff reported that the student continued to have the supports of his hearing aides and FM unit during the 2022-23 school year (Parent Ex. F at p. 1).

<sup>12</sup> Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

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 did not make any determinations related to equitable considerations. The district alleges in its cross-appeal that the parents did not establish a financial obligation with Darchai Menachem and that the portion of religious instruction the student received exceeded the requirements of a FAPE and were segregable. The district also argues that Article XI Section 3 of the New York State Constitution and federal regulation required the reduction of the award for any time spent in religious instruction.

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 whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private 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 [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"]).

Here the districts arguments that a reduction is required by the State Constitution or federal regulation misses the mark because the unilateral placement of the student a Darchai Menachem was not an action by the district, but an permissible action by the parent in response to the district's failure to complete its obligation under the federal statute.



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

In Carson, the Supreme Court annulled a Maine law that gave parents tuition assistance to enroll their children at a public or private nonreligious school of their choosing because their town did not operate its own public high school (596 U.S. at 789). The program in Maine allowed parents who live in school districts that did not have their own high school or did not have a contract with a school in another district, to send their student to a public or private high school of their selection (id. at 773). The student's home district then forwarded tuition to the chosen public or private school (id.). However, the Maine law creating the program barred funds from going to any private religious school (id.). The parents in the Carson case lived in school districts that did not operate public high schools, and challenged the tuition assistance program requirements which they felt would not award them assistance to send their children to religious private schools (id.). The parents sued the Maine education commissioner in federal district court, alleging that the "nonsectarian" requirement violated the Free Exercise Clause and the Establishment Clause of the First Amendment (id.). Ultimately, the Supreme Court found the law to be unconstitutional on the grounds that it violated the Free Exercise Clause of the First Amendment by excluding religious private schools from receiving funding (id. at 789).

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement in a Burlington/Carter analysis, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest, 509 U.S. at 10). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at \*7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at \*10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];<sup>13</sup> see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F.

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<sup>13</sup> 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).

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]).<sup>14</sup> Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases summarized above, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380, 392-93 [D. Mass. 1998], citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this matter, it is uncontroverted that the district failed to offer the student a FAPE for the 2022-23 school year. Based on this, the parents 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. The State and federal law cited by the district operates as 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. 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 district's argument that tuition reimbursement should be reduced because it the religious aspects of the class were segregable, here, the district does not provide any support for the proposition that the subject matter of a particular class period could cause the class to be treated as a segregable special education service for these purposes, rather than as the type of feature that is "inextricably linked to the substitution" of a private program for a public one (Bd. of Educ. of City Sch. Dist. of City of New York v. Gustafson, 2002 WL 313798, at \*7 [S.D.N.Y. Feb. 27, 2002] [finding features such as small class size or greater personal attention were not segregable]). With regard to the degree to which the services are segregable, 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-

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<sup>14</sup> 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"])).

130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071).

The district points to the student's schedule and argues for a reduction based on the amount of time the student spent in particular classes; 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).

Finally, with respect to the district's assertion that the parents failed to demonstrate that they had a financial obligation to Darchai Menachem, this assertion is without merit, as the parents produced a tuition contract for the 2022-23 school year, the student attended Darchai Menachem for the 2022-23 school year and the parent's affidavit reflected her understanding that the parents were responsible for paying the student's tuition at Darchai Menachem (Parent Exs. N; O; Y at ¶13). As, the district has not challenged the student's religious instruction on any other grounds, there is no equitable basis for a reduction in reimbursement for the cost of the student's attendance at Darchai Menachem.

## **VII. Conclusion**

Having determined that the evidence in the hearing record does not support the IHO's finding that Darchai Menachem was an inappropriate unilateral placement and having found that equitable considerations do not warrant a reduction in the amount of tuition funding, the IHO's decision is reversed.

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

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision dated March 18, 2024 is modified by reversing those portions that found that the parents' unilateral placement at Darchai Menachem was not appropriate for the 2022-23 school year; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated March 18, 2024, is modified to provide that the district shall reimburse the parents in the amount of \$8,050 and directly fund

the remaining balance of the cost of the student's attendance at Darchai Menachem in the amount of \$112,000.

**Dated:**        **Albany, New York**  
                  **July 11, 2024**

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**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**