The University of the State of New York

The State Education Department
State Review Officer
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No. 24-197

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Daniel A. Costigan, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer an appropriate educational program to respondent's (the parent's) son and ordered it to fully reimburse the parent for her son's tuition costs at the Mill Basin Yeshiva Academy (Mill Basin) for the 2022-23 and 2023-24 school years. The 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[a]). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Given the limited issues to be resolved on appeal, a full recitation of the student's educational history is unwarranted. Briefly, the student, who is eligible to receive special education as a student with an other health impairment, attended Mill Basin—a religious, nonpublic school—for the 2022-23 (second grade) and the 2023-24 (third grade) school years at issue (see Parent Exs. E-Q; U ¶¶ 14, 29).[1] Evidence in the hearing record reflects that the student

[1] For the 2022-23 school year, the student was eligible for special education and related services as a student with autism; however, for the 2023-24 school year, while the student remained eligible to receive special education, his eligibility category was changed to other health impairment (compare Dist. Ex. 1 at p. 1, with Dist. Ex. 2 at p. 1). As reflect in the student's IEP developed for the 2023-24 school year, a neuropsychological evaluation (dated

participated in the "Yesod Program" at Mill Basin, which was described as a "rigorous curriculum for students in Kindergarten through 3rd grade who struggle with language based learning and foundational skills" (Parent Exs. E at p. 1; F at p. 1; K at pp. 1-3). According to the program description, Yesod was "Hebrew for foundation, reflecting [their] belief and aligned with research-based evidence that explicit instruction of foundational skills [wa]s critical in early elementary school" (Parent Ex. E at p. 1). The Yesod program consisted of a "specialized classroom program that serve[d] student with disabilities in a small classroom setting, [with] the goal of successfully returning to a mainstream setting"; additionally, Yesod program classrooms were "taught by special education teachers who work[ed] collaboratively with the general education teachers and related service providers to modify and enhance instruction for each student" (id.).

By due process complaint notice dated September 7, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2022-23 and 2023-24 school years based on various procedural and substantive violations (see generally Parent Ex. A).[2] As relief, the parent sought an order directing the district to directly fund or reimburse the parent for the costs of the student's unilateral placement at Mill Basin in the Yesod program for the 2022-23 and 2023-24 school years (id. at p. 4).

On October 23, 2023, the parties proceeded to an impartial hearing, which concluded on February 13, 2024, after five total days of proceedings (see Tr. pp. 1-147). In a decision dated April 10, 2024, the IHO concluded that the district failed to offer the student a FAPE for the 2022-23 and 2023-24 school years, that Mill Basin and the Yesod program was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's requested relief (see IHO Decision at pp. 3, 5-13).

As relevant to this appeal, the IHO, in finding that equitable considerations weighed in favor of the parent's requested relief, addressed the district's concerns with awarding funding or reimbursement for the religious instruction delivered to the student while attending Mill Basin (see IHO Decision at pp. 11-13). More specifically, the IHO examined and confirmed testimonial evidence elicited at the impartial hearing indicating that the student received religious instruction through his "Prayer" and "Judaic Studies" classes during the 2022-23 school year for approximately 8.15 percent of his school week (id. at pp. 11-12). For the 2023-24 school year, the IHO also confirmed, through his own calculations, that the student received religious instruction

2021) indicated that the student was "no longer diagnosed with Autism Spectrum Disorder," but instead, was diagnosed as having an attention deficit hyperactivity disorder (ADHD) and a specific learning disability with impairments in reading and writing (Dist. Ex. 2 at p. 1). Nevertheless, the student's eligibility for special education and related services as a student with either autism or an other health impairment is not in dispute (see 34 CFR 300.8[c][1], [c][9]; 8 NYCRR 200.1[zz][1], [zz][10]). Additionally, the Commissioner of Education has not approved Mill Basin as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7]).

[2] In the due process complaint notice, the parent invoked the student's right to pendency services based on an unappealed IHO decision, dated February 9, 2023 (see Parent Ex. A at p. 4). The IHO in this matter issued an interim decision on pendency, dated November 15, 2023, which ordered the district to fund the student's 10-month school program at Mill Basin in the Yesod program, consistent with the unappealed IHO decision (see Interim IHO Decision at p. 1).

through his "Prayer, Parsha, Chumash, Yediot Klailiot (sic) and Yahadut classes," which constituted approximately 14.39 percent of his school week (id.).[3]

With this as a backdrop, the IHO next reviewed Supreme Court caselaw, including the pertinent holdings in Zobrest v Catalina Foothills School District, 509 U.S. 1 (1993); Espinoza v Montana Department of Revenue, 591 U.S. _, 140 S. Ct. 2246 (2020); and Carson v Makin, 596 U.S. 767 (2022) (see IHO Decision at p. 12). Based on his review, the IHO initially noted that the IDEA was a "neutral government program that distribute[d] benefits 'to any child qualifying as disabled under the IDEA, without regard to the sectarian-non-sectarian, or public-nonpublic nature of the school the child attend[ed]'" (id., citing Zobrest, 509 U.S. at p. 10). Thus, the IHO noted that, according to the Supreme Court's view, "'[d]isabled children, not sectarian schools, [we]re the primary beneficiaries of the IDEA,'" and to the extent that "'sectarian schools benefit[ted] at all from the IDEA, they [we]re only incidental beneficiaries,' because '[a]ny attenuated financial benefit that [sectarian] schools do ultimately receive from the IDEA [wa]s attributable to the private choices of individual parents,' and not to government decision making" (IHO Decision at p. 12, citing Zobrest, 509 U.S. at p. 12). The IHO then noted that, in Espinoza, the Supreme Court "indicated that '[a] State need not subsidize private education,'" however, "'once a State decide[d] to do so, it c[ould not] disqualify some private schools solely because they [we]re religious'" (IHO Decision at p. 12, citing Espinoza, 140 S. Ct. at p. 2261). And finally, the IHO turned to the Court's holding in Carson, which held that "'a neutral benefit program in which public funds flow[ed] to religious organization through the independent choices of private benefit recipients d[id] not offend the Establishment Clause'" (IHO Decision at p. 12, citing Carson, 142 S. Ct. at p. 1997).

The IHO acknowledged that although the Supreme Court's decisions had not "directly addressed the issue of tuition reimbursement for the portion of religious instruction provided at a private school, the principles outlined in each of these decisions provide[d] relevant guidance" (IHO Decision at p. 12). The IHO further acknowledged that other federal courts had determined that "full tuition reimbursement for sectarian programs [wa]s appropriate under the Establishment Clause" (IHO Decision at p. 12, n.36 [collecting cases]).

In light of the foregoing, the IHO concluded that the parent was entitled to be fully reimbursed for her out-of-pocket costs for the student's tuition at Mill Basin in the Yesod program for the 2022-23 and 2023-24 school years, and, moreover, she was entitled to an award of direct funding for the remainder of the student's tuition costs for both school years (see IHO Decision at pp. 12-14).

IV. Appeal for State-Level Review

The district appeals, arguing on a limited basis that the IHO erred by finding that, regardless of the religious instruction delivered to the student at Mill Basin in the Yesod program, the parent was entitled to an award of the full costs for the student's tuition therein for the 2022-23 and 2023-24 school years. More specifically, the district contends that the IHO erred by ignoring the absence of any evidence to demonstrate that "Prayer" constituted an academic subject, as opposed to a group act of religious worship, and thus, was beyond the scope of what is reimbursable under the

[3] In the hearing record, Parsha, Chumash, Yediot Klaliot, and Yahadut classes were collectively referred to as "Religious Studies" (see, e.g., Parent Ex. W ¶17[a]).

IDEA. The district also contends that, contrary to the IHO's decision, classes identified as "Chumash, Yediot Klaliot, Yahadut and Parsha," as well as "Judaic Studies," were all religious classes and similarly beyond reimbursement available under the IDEA. Next, the district asserts that federal regulations require deductions for time the student spent receiving religious instruction. As a final argument, the district argues that the IHO erred by failing to reduce the amount of tuition awarded to the parent on the basis that "Judaic studies" was a segregable service that exceeded the level required for a FAPE. As relief, the district seeks to modify the IHO's decision by reducing the amount of tuition costs awarded for both school years by a percentage attributed to the portion of the school week the student spent receiving religious instruction.

The parent did not file an answer to the district's request for review.

V. Discussion

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Initially, the district has not appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 and the 2023-24 school years and that Mill Basin and the Yesod program was an appropriate unilateral placement for the student for the 2022-23 and the 2023-24 school years (see generally Req. for Rev.). Accordingly, these findings have become final and binding and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only issue presented on appeal is whether the IHO erred by declining to reduce the amount of tuition awarded for the student's attendance at Mill Basin for the portions of the school day the evidence, and the IHO, determined to be religious instruction.

As noted above, the crux of the district's appeal its argument that the evidence in the hearing record establishes that the student's classes—Prayer, Chumash, Yediot Klaliot, Yahadut, Parsha, and Judaic Studies—were religious in nature and content, without an academic component, and

were thus, beyond the category of what is reimbursable under the IDEA. In support of this contention, the district points to federal regulations, asserting that because these religious classes represent religious training and the advancement of religion, they run afoul of the First Amendment and the private school is precluded from receiving federal funding under the IDEA for those portions of the school day. More specifically, the district cites to the U.S. Constitution and the constraints placed on Congress's spending power. Additionally, the district asserts that the student's class schedule is an appropriate proxy to use to apportion a percentage of the total tuition costs attributable to religious classes as a basis to deny reimbursement or direct funding.

In reaching the conclusion that equitable considerations warranted an award of full reimbursement to the parent, the IHO specifically considered the religious nature and content of the student's classes, and consistent with the district's arguments, found that the evidence in the hearing record demonstrated that Prayer, Chumash, Yediot Klaliot, Yahadut, Parsha, and Judaic Studies, were religious in nature (see IHO Decision at pp. 10-12). The IHO also credited the testimonial evidence establishing that the student's religious classes constituted "8.15 [percent]" of his instruction during the 2022-23 school year and "14.39 [percent]" of his instruction during the 2023-24 school year (id. at pp. 11-12). In this regard, the district's arguments do not point to any error in the IHO's decision, as the IHO concluded that the student's schedule for both school years included religious instruction. Contrary to the district's arguments, the IHO directly addressed the religious nature of the student's instruction at Mill Basin in the Yesod program in the decision and did not find that it was reimbursable because the classes provided an academic component; rather, the IHO found that, based on the relevant Supreme Court case law, the funding of the religious classes under the IDEA did not offend the Establishment Clause (id. at pp. 11-13).[4]

Relatedly, the district's contention that, based on federal regulation that prevents school districts from using IDEA funding for religious instruction, the IHO erred by failing to reduce the amount of tuition reimbursement is not persuasive (see Req. for Rev. ¶¶ 7-14). The pertinent federal regulation cited by the district states that "[n]o State or subgrantee may use its grant or subgrant to pay for any . . . [r]eligious worship, instruction, or proselytization" (34 CFR 76.532; see Req. for Rev. ¶ 8).

As has been explained in prior decisions, the district's arguments are flawed in several respects. First the party seeking equitable relief for the denial of a FAPE, and who incurred the liability for the student's unilateral placement as a result, is the parents and they are neither the State nor a subgrantee within the meaning of 34 CFR 76.532. Instead it was the subgrantee, namely the district, who caused the denial of a FAPE and left the parents to fix it with a self-help remedy and bear the risk that they might not succeed in their Burlington/Carter claims. Accordingly, the regulation does not apply to the facts of this case. Furthermore, the Supreme Court has held the federal regulation in question is not a separate limitation on the IDEA, but is merely coextensive with the requirements of the Establishment Clause (Zobrest v Catalina Foothills Sch. Dist., 509 U.S. 1, 7 n.7 [1993]). Accordingly, in asking for interpretation of this particular federal regulation as part of this administrative proceeding, the district is, in all practicality, asking the administrative due process tribunal to draw conclusions based upon constitutional law principles; therefore, I will

[4] The district made all of the same arguments against awarding full reimbursement to the parents in its closing brief submitted to the IHO (see IHO Ex. I at pp. 5-20).

provide the analysis below out of an abundance of caution while acknowledging that a federal or state court is the appropriate forum in which to resolve such constitutional law disputes.

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

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

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement in a Burlington/Carter analysis, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest, 509 U.S. at 10). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment

Clause];[5] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F. Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at 818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[6] 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 and 2023-24 school years. Based on this, the parents had no choice but to seek remedial relief, and the parents, under the IDEA, had the right to place the student at a school of their choosing and seek funding for it, provided that it was appropriate to meet the student's needs. In this instance, as noted above, the district has not appealed from the IHO's determination that Mill Basin and the Yesod program were, in fact, an appropriate unilateral placement for the student for the 2022-23 and 2023-24 school years. Contrary to the district's arguments on appeal, direct funding for the cost of the student's attendance at Mill Basin is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution—according to the applicable case law, statutes, and regulations addressing the issue in the context of the availability of federal funding for religious private schools generally and the IDEA in particular as discussed above. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a FAPE. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it.[7] The remedy is available to all parents who otherwise meet

[5] 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).

[6] 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"]).

[7] A recent district court explained that in analyzing a matter under Burlington and Carter there is little difference between reimbursement and direct payment as a remedy as both "'merely requires [the school district] to belatedly

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

With respect to the student's Judaic Studies class, the district further contends that it is segregable and not reimbursable because it exceeds the level required to offer the student a FAPE. It is well settled that among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding the reasonableness of the costs of the program or whether any segregable costs exceeded the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, the district's arguments on appeal do not provide any viable support for the proposition that the subject matter of a particular class period could cause the class to be treated as a segregable special education service for these purposes, rather than as the type of feature that is "inextricably linked to the substitution" of a private program for a public one (Bd. of Educ. of City Sch. Dist. of City of New York v. Gustafson, 2002 WL 313798, at *7 [S.D.N.Y. Feb. 27, 2002] [finding features such as small class size or greater personal attention were not segregable]). With regard to the degree to which the services are segregable, the authority relating to excessive

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pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023], citing E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).

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

In order to make the religious portion of the tuition appear segregable from the rest of the student's educational program, the district argues for a reduction based solely on the amount of time spent in each class. However, it is worth noting that there is no indication in the hearing record that costs for any of the student's classes, regardless of whether those classes are characterized as 100 percent religious in content, equates to funding for any other class. Additionally, as the hearing record provides no concrete information as to the school's method for financing its activities, there was no reasoned way for the IHO or the parties to know what portion of the student's tuition, if any, were actually used to pay for the portions of the school day devoted to religious instruction. Moreover, even if the proportion of the student's schedule devoted to Prayer, Chumash, Yediot Klaliot, Yahadut, Parsha, and Judaic Studies 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 Prayer, Chumash, Yediot Klaliot, Yahadut, Parsha, and Judaic Studies beyond the religious aspect (see Application of a Student with a Disability, Appeal No. 24-056). Rather, "the situation does not permit a fair approximation of the value of the services received" compared to the program overall and, therefore, equity supports full reimbursement (Gustafson, 2002 WL 313798, at *7).

As previously noted, it is undisputed that the IHO found that Prayer, Chumash, Yediot Klaliot, Yahadut, Parsha, and Judaic Studies, constituted religious instruction and specific percentages of the student's overall class schedules for the 2022-23 and 2023-24 school years based on testimony provided by Mill Basin's principal (see IHO Decision at pp. 11-12; Parent Ex. U ¶¶ 28-29). The principal also testified that, during the 2022-23 school year, in second grade, the student participated in "Hebrew Reading, Hebrew Writing and Hebrew Grammar" (Parent Ex. U ¶ 30). In third grade during the 2023-24 school year, the student participated in "Hebrew Language Reading, Hebrew Language Writing and Hebrew Language Listening and Speaking" (id.). According to the principal's testimony, these classes "focused on teaching the students to read, speak, and write in Hebrew," which, as a "completely phonetic language," supported the student's "learning to read and write in English, particularly as the curriculum aligned with the [Preventing Academic Failure (PAF)] program" (id.). The principal clarified, however, that "religious texts [we]re never used during these periods" (id.). And while the Mill Basin program description in the hearing record does not specifically delineate the course content of each class above, it provides other reliable evidence regarding what occurred during instruction at Mill Basin, as follows:

> All subject areas: math, social studies, science, Jewish Studies, are designed to support and enhance the reading and writing curriculum. While each subject area has specific goals it is the building, strengthening, integrating of language that achieve success for each student. Our social studies curriculum teaches students about their communities and the world around them and exposes them [to]

> history, culture, geography, etc. Our science curriculum engages students through observations and experiments. Math focuses on developing problem solving skills, mathematics concepts and real world application and is taught with manipulatives and a hand-on approach. In Judaic Studies, students engage with Jewish traditions. They learn about Jewish life, holidays, history, Torah and the State of Israel. The majority of the instruction occurs in English to support students with language-based learning disabilities. Hebrew language is taught in a similar manner to English and is differentiated for each student.

(Parent Ex. E at p. 2).[8]

Thus, overall, based on the limited evidence in the hearing record, the amount of time the student spent at school receiving instruction that could be described as solely religious was limited to at most approximately 8 percent weekly during the 2022-23 school year and approximately 14 percent weekly during the 2023-24 school year (see Parent Exs. F; K; U ¶¶ 28-29). As a final note, rather than weighing the amount of time the student spent receiving religious instruction, or instruction not tied to special education or an academic curriculum, as an equitable consideration, the proportionate amount of time the student spent receiving such instruction during the school day could be weighed as a factor regarding the appropriateness of the unilateral placement (see e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012] [finding a unilateral placement inappropriate because the school did not provide special education supports and the student spent a substantial amount of time receiving religious education], adopted as mod at, 2012 WL 4344301 [D Conn Sept. 21, 2012], aff'd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]).

VII. Conclusion

Having reviewed the evidence in the hearing record, there is no basis for finding that federal regulation or the Establishment Clause bars the district from funding the portions of the student's educational program characterized as "religious instruction" at Mill Basin. As a result, there is no reason to disturb the IHO's finding that the time the student spent in Prayer, Religious Studies (Chumash, Yediot Klaliot, Yahadut, and Parsha), and Judaic Studies, was not segregable from the student's overall educational program, such that a specific direction could be made for reducing the costs of the student's tuition at Mill Basin for the 2022-23 and 2023-24 school years.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
June 20, 2024

STEVEN KROLAK
STATE REVIEW OFFICER

[8] At the impartial hearing, the principal clarified that "Jewish Studies" and "Judaic Studies" were the same (Tr. p. 115).