The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-456

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 Office of Laura D. Barbieri, PLLC, attorneys for petitioner, by Laura Dawn Barbieri, 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. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied in part her request that respondent (the district) fund the costs of her son's tuition at the Mill Basin Yeshiva Academy - Yesod Program School (Yesod) for the 2022-23 school year. The district cross-appeals from that portion of the IHO's decision which granted the parent's request for direct funding. 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. Briefly, the student began receiving speech-language therapy, physical therapy (PT), occupational therapy (OT), and special education through the Early Intervention Program (EIP) at approximately 16-18 months of age (Parent Ex. M at ¶ 2). After receiving services through the EIP, the student attended a preschool program through the district and, at five years of age, the student began attending a "[g]eneral [e]ducation [s]chool with [s]pecial [e]ducation supports" with approximately 10

students in his class (id. at ¶ 3). The parent determined that the student "required a class with higher special education support," and subsequently the student "began attending special education schools" (id.).

On August 11, 2022, a CSE convened and determined that the student was eligible for special education as a student with a speech or language impairment (Dist. Ex. 2 at pp. 1, 14; see also Parent Ex. M at ¶ 4).[1] The CSE developed an IEP for the student with an implementation date of September 29, 2022 and recommended that he receive one 30-minute session per week of individual counseling services, one 30-minute session per week of group counseling services, one 30-minute session per week of individual OT, and two 30-minute sessions per week of individual speech-language therapy (id. at pp. 14-15).

Also on August 11, 2022, the parent executed an "Enrollment Contract" with Yesod for the 2022-23 school year (Parent Exs. I, M at ¶ 7).[2] On August 23, 2022, the parent notified the CSE, through her attorney, that she had "significant concerns about the district's proposed educational program" based on the CSE's refusal to place the student in a "smaller classroom," and requested that the CSE provide a copy of the August 2022 IEP and notify them of the public school the student would be assigned to attend (Parent Ex. B at p. 1). The letter informed the district that the parent intended to enroll the student at Yesod pending receipt of an appropriate IEP and public school placement and advised the district that if the parent's concerns were not met she would seek an impartial hearing "to assert [the student's] right to remain in [the] placement with public funding" (id. at p. 1-2).

A. Due Process Complaint Notice

In a due process complaint notice dated October 25, 2023, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A at p. 1).[3] The parent alleged that the CSE failed to conduct "adequate and sufficient evaluations" by not performing evaluations in all areas of suspected disability, did not obtain "sufficient clinical data" to support its recommendations, failed to provide prior written notice in accordance with the IDEA and State law, and prevented the parent from participating in the development of the student's educational program (id. at pp. 1, 2). Finally, the parent alleged the district failed to provide her with a copy of the August 2022 IEP and a public school placement for the student prior to the start of the school year (id. at p. 2). As a proposed resolution, the parent

[1] The student's eligibility for special education as a student with a speech or language impairment is not in dispute (see 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

[2] Neither the Mill Basin Yeshiva Academy nor Yesod have been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d]; 200.7). The contract does not identify the Mill Basin Yeshiva Academy; however, other parts of the hearing record indicate that Yeshod is part of the Mill Basin Yeshiva Academy (Parent Exs. I; see Parent Exs. C; K at ¶1).

[3] Duplicative copies of the Parent's Due Process Complaint Notice appear in the hearing record, except that the district exhibit also includes the email in which the due process complaint notice was delivered to the district as an attachment (Parent Ex. A; District Ex. 1). For purposes of this decision, only the parent exhibit will be cited to when referring to the due process complaint notice.

requested that the district fund or reimburse the parent for the cost of the student's educational program at Yesod (id. at p. 3).

B. Impartial Hearing Officer Decision

Following eight status conferences held between November 27, 2023 and July 19, 2024, an impartial hearing convened on August 27, 2024 and concluded the same day (Tr. pp. 1-82). In a decision dated September 16, 2024, the IHO concluded that the district denied the student a FAPE for the 2022-23 school year because the district "did not offer any witnesses at the hearing to defend the student's IEP and/or proposed placement" (id. at p. 4). Turning to the appropriateness of the unilateral placement, the IHO found that the parent's witnesses "claim[ed] that the student's placement at [Yesod] was appropriate" and the factual allegations were "unrebutted"; on that basis, the IHO determined the unilateral placement at Yesod was appropriate (id.). On the issue of equitable considerations, the IHO held that the evidence in the hearing record indicated that the parent provided the district with the requisite notice and otherwise cooperated with the CSE process (id. at p. 5). Finally, the IHO concluded that the hearing record indicated that religious instruction amounted to "50 percent of the school day" and reduced the parent's requested award commensurate with that amount (id.).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing funding for the costs of the student's tuition at Yesod. According to the parent, reducing tuition based on the provision of religious instruction was a violation of the First Amendment to the Constitution. The parent asserts that equitable considerations support full funding of the contracted for tuition.

In its answer and cross-appeal, the district concedes that the IHO improperly calculated the portion of the student's schedule devoted to religious instruction; however, the district argues that the parent's award should still be reduced by 17 percent considering that certain Hebrew language classes the IHO determined were "religious instruction" should have been considered secular in nature.[4]

[4] Although the district served and filed a document labeled "Verified Answer and Cross-Appeal," it is not clear that it is a proper cross-appeal as a review of the document as a whole shows that it does not identify precise rulings which were adverse to the district (see 8 NYCRR 200.5[k][1]; 279.8[c][2]). Nevertheless, the parent filed an answer to cross-appeal and reply in the instant matter on November 19, 2024, which included an affidavit of service notarized on November 19, 2024 indicating the parent served the documents on the district on November 8, 2024. The district responded to the parent's filing in a letter arguing that the filing was untimely and did not comport with State regulations. The latest the parent could have timely served an answer to the district's cross-appeal would have been November 12, 2024, and the latest the parent could have served a reply would have been November 7, 2024, as the answer with cross-appeal was served on the parent on November 4, 2024 (8 NYCRR 279.5[b]; 279.6[a]; 279.11). The district included an email communication with its letter, which indicates the parent's counsel served the district on November 14, 2024 and not November 8, 2024 as indicated in the parent's affidavit of service. Therefore, the parent's answer to cross-appeal and reply was not served within the applicable time period, nor was it timely filed, and it will not be considered (see 8 NYCRR 279.5[b], [c]; 279.8[a]).

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]).[5]

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

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

[5] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

VI. Discussion

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

The district contends that the IHO's decision to reduce tuition was justified based on federal regulation which prevents school districts from using IDEA funding for religious instruction.[6] The pertinent federal regulation states that "[n]o State or subgrantee may use its grant or subgrant to pay for any . . . [r]eligious worship, instruction, or proselytization" (34 CFR 76.532). The district's argument is flawed in several respects. First the party seeking equitable relief for the denial of a FAPE and who incurred the liability for the student's unilateral placement as a result is the parent and she is neither the State nor a subgrantee within the meaning of 34 CFR 76.532. Instead, it was the subgrantee, namely the district, which caused the denial of a FAPE and left the parent to fix it with a self-help remedy and bear the risk that she might not succeed in her 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]).

Turning to the constitutional law issue raised by implication by the district, the current trend in case law on the issue of public funding for religious instruction permits district funding of nonpublic school tuition without reduction for aspects of religious instruction (see Application of a Student with a Disability, Appeal No. 23-133 [laying out the relevant caselaw through the Supreme Court's decision in Carson v Makin, 596 U.S. 767 (2022)]).

In Carson, the Supreme Court annulled a Maine law that gave parents tuition assistance to enroll their children at a public or private nonreligious school of their choosing because their town did not operate its own public high school (596 U.S. at 789). The program in Maine allowed

[6] The district also asserts that the New York State Constitution prohibits district payment for the portion of the school day attributed to religious instruction in that it states that: "[n]either the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning" (N.Y. Const. art. XI, § 3). Notwithstanding this language, the State Constitution also provides that: "nothing in this constitution contained shall prevent the legislature from providing for the . . . education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the [developmentally or intellectually disabled] . . . as it may deem proper" (N.Y. Const. art. VII, § 8[2]; see Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 96-036).

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

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[7] 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.

[7] 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. at818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[8] 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 parent had no choice but to seek remedial relief, and the parent, under the IDEA, had the right to place the student at a school of her 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 Yesod was, in fact, an appropriate unilateral placement for the student for the 2022-23 school year.[9] Contrary to the IHO's determinations and the district's arguments on appeal, direct funding for the cost of the student's attendance at Yesod is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution—according to the applicable case law, statutes, and regulations addressing the issue in the context of the availability of federal funding for religious private schools generally and the IDEA in particular as discussed above. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a FAPE. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it. The remedy is available to all parents who otherwise meet the criteria set forth in those decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

[8] 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"]).

[9] At this juncture, I note that 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 have been 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]). Nevertheless, in this instance, the district concedes that Yesod provided an appropriate program for the student and also concedes that religious instruction did not constitute 50 percent of the student's school day as determined by the IHO, but at most consisted of 17 percent of the student's school day during classes identified as prayer, Judaic Studies, and Hebrew centers (see Parent Ex. D).

I now turn to the district's argument to uphold a portion of the IHO's decision on the basis that the "class schedule shows that a majority of the day was allocated to religious instruction" and that it constituted a segregable service that exceeded the level required under the IDEA for a FAPE.(IHO Decision p. 2) 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, neither the IHO nor the district 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, 23-130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071).

In this instance, the IHO reduced the student's tuition at Yesod for the 2022-23 school year by a percentage based solely on the IHO's interpretation of the student's schedule, finding that portions of the school day were "religious instruction" (IHO Decision p. 5). However, the IHO did not identify a method for segregating the costs for those portions of the school day and any attempt to do so at this level of the proceeding can lead only to further problems. While the district argues for a reduction based solely on the amount of time spent in each class, it is worth noting that there is no indication in the hearing record that costs for any of the student's classes 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 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 "religious instruction" 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 "religious instruction" 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).

VII. Conclusion

Having reviewed the evidence in the hearing record, there is no basis for a finding that the federal regulation or the Establishment Clause bars the district from funding the religious portion of the student's education program at Yesod and there is no evidence in the hearing record to support the IHO's finding that the time the student spent in "religious instruction" was segregable form the student's overall educational program such that a specific direction could be made for reducing the costs of the student's tuition at Yesod for the 2022-23 school year.

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

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision, dated September 16, 2024, is modified by reversing that portion which found that funding for tuition should be reduced for a portion of the school day due to the provision of religious instruction; and

IT IS FURTHER ORDERED that the district shall fund the total cost of the student's tuition at Yesod for the 2022-23 school year.

Dated: **Albany, New York**
December 6, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER