The University of the State of New York

The State Education Department
State Review Officer
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No. 24-457

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

Appearances:
The Law Office of Laura D. Barbieri, PLLC, attorneys for petitioner, by Laura Dawn Barbieri, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, 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 her request that respondent (the district) fund the costs of her son's tuition at the Mill Basin Yeshiva Academy - Yesod Program (Yesod) for the 2021-22 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local Committee on Special Education (CSE) that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross-appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings, conclusions, and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The 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. Additionally, as the district declined to enter evidence during the hearing much of the student's educational history is derived from unrebutted allegations made by the parent.

Briefly, the student began receiving services through the Early Intervention Program at approximately 16-18 months of age including speech-language therapy, physical therapy (PT), occupational therapy (OT), and special instruction (Parent Ex. L ¶ 2). The parent reported that the student attended a preschool program through the district and at age five attended a general education school with special education supports in a class of approximately 10 students (id. ¶ 3).

According to the parent, on March 24, 2021 a CSE convened and, despite the parent the parent advising the committee that the student required a small class size, did not recommend special education instruction for the student (see id. ¶ 4).[1] The parent also reported that she "never received a public-school placement for 2021-22 school year" (id. ¶ 5). In an undated letter, the parent advised the district that she would be placing the student in the Yesod program for the 2021-22 school year and seeking funding from the district (Parent Ex. C).[2] For the 2021-22 school year the student attended a Yesod special class of seven students staffed by a special education teacher and assistant teacher (Parent Ex. J ¶¶ 8, 14). In addition, the student received related services of two 30-minute sessions of individual speech-language therapy per week and two 30-minute sessions of individual occupational therapy (OT) per week (id. ¶ 26).

A. Due Process Complaint Notice

In a due process complaint notice dated November 14, 2022, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2021-22 school year (Parent Ex. A at p. 1).[3] The parent alleged that the CSE failed to conduct "adequate and sufficient evaluations" of the student in all areas of suspected disability, did not obtain "sufficient clinical data" to support its recommendations, and failed to provide prior written notice in accordance with the IDEA and State law (id. at pp. 1, 2). The parent alleged that the CSE failed to discuss all components of the IEP with her and that the recommendations "were predetermined" and made pursuant to "district policy and not the student's educational needs" (id. at pp. 1, 2). With respect to the March 2021 IEP developed by the district, the parent claimed that it failed to "provide an adequate baseline from which to determine progress," contained goals that were "insufficient, inappropriate, vague and unmeasurable," failed to provide for "sufficient supports and strategies (including, but not limited to, management needs and sufficient and appropriate related services)" to address the student's "academic, sensory/motor, social/emotional, and language needs," recommended that the student participate in standardized assessments, without accommodations, and also recommended that the student "be held to the same promotional criteria as his typically developing peers, despite his notable academic delays" (id. at p. 3). The parent also contended that the recommendation for the student to attend a general education class placement with related services was not appropriate as it failed to "provide for the intensive level of individualized instruction that [the student] require[d]" (id. at pp. 2-3). Finally, the parent alleged the district failed to provide her with notice of a public school location for the student to attend prior to the

[1] The March 24, 2021 IEP was not offered as evidence. According to the parents' due process complaint notice, although the management needs section of the March 2021 IEP indicated that the student would attend a 12:1+1 special class and receive related services of speech-language therapy, OT, and counseling, the programming set forth in the IEP provided for the student to attend a general education class and receive the identified related services (Parent Ex. A at p. 2).

[2] The parent indicated that in August 2021 the CSE was notified of the student's placement in the Yesod program (Parent Ex. L ¶ 6).

[3] Duplicative copies of the parent's due process complaint notice appear in the hearing record (compare Parent Ex. A at pp. 1-3, with Dist. Ex. 1 at pp. 1-4). For purposes of this decision, Parent Exhibit A will be cited when referring to the due process complaint notice.

start of the school year (id. at p. 3). As relief, the parent requested "funding/reimbursement" for the student's unilateral placement at Yesod for the 2021-22 school year (id.).

B. Impartial Hearing Officer Decision

After sixteen status conferences that took place between February 13, 2023, and July 23, 2024, an impartial hearing devoted to the merits convened on August 16, 2024 and concluded the same day (see Tr. pp. 1-83). Neither party gave opening statements at the hearing and the district declined to present any testimonial or documentary evidence (see Tr. pp. 67-72). In a decision dated September 13, 2024, the IHO concluded the district failed to meet its burden to prove that it offered the student a FAPE for the 2021-22 school year because the district "did not offer any witnesses or documentary evidence to defend the student's IEP and/or proposed placement" (IHO Decision at p. 3). The IHO stated in his findings of fact that the student was classified as a student with a disability, was "struggle[ing] academically," and was performing below grade level, noting that the student was in second grade reading at a first-grade level (id. at p. 2). However, the IHO held that the evidence presented by the parent did not indicate that Yesod provided direct and specialized education instruction designed to address the student's needs (id. at p. 4). The IHO concluded that "most of the school day" at Yesod was allocated towards "religious instruction and/or reading of Hebrew text" and that this was "not appropriate" given the student's struggles with reading (id.). The IHO declined to credit the testimony of the school's principal that "the Hebrew instruction throughout the day was not related to religious instruction as it is very clear that this is a religious school and that Hebrew is the only foreign language because it is related to its religious instruction" (id.). The IHO dismissed the parent's due process complaint on the basis that the parent failed to demonstrate that Yesod was an appropriate unilateral placement for the student for the 2021-22 school year (id. at p. 5).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in reducing the tuition funding for Yesod and allege that the reduction was improper and in violation of the Constitution and that equitable considerations support full tuition funding.[4] In addition, the parent argues that the IHO did not discuss the basis for his determination that the unilateral placement was inappropriate and only indicated that religious instruction was provided by Yesod.

In an answer, the district concedes it denied the student a FAPE for the 2021-22 school year, however, requests that the IHO decision be upheld on the basis that the hearing record does not support a finding that Yesod was an appropriate unilateral placement for the student.

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

[4] While the parent argues the "reduction" was in error, a semantic distinction is warranted, as the IHO did not reduce the funding but denied it outright (see IHO Decision).

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).

VI. Discussion

Initially, neither party has appealed from the IHO's determination that the district failed to offer the student a FAPE for the 2021-22 school year. 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]).

[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).

A. Unilateral Placement

On appeal, the parent argues that the IHO erred by denying district funding for the parent's unilateral placement of the student at Yesod because the placement was reasonably calculated to provide the student with educational benefit and religious instruction only constituted 15 percent of the school curriculum.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129). Citing the Rowley standard, the Supreme Court has explained that "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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., 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). 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).

As noted above, the district declined to enter evidence during the impartial hearing. As a result, the only information available regarding the student's needs at the beginning of the 2021-22 school year is the information embedded in the affidavits of the Yesod principal and special education teacher and the information found in the Yesod May 2022 progress reports (see Tr. pp. 76-78; Parent Exs. E; F; J; K). As explained in more detail below, at the beginning of the 2021-22 school year the student presented with difficulties in academics, social skills, cognition, sensory processing, and fine motor coordination (Parent Exs. E; F).

Here, the Yesod principal testified that Yesod is a "small, specialized classroom program which provides self-contained classes for students who are unable to make progress in a mainstream setting due to learning disabilities, behavioral difficulties, and social/emotional challenges" (Parent Ex. J ¶ 8). The principal explained that classroom instruction at the school is provided by special education teachers who collaborate with the school's regular education teachers and related services providers to "modify and enhance instruction for each student" (id.). The principal indicated that the program utilizes multi-sensory approaches and hands on games and activities as well as direct social skills instruction to keep students engaged and learning (id.). According to the principal, the Yesod program has a speech-language pathologist, occupational therapist, counselor and reading specialist who collaborate with the classroom teachers and co-teach key concepts and skills (id. ¶ 9). She indicated that the student received two 30-minute sessions of individual OT and two 30 minutes sessions of individual speech-language therapy weekly during the 2021-22 school year (id. ¶ 26).[6]

The hearing record indicates that at Yesod the student attended an intensive reading program that used Preventing Academic Failure (PAF) to focus on phonics instruction, and that two reading intervention programs called Lexia Core 5 and Reading A-Z were used both at school and at home to help accelerate the student's literacy skills (Parent Exs. E at p. 1; K ¶ 17). The student's special education teacher explained that the reading specialized utilized PAF, which is an Orton-Gillingham based program that focuses on phonics instruction, handwriting, and spelling (Parent Exs. E at p. 1; K ¶ 16). The teacher opined that instructing the student in a small group of two students "really helped improve his confidence," which made him "more willing to try and work on new decoding and comprehension skills" (Parent Ex. K ¶ 16). The principal described PAF as a "comprehensive, structured language program for teaching reading, spelling and handwriting, all using multisensory techniques" and opined that it was "an effective beginning reading program supported by scientific research" (Parent Ex. J ¶ 18).

The principal further explained that the Reading A-Z program was an online program that aligned with the Fountas and Pinnell reading assessment and allowed students to access books and

[6] According to a May 2022 OT progress report, the student received OT services once per week for 30 minutes (Parent Ex. F at p. 1).

texts on their specific reading level and included a social studies and science component (Parent Ex. J ¶ 19). She described Lexia Core 5 as an "adaptive blended learning program that accelerates the development of literacy skills for students of all abilities, helping them make the shift from learning to read to reading to learn" (id. ¶ 17). She further explained that Lexia Core 5 is a computer program that provides a systematic and structured approach to these six areas of reading: phonological awareness, phonics, vocabulary, structural analysis, fluency, and comprehension (id.). Additionally, she reported that the program creates a personalized learning path for each student through an adaptive placement and scaffolded activities that align with Common Core standards, it is adaptive to each child's level, and it conducts its own assessments and allows students to go at their own pace (id.). The Yesod special education teacher explained that Lexia Core 5 and Reading A-Z both provide instruction in fluency and comprehension, and work on building fluency and comprehension individualized to the student's level (Parent Ex. K ¶ 17).

According to the Yesod special education teacher, at the beginning of the 2021-22 school year the student was reading on a first-grade level (Parent Ex. K ¶ 13). He struggled with reading comprehension, could not answer simple "wh" questions, and felt overwhelmed by the numbers of words on a page (id.). The teacher indicated that the student was successful with reading instruction provided by Yesod and noted that he had progressed from a Fountas and Pinnell reading level E at the beginning of the 2021-22 school year to a level K (beginning second grade) towards the end of the year (id. ¶ 19). She further reported that, even though the student was still slightly behind grade level expectations, he had made significant progress and that his decoding, fluency, and reading comprehension skills had improved (id.). Specifically, the teacher indicated that the student had mastered consonant blends, multiple suffixes, and had improved in his ability to answer "wh" questions and questions about the main idea (Parent Exs. E at p. 1; K ¶ 21).

Turning to the student's writing skills, according to the Yesod special education teacher, at the beginning of the 2021-22 school year the student had trouble writing one complete sentence without prompting as well as difficulty expressing his thoughts on paper (Parent Exs. E at p. 2; K ¶ 26). Many of the student's letters were formed incorrectly or reversed and he did not use punctuation (Parent Exs. E at p. 2; K ¶ 26). The teacher reported that, to address the student's writing needs, he was provided with whole group, small group, and 1:1 instruction (Parent Ex. K ¶ 27). She further explained that a chart was attached to his desk to assist him in his formation of all letters as well as a visual showing the correct spelling of his last name and he was given graphic organizers and sentence starters to help him expand his writing (id.). Finally, she explained that when working 1:1 she would work through his composition sentence by sentence before putting a whole paragraph together to make sure he did not repeat words or sentences (id.). In her May 2022 teacher progress report, the teacher indicated that the student's writing had improved and he was able to write more complete sentences and add details when asked; however, he continued to struggle with writing more than two sentences that flowed together (Parent Ex. E at p. 2). She further reported that the student's letter formation had improved, as he reversed letters less frequently (Parent Ex. K ¶ 28).

With regard to mathematics, the Yesod special education teacher reported that at the beginning of the 2021-22 school year the student struggled to comprehend word problems due to his reading delays, and specifically had difficulty determining whether to add or subtract (Parent Ex. K ¶ 21). According to the teacher, Yesod used the IXL computer program for math which aligned with the classroom textbooks and could be used both at school and at home (id. ¶ 24). She

opined that this program used "very engaging programming with videos that help reinforce skills students are struggling with" (id.). Additionally, she indicated that math was taught using multi-sensory approaches such as manipulatives, visuals, and online games (Parent Exs. E at p. 2; K ¶ 22). The teacher reported that, when word problems were assigned, she would read the problem out loud to the student, circle the relevant numbers on the page, and together they would determine if the problem was asking the student to add or subtract (Parent Ex. K ¶ 22). The teacher further reported that she taped a 100s chart, a number line, and ruler to the student's desk and that the chart helped him to line up three-digit numbers into columns so he could "work through the problem systematically" (id. ¶ 23). She explained that the student was a visual learner and that providing him with visual aids was helpful (id.). The teacher reported that by the end of the year the student could complete single digit addition in his head without counting on his fingers and had learned basic fractions and geometry (id. ¶ 25).

According to the Yesod special education teacher, the student's social skills were an area of weakness for him for the 2021-22 school year (Parent Ex. K ¶ 29). She noted that the student had trouble expressing his emotions and interacting with those who were not in his classroom or with whom he was not comfortable (id.). The teacher indicated that the student's social needs were addressed through a weekly social skills class with the school's counselor (id. ¶ 30). She described that the class worked on sharing thoughts and feeling as well as how to properly express them and opined that the class was helpful to the student (id.). The teacher expressed that by the end of the year the student understood that he could hurt others' feelings by "showing off and no longer did so" and he was able to clearly communicate his feeling with his peers (id.). The teacher indicated that the student's "lack of focus" was addressed by providing a "considerable amount of 1:1 support and redirection" and opined that this was possible due to the low teacher-to-student ratio in the class (id.).

The Yesod occupational therapist indicated that during the 2021-22 school year the student presented with deficits in sensory processing, cognition, and fine motor skills (Parent Ex. F). More specifically, the therapist noted the student had difficulty with sensory modulation, executive functioning skills, and handwriting (id.). With regard to the student's sensory processing and fine motor coordination skills, the May 2022 OT progress report indicated that the student's OT sessions always began with heavy work activities "to provide an alerting response to improve his attention and focus" and noted that the student responded positively to wall push-ups, deep pressure input, and joint compression in both arms (id.). The occupational therapist explained that the student displayed improved behavior with modifications made throughout sessions including movement breaks when he appeared to be inattentive, and verbal and visual cues to stay focused on the task at hand (id.). The occupational therapist indicated that the student continued to require verbal and visual cues during handwriting tasks to write more legibly, however, she noted that he had improved his pacing during writing attempts (id.). Finally, the occupational therapist reported that, based on observations regarding the student's pacing and alignment difficulties, he participated in various therapeutic activities that targeted skills in visual-spatial awareness, eye hand coordination, focus and attention, and problem solving (id.).

Based on the foregoing, the hearing record contains sufficient information, taking into account the totality of the circumstances, to show that the Yesod program provided the student with specially designed instruction to meet his unique educational needs in the areas of reading, writing, social/emotional development, and OT during the 2021-22 school year. Regarding the

IHO's reasoning to the contrary, the proportionate amount of time the student spent receiving such instruction during the school day could be factored in assessing 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]). Here, while the IHO found that "most of the school day was allocated to religious instruction and/or reading of Hebrew text, which was relevant to the student's Judaic education" based on the student's school schedule (IHO Decision at p. 4), a review of the schedule reveals that the student received instruction in math, ELA, science, social studies, writing, art, music, Hebrew language and writing, and Hebrew language listening and speaking, as well as some periods of religious instruction (Parent Ex. D). Overall, however, the evidence in the hearing record does not indicate that the religious instruction was so predominant in the student's education that it replaced or supplanted the academic and special education instruction provided. To the contrary, the evidence summarized above describes the specialized instruction and services provided to the student as well as the progress the student achieved as a result of those services. Additionally, although the IHO determined that Yesod's provision of Hebrew to the second-grade student who was assessed as reading at a first-grade level constituted evidence of the private's school's inappropriateness, he failed to cite to any record evidence in support of that finding (IHO Decision at p. 4). As a result, the IHO incorrectly determined that the unilateral placement at Yesod was inappropriate and such finding must be reversed.

B. Equitable Considerations

While the district argues in its answer that the IHO's decision should be upheld in its entirety, it also asserts an alternative argument that, if the IHO's decision to deny tuition reimbursement is not upheld on appeal, as an equitable matter, any tuition awarded should be reduced "by 15 percent, which reflects [the] segregable portion of the Student's daily scheduled devoted to non-secular education."[7] The parent argues that the IHO improperly denied her request for an award of tuition reimbursement on the ground that the private school primarily provided the student with religious instruction.

Having determined above that Yesod was an appropriate unilateral placement, I now turn to the issue of religious instruction and equitable considerations. As an initial matter, some consideration is warranted of the constitutional issues impliedly raised by the district's request that any tuition reimbursement should be reduced by a percentage representing the religious instruction provided to the student at Yesod. As a general matter, the current trend in case law on the issue of public funding for religious instruction permits district funding of nonpublic school tuition

[7] Although the IHO addressed the issue of religious instruction as one pertaining to the appropriateness of Yesod, to the extent he construed the religious instruction provided at the school as a segregable service that constituted an excessive amount of the student's school day, the issue of the impact of religious instruction on tuition reimbursement was perhaps more properly considered as an equitable consideration (see A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] ["The first two prongs of the [Burlington/Carter] test generally constitute a binary inquiry that determines whether or not relief is warranted, while the third enables a court to determine the appropriate amount of reimbursement, if any"]).

without reduction for aspects of religious instruction (see Application of a Student with a Disability, Appeal No. 23-133 [laying out the relevant caselaw through the Supreme Court's decision in Carson v Makin, 596 U.S. 767 (2022)]).

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

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[8] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F. Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

[8] In L.M. v. Evesham Tp. Bd. Of Educ., the district court did not decide whether the parent was eligible for tuition reimbursement because the court remanded the case to determine whether the student was offered a FAPE and if the unilateral placement was appropriate (256 F. Supp. 2d at 305).

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]).[9] Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases predating Carson, 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., 989 F. Supp. at 392-93, 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 2012-22 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. Thus, direct funding for the cost of the student's attendance at Yesod is not precluded by the Establishment Clause of the First Amendment. 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 unless other equitable considerations warrant a denial or reduction of relief.

I now turn to the district's argument that a 15 percent reduction of the parent's requested relief is warranted on equitable grounds.[10] The district contends that the classes on the student's schedule that constitute religious instruction, as per the testimony of the school's principal, constitute segregable services that are beyond what the district would have been obligated to provide the student in the first instance in order to offer him a FAPE. 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

[9] The second prong of the test set forth in Lemon v. Kurtzman, which has since been abandoned, was that the government action could not have a primary effect of advancing or inhibiting religion (403 U.S. 602, 612-13; see (Kennedy v Bremerton School Dist., 597 U.S. _, 142 S. Ct. 2407, 2411 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"]).

[10] While the percentage amount of the religious instruction provided by Yesod as part of its curriculum was not specifically developed during the impartial hearing, it appears that the district is adopting the 15 percent figure the parent's counsel represented as reflecting the amount of religious instruction provided to the student at Yesod (Tr. p. 71).

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 [2d Cir. Jan. 19, 2017]). 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. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]; 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 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, 23-130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071).

As previously discussed, the IHO did not grapple with the evidence of specialized instruction in the hearing record, conflated Hebrew instruction with religious instruction, and otherwise did not consider if the religious instruction provided was segregable from the student's secular classes. In its answer, the district argues for a reduction based solely on the amount of time spent in each class, but 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 "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. Indeed, while the content of a class may be religious in nature, it does not follow that special education support categorically could not provide educational benefit in that context; more evidence, which is not present in the record before me would be needed to make that determination. Rather, based on the evidence in the hearing record, "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, the IHO erred by determining that the parent failed to meet her burden to demonstrate that Yesod was an appropriate unilateral placement, there is no basis for a finding that district would be barred on constitutional grounds or otherwise from funding the religious portion of the student's education program at Yesod, and there is no evidence to support a finding that the religious instruction provided to the student is segregable from the student's overall educational program such that a reduction of tuition funding is warranted on equitable grounds. Accordingly, the necessary inquiry is at an end.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated September 13, 2024, is modified by reversing those portions which found that Yesod was not an appropriate unilateral placement for the student for the 2021-22 school year and denied the parent's request for tuition reimbursement; and

IT IS FURTHER ORDERED that the district shall fully reimburse the parent for any tuition paid and directly fund the remaining costs of the student's tuition at Yesod for the 2021-22 school year.

Dated: **Albany, New York**
December 17, 2024

SARAH L. HARRINGTON
STATE REVIEW OFFICER