The University of the State of New York

The State Education Department
State Review Officer
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No. 24-508

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Offices of Lauren A. Baum, PC, attorneys for petitioner, by Matthew Finizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Abigail Hoglund-Shen, 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 reduced the award of reimbursement/direct funding of her daughter's tuition at the Hamaspik School (Hamaspik) for the 2022-23 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which granted in part tuition reimbursement/direct funding for Hamaspik. 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 hearing record regarding the student's educational history is sparse. 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 fully recited.

Briefly, as reported by the parent, the student has received a diagnosis of Down syndrome, is bilingual-English/Yiddish, and exhibits delays in the areas of language and communication, activities of daily living, social/emotional skills, gross motor skills, fine motor skills, visual motor

skills, and self-care skills (Parent Exs. A at p. 1; Q ¶ 2). According to the parent, the student received services through the Early Intervention Program and preschool special education services, and attended a district elementary school until the 2021-22 school year (Parent Ex. Q ¶ 3). The parent indicated that a CSE determined the student was eligible for special education as a student with an intellectual disability (Parent Ex. A at p. 1).[1]

In a letter dated August 19, 2022, the parent through her attorney informed the district that a CSE meeting was not held to develop an IEP for the student for the 2022-23 school year and that a public school placement had not been offered to the student (Parent Ex. B). The parent indicated that she remained willing to consider any appropriate program or placement that may be recommended by the CSE for the student for the 2022-23 school year, but in the interim, the student would be attending Hamaspik, and she would seek funding/reimbursement from the district for the cost of such placement (id.).

On August 31, 2022, the parent signed a school contract with Hamaspik for the student to attend during the 2022-23 school year (Parent Ex. N).

A. Due Process Complaint Notice

In a due process complaint notice dated May 13, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year by failing to convene a CSE to develop an appropriate program and placement recommendation (Parent Ex. A at p. 2). The parent also claimed that Hamaspik was an appropriate unilateral placement for the student (id.). As relief, the parent requested tuition funding, funding for appropriate related services, and funding for costs and fees associated with the student's attendance at Hamaspik during the 2022-23 school year (id.).

In a due process response dated May 15, 2024, the district indicated that the CSE last convened on February 2, 2021, found the student eligible for special education as a student with an intellectual disability, and recommended a 12:1+1 special class for English language arts (ELA), math, science, and social studies, with related services in occupational therapy (OT), physical therapy (PT) and speech-language therapy (see Due Process Response).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on June 26, 2024 and concluded on August 12, 2024 after three days of proceedings including a prehearing conference and a status conference (Tr. pp. 1-75).[2] In a decision dated September 25, 2024, the IHO found that the district did not meet its burden to show that it offered the student a FAPE for the 2022-23 school year, that Hamaspik offered the student specially designed instruction sufficient to meet her needs, and that equitable considerations supported the

[1] It appears that the last CSE meeting held for this student was on or around February 2, 2021 (see Parent Ex. A at p. 1; Due Process Response). A copy of the February 2, 2021 IEP was not entered into evidence during the impartial hearing (see Tr. pp. 17-75).

[2] A representative for the district did not appear at the June 26, 2024 prehearing conference (Tr. pp. 1-6).

parent's requested relief in part (IHO Decision at pp. 3, 5, 7, 9). Regarding equitable considerations, the IHO determined that an award of direct funding of the student's tuition should be reduced by 4.7 percent for religious studies because the IHO determined religious studies did not fall within a school district's duty to provide a FAPE (id. at p. 9). As relief, the IHO ordered the district to reimburse the parent for all out-of-pocket expenses incurred and directly fund all remaining costs of the student's attendance and tuition at Hamaspik for the 2022-2023 school year, in a total amount not to exceed $114,122.00 (id.).

IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review, the district's answer and cross-appeal, and the parent's answer thereto is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved on appeal in order to render a decision in this case:

1. Whether the IHO erred in determining that Hamaspik was appropriate to address the student's needs; and

2. Whether the IHO erred in reducing tuition funding based on the provision of religious instruction.

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]).[3]

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education

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 determinations that the district failed to offer the student a FAPE for the 2022-23 school year, and that equitable considerations (other than as related to the proportion of religious instruction delivered at Hamaspik) weighed in favor of the parent. 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]).

A. Unilateral Placement

The district appeals from the IHO's finding that the parent demonstrated that Hamaspik was an appropriate unilateral placement for the student. The district argues that the parent did not show Hamaspik provided specially designed instruction to the student, that it was unclear from the student's schedule when she received her related services and therefore was not clear "what services [the student] actually received," and that "copy-pasting" from a January 2023 to the May 2023 progress report "suggest[ed] a lack of tailoring" to the student. However, review of the hearing record supports the IHO's finding that Hamaspik was an appropriate placement for the student for the 2022-23 school year.

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

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).

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).

Further, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp.

2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

Regarding the student's special education needs, the student's lead teacher during the 2022-23 school year testified in an affidavit that the student's "high distractibility and sensory needs impede[d] her ability to perform tasks independently," she struggled to interact appropriately due to poor perspective-taking skills and a speech "impediment," and at times, she engaged in problem behavior primarily when presented with challenging tasks or activities (Parent Ex. R ¶¶ 11, 12; see Parent Ex. E).[4] During the 2022-23 school year the student was 10 years old and worked on acquiring pre-academic and academic skills such as identifying sounds and letters, reading and spelling CVC words, writing her name on a line, understanding basic number concepts, and recognizing numbers larger than five (Parent Ex. E at pp. 1-2). The student exhibited communication deficits including receptive and expressive language delays, reduced speech intelligibility due to oral motor and articulation skill deficits and hypernasality, and social pragmatic delays (see Parent Ex. H). Additionally, the student exhibited gross and fine motor delays, difficulty with self-regulation, ocular motor, visual perceptual and perceptual motor delays, executive functioning deficits, overall muscle weakness, and difficulty with some aspects of dressing (see Parent Exs. F; G).

Information in the hearing record indicates that Hamaspik is a school that "caters" to students who have received a diagnosis of Down Syndrome, many of whom are bilingual-English/Yiddish (Parent Exs. C at p. 1; R ¶ 9). According to the Hamaspik description, the school offers "a combination of conventional pull out and push in therapy sessions," including OT, PT, and speech-language therapy (Parent Ex. C at p. 4). During the 2022-23 school year, the student was in a class of six students ages 8 to 10 years old, with one lead teacher and three paraprofessionals (Parent Ex. R ¶¶ 8, 10, 11). The lead teacher testified in an affidavit that, after she provided instruction to the students, they broke into groups of two with a paraprofessional, and the lead teacher "would go to each group and provide further instruction and support as needed" (id. ¶ 10).

As for the district's assertion on appeal that the parent failed to show Hamaspik delivered specially designed instruction to the student, review of the hearing record shows otherwise. When working with the student, the lead teacher testified that continuous reinforcements and prompts were necessary for the student to complete tasks during the day, and that sensory activities, engagement strategies and visual were incorporated into her routine to assist her in communicating her needs (Parent Ex. R ¶ 12). Additionally, proactive strategies such as a visual schedule, sensory activities, difficult tasks broken down, and the opportunity to earn a desired item or activity were used with the student when she engaged in problem behaviors, while reactive strategies such as

[4] The district did not present any testimony or documentary evidence at the hearing, and the hearing record does not include an IEP for the student (Tr. p. 28; see Parent Exs. A-R).

"maintaining the demand," redirection, physical prompting, and ignoring attention seeking behaviors were also used (id.). Further, a class-wide behavior plan was used to increase the student's social motivation (id.).

In written testimony the lead teacher stated that lessons were structured in a manner to address the student's sensory needs and limited attention by incorporating multisensory learning activities and sensory breaks (Parent Ex. R ¶ 13). According to the lead teacher, the student received small group instruction for reading using "the Orton Gillingham Method," whole group writing instruction using "the VAKT approach" and "Handwriting Without Tears," and small group math instruction using "My Math" (id. ¶¶ 15-17). During the hearing, the lead teacher testified that she oversaw the small group instruction "to make sure that whatever [the student] was learning was specifically catered to her needs" and allowed the teacher to individualize goals and help the student learn skills faster (Tr. pp. 51-52). The student also received individualized instruction during related service sessions conducted in the classroom during "skill-based groups" (id.).

The lead teacher testified that students received individual sessions of related services and that the group sessions of related services were delivered in the classroom (Tr. pp. 42-44). Regarding the district's allegation that it was unclear from the 2022-23 class schedule in the hearing record when the student's related services were delivered, review of the schedule shows that there were multiple opportunities throughout the day for the student to receive her related services (see Parent Ex. D). For example, at "Breakfast," the ADL and conversation skills noted on the schedule could be addressed by OT and speech-language therapy (id.). Other times throughout the day were more explicitly designated for a particular related service, for example, at "Lunch," the schedule reflected "Slp push in feeding skills/conversation goals" (id.).[5] At another time, the schedule reflects "OT push in" for individualized handwriting groups (id.). Although the schedule in the hearing record was not student specific, it included designated times for the delivery of related services, and the lead teacher testified in an affidavit that during the 2022-23 school year the student received PT, OT, and speech-language therapy (Parent Ex. R ¶¶ 1, 13). Additionally, as described in more detail below, the hearing record contains progress reports that indicate the student received individual and group related services during the 2022-23 school year (see Parent Exs. F at p. 1; G at p. 1; H at p. 1; K at p. 1; L at p. 1; M at p. 1).

The hearing record contains progress reports for each discipline describing the student's educational progress, and progress exhibited in OT, PT, and speech-language therapy (Parent Exs. E; F; G; J; K; L). Review of the February 2023 and June 2023 educational progress reports provides descriptions of the student's academic and social skills and needs, and the June 2023 report included updated information regarding the progress the student made such as "having more flexible thinking patterns," increased "perspective taking" and "reduced impulsivity" (Parent Exs. E; J at p. 3). According to the June 2023 report, use of positive reinforcement, engagement strategies, and consistency had reduced many of the student's behaviors (Parent Ex. J at p. 3). The student's occupational therapist reported that the student received individual and group sessions weekly that focused on increasing self-regulation skills, visual motor/perception, fine and graphomotor skills, ocular motor skills, and balance (Parent Exs. F; L). In June 2023, the

[5] "Slp" refers to speech-language pathologist (see Parent Ex. M at p. 3).

occupational therapist reported that the student had made progress with identifying her emotions and expressing them, engaging in activities requiring attention and visual perceptual skills, strengthening eye movements, and completing fine and graphomotor tasks with cuing (Parent Ex. L at pp. 3-4). Regarding PT, the physical therapist reported that the student received two 30-minute sessions of individual PT per week, and worked on and improved gross motor skills, strength and endurance, coordination, and motor planning (Parent Exs. G; K). The student's speech-language pathologist reported that the student received both individual and group sessions, and four 15-minute sessions of "oral motor group push in" (Parent Exs. H; M). In a May 2023 update, the speech-language pathologist reported that the student required support to describe pictures and expand the length of her utterances, she improved her ability to attend to non-preferred activities, use oral resonance during conversation, articulate specific words correctly, and planning/executing steps of a functional routine (Parent Ex. M at pp. 3-4). With regard to the district's argument that the progress reports contain copy/pasting suggesting the reports were not tailored to the student, although the reports contain similar, if not identical, information regarding the student's overall skills and needs, the educational, OT, and speech-language therapy progress reports also include a section of the report detailing updated end-of-the-year information about the student's performance (see Parent Exs. J at p. 3; L at pp. 3-4; M at pp. 3-4).

Contrary to the district's assertions on appeal, review of the information in the hearing record regarding the student's Hamaspik programming during the 2022-23 school year supports the IHO's finding that it was an appropriate unilateral placement.

B. Equitable Considerations

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

Turning to the parties' arguments regarding whether the IHO erred in reducing the amount of tuition awarded for the student's attendance at Hamaspik for the portions of the school day the IHO determined were for religious studies, the parent argues that the IHO did not consider a recent

Supreme Court case standing for the proposition that a nonsectarian requirement for funding violated the Free Exercise Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment. The parent also argues the IHO did not consider the secular benefit of the student's religious class. The district argues the religious studies class at Hamaspik was above and beyond what was required to offer the student a FAPE and that equitable considerations supported the IHO's determination to reduce tuition funding by 4.7 percent.

1. Religious Instruction

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 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). More recently, in a case where Orthodox Jewish parents sued California school officials over a statutory requirement that nonpublic schools (NPS) must be "nonsectarian" to apply for certification to provide special education services to disabled students, claiming it violated free exercise and equal protection, the Ninth Circuit Court of Appeals explained that when the parent plaintiffs asked that a public benefit—state funding of nonpublic school placements for disabled students—not be restricted to those seeking placement in nonsectarian schools, they plausibly alleged that California's nonsectarian NPS requirement burdened their free exercise of religion. This was because it conditioned public funding for their children's school on that school's nonreligious character and "presented a 'tendency to coerce' them 'into acting contrary to their religious beliefs'" (Loffman v. California Dep't of Educ., 119 F.4th 1147, 1169 [9th Cir. 2024]). In that case, the court held that the statute failed the neutrality test, the government was required to overcome strict scrutiny, and the government's alleged compelling interest in maintaining neutrality toward religion was insufficient to overcome such scrutiny (Loffman, 119 F.4th at 1170-71).

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

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at 818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[7] Focusing on the indirect aid and individual choice factors discussed in prior Supreme Court cases, 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 arrived in these circumstances because it failed to offer the student a FAPE for the 2022-23 school year. Based on this, the parent cannot be forced into choosing remedial relief that is nonsectarian only in nature, 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

[6] In L.M. v. Evesham Township Board of Education, 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).

[7] 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. 507, 510 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"]).

hearing record support the IHO's determination that Hamaspik was an appropriate unilateral placement for the student for the 2022-23 school year.[8] Contrary to the IHO's determination, and as argued by the parent, 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, direct funding for the cost of the student's attendance at Hamaspik is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution. 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.

2. Excessive Services

I now turn to the district's argument to uphold a portion of the IHO's decision on the basis that the religious studies class constituted a segregable service that exceeded the level required under the IDEA for 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., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding 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

[8] 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, Hamaspik provided an appropriate program for the student and the religious instruction did not constitute 50 percent of the student's school day but, according to the IHO, at most consisted of 4.7 percent of the student's school day during a period set aside for "davening" (IHO Decision at p. 9; see Parent Ex. D).

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 Hamaspik 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. 9). 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 davening 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

Based on the foregoing, the hearing record supports the IHO's determination that Hamaspik was an appropriate unilateral placement that provided specially designed instruction to address the student's unique needs. Additionally, 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 Hamaspik 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 Hamaspik 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 25, 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 district shall fund the total cost of the student's tuition at Hamaspik for the 2022-23 school year including reimbursement to the parent for any out-of-pocket expenses incurred related to the student's attendance and tuition at Hamaspik.

Dated: **Albany, New York**
February 26, 2025

JUSTYN P. BATES
STATE REVIEW OFFICER