



# The University of the State of New York

The State Education Department  
State Review Officer  
[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 20-016

**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:**

Law Offices of Lauren A. Baum, P.C., attorneys for petitioner, by Lauren A. Baum, Esq.

Howard Friedman, Special Assistant Corporation Counsel, attorneys for respondent, by Sarah M. Pourhosseini, 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 part of the decision of an impartial hearing officer (IHO) which failed to make a determination regarding whether respondent (the district) is required to reimburse the parent for the unilateral placement of her son at a nonpublic school for the 2017-18 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**

Due to the narrow scope of this appeal, a brief recitation of the student's educational background and the underlying procedural history is provided. The student in this matter had received special education and related services during preschool and kindergarten, and exhibited executive functioning and sensory integration delays as well as motor stereotypies that affected his academic progress (Parent Ex. G at pp. 2-3). According to the parent, the district failed to develop an IEP for the student for the 2017-18 school year (second grade) and she unilaterally

placed the student at an out-of-state, nonapproved, nonpublic parochial school (NPS) at her expense for the 2017-18 and 2018-19 (third grade) school years (see Parent Exs. A at p. 1; H; I; K; M; O; Q; R).<sup>1</sup>

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

In a due process complaint notice dated October 23, 2018, the parent requested an impartial hearing asserting that the district failed to offer the student a FAPE for the 2018-19 school year (Parent Ex. C). Specifically, the parent asserted that no CSE review meeting was held; no IEP was developed; no recommendation of placement was made; and no public-school placement was offered for the 2018-2019 school year (id.).

In a response to the parent's due process complaint notice, the district indicated that the CSE met and developed an IEP for the student on August 4, 2016 (Parent Ex. B at p. 1).

In an amended due process complaint notice, dated December 19, 2018, the parent added a claim regarding the 2017-18 school year, asserting that a recommendation was not made for either the 2017-18 school year or the 2018-19 school year (Parent Ex. A at p. 1). The parent also added an allegation that the last IEP for the student was developed in 2016 (id.). The amended due process complaint notice included assertions regarding the development and substance of the 2016 IEP, such as that the CSE lacked sufficient evaluative information, including a medical evaluation, a classroom observation, a clinical report/psychiatric report, or a functional behavioral assessment; the CSE failed to create a behavioral intervention plan; the IEP did not accurately reflect the student's present levels of performance; the annual goals were inappropriate given the student's failure to meet his prior goals or make measurable progress in the prior school year; the recommended integrated co-teaching (ICT) classroom placement for ELA and math, along with the support of a health paraprofessional was inappropriate; the program provided insufficient individual attention; and the CSE did not recommend special education transportation (id. at pp. 1-2). The parent requested reimbursement or funding for the placement of the student at Carmel for the 2017-18 and 2018-19 school years (id. at p. 3).

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

A one-day impartial hearing was held on June 6, 2019 (Tr. pp. 1-75). At the start of the hearing, the district confirmed the IHO's understanding that the district would not meet its statutory burden and would not present a case and that there would be "no rebuttal to the presumption in the law that the Parent has cooperated with the Agency" (Tr. pp. 6-7). Thus, the parties agreed that the sole issue presented at the hearing would be "the needs of the student, and the appropriateness of the relief sought" (Tr. p. 7). Also, at the start of the hearing, counsel for the parent noted that the hearing concerned both the 2017-18 school year and the 2018-19 school year and the IHO

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<sup>1</sup> The student's eligibility for special education services as a student with an other health impairment is not at issue in this appeal (see 8 NYCRR 200.1[zz][10]).

acknowledged that she was correct noting the amended due process complaint notice (Tr. pp. 8-9).

In a decision dated December 21, 2019, the IHO addressed the 2018-19 school year, finding that the district failed to offer the student a FAPE (IHO Decision at p. 7-10).<sup>2</sup> The IHO first determined that the district did not call any witnesses, did not submit any documentation, did not rebut the parent's documentary evidence, and did not file a response to the parent's due process complaint notice or a prior written notice (*id.* at p. 7).<sup>3</sup> The IHO further determined that because the district did not present a case at the hearing, "the hearing process essentially bec[ame] an 'inquest' as to the appropriate relief" (*id.* at p. 10). After reviewing the testimony regarding the student's needs and the program provided to the student at the NPS, the IHO found that the NPS was an appropriate unilateral placement for the student (*id.* at pp. 14-18). In evaluating the appropriateness of the NPS, the IHO also explicitly found that an award of reimbursement for the cost of the tuition at the NPS "would not violate the Establishment Clause" of the United States Constitution (*id.* at pp. 15-18). As relief, the IHO ordered the district to reimburse the parent for the cost of the student's tuition, related services, and transportation at the NPS for the 2018-19 school year, and further ordered the district to conduct evaluations of the student in all areas of suspected disability that have not occurred in the prior two years and that the CSE reconvene once they are completed (*id.* at p. 19).

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

The parent appeals, asserting the IHO erred in failing to make any determination concerning the 2017-18 school year.<sup>4</sup> The parent contends that the amended due process complaint

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<sup>2</sup> The IHO decision has not been paginated. For the purposes of this decision, and consistent with the pleadings, the cover page is designated as page 1 with the remaining pages assigned page numbers 2-20.

<sup>3</sup> The IHO first noted that "silence in a responsive pleading is an admission, and a counterclaim in federal practice is compulsory in the answer or deemed waived, referring to the Federal Rules of Civil Procedure and New York Practice" and that the district did not file a responsive pleading [response to the due process complaint notice] (IHO Decision at p. 7). Initially, the IHO placed an incorrect standard on the district, as a response to a due process complaint notice is "qualitatively different than a federal or state court pleading" and does not require affirmative defenses or specific denials of the allegations contained in the due process complaint (see R.B. v. Dep't of Educ., 2011 WL 4375694, at \*5-\*6 [S.D.N.Y. Sept. 16, 2011]). When a district receives a due process complaint notice from a parent, it shall, within 10 days of receiving the complaint, send the parent a response that includes (a) an explanation of why the school district proposed or refused to take the action raised; (b) a description of other options that the CSE considered and the reasons why those options were rejected; (c) a description of each evaluation procedure, assessment, record or report the school district used as a basis for the proposed or refused action; and (d) a description of the factors that are relevant to the school district's proposal (8 NYCRR 200.5[a]; see 34 CFR 300.508[e]). Furthermore, the district did submit a response to the parent's initial due process complaint notice, which identified the August 2016 IEP as the last IEP developed for the student (Parent Ex. B).

<sup>4</sup> On appeal, the parent also contends that the district's impartial hearing office failed to timely provide the IHO decision to the parent thereby prejudicing the parent's ability to prepare her appeal, specifically that the parent "was denied 17 days" to prepare her appeal because the IHO decision was dated December 21, 2019 but was not issued and received by parent's counsel until January 7, 2020 (Req. for Rev. at p. 4). In an answer, the district argues that the parent does not claim any specific prejudice beyond the slightly shortened timeframe in which to prepare the appeal, nor does the parent indicate what specific relief should be granted, and thus the SRO should

notice included allegations regarding the 2017-18 school year that should have been addressed by the IHO and that the hearing record supports a finding that the district did not offer the student a FAPE for the 2017-18 school year, the unilateral placement was appropriate to meet the student's needs during the 2017-2018 school year, and a weighing of the equities supports tuition reimbursement. For relief, the parent requests an order remanding the case to the same impartial hearing officer to complete the case and to issue a decision regarding the parent's claims for the 2017-2018 school year.

In its answer, the district agrees that the amended due process complaint notice included claims regarding the 2017-18 school year and joins in the parent's request that the matter be remanded back to an IHO to render a determination as to the 2017-18 school year. The district goes on to argue that there is sufficient information available in the hearing record to make determinations regarding the 2017-18 school year. More specifically, the district concedes that it did not present a case regarding the 2017-18 school year, and that the parent presented "somewhat more extensive evidence" regarding the 2017-18 school year than the 2018-19 school year. The district explicitly states that "[it] does not contest that Petitioner met her prong two burden, and that there are no equitable considerations which would bar relief."

## **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

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decline to address the issue as it is not properly before the SRO (Answer at pp. 3-4, 7). The time period for appealing an IHO decision begins to run based upon the date of the IHO's decision and State regulations do not rely upon the date of a party's receipt of an IHO decision for purposes of calculating the timelines for serving a petition (see 8 NYCRR 279.4[a]). Therefore, the actual date that the IHO's decision was transmitted to the parties or the actual date upon which either of the parties received the IHO's decision is not relevant to the timeline for appealing from the decision. However, the parent's appeal was served on the district within the 40-day period after the date of the IHO Decision. Accordingly, there is no indication that the parent suffered prejudice from the delay in receiving the IHO Decision, and there is no relief that can or should be granted for any delay under the circumstances presented in this matter. Nevertheless, in response to the parent's argument that a party should have a 40-day period in which to prepare and serve an appeal after the date the IHO decision was received, State regulation plainly states the contrary, i.e. that a request for review must be served within 40 days after the date of the IHO decision (see 8 NYCRR 279.4[a]).

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. \_\_\_, 137 S. Ct. 988, 999 [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., 137 S. Ct. at 1001). 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., 137 S. Ct. at 1001 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).<sup>5</sup>

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

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

## **VI. Discussion**

### **A. Preliminary Matters**

#### **1. Additional Evidence**

The request for review contains supplemental documents, including a paginated copy of the IHO decision in this matter (Req. for Rev. Ex. A), along with four other documents consisting of email correspondence with the IHO and a list identifying how many cases are assigned to different IHOs (Req. for Rev. Exs. A-A; A-B; A-C; A-D). The parent asserts these documents cover relevant events that occurred after the impartial hearing and they are necessary in order to render a decision (Req. for Rev. at n. 4, 5). The district disagrees and requests that an SRO reject the documents' introduction into the hearing record. Generally, documentary evidence not presented at an impartial hearing will be considered in an appeal from an IHO's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see Application of a Student with a Disability, Appeal No. 14-179; Application of a Student with a Disability, Appeal No. 13-238; Application

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<sup>5</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Andrew F., 137 S. Ct. at 1000).

of a Student with a Disability, Appeal No. 12-185; Application of the Dep't of Educ., Appeal No. 12-103; see also 8 NYCRR 279.10[b]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 488-89 [S.D.N.Y. 2013] [holding that additional evidence is necessary only if, without such evidence, the SRO is unable to render a decision]). When the non-submitting party does not object to the inclusion of additional evidence, or relies on the evidence in formulating its pleadings, the determination to either include or exclude additional evidence still rests solely within the discretion of the SRO (see 8 NYCRR 279.10[b]; L.K., 932 F. Supp. 2d at 488-89; Application of a Student with a Disability, Appeal No. 18-114). A review of the documentation shows that none of the documents submitted are necessary for an SRO to render a decision in this matter, and as such, I will not consider them in this appeal.

## **2. Scope of Impartial Hearing**

The parent is requesting that an SRO remand the matter back to the IHO for the purpose of rendering a decision regarding the parent's claims related to the 2017-18 school year and the appropriateness of the unilateral placement for the 2017-18 school year.

As indicated above, the parent's amended due process complaint notice included allegations that the district did not develop an IEP for either the 2017-18 school year or the 2018-19 school year and requested reimbursement or direct payment for the cost of the student's tuition at the NPS for both school years (Parent Ex. A at pp. 1, 3). While the IHO referenced exhibits and testimony that related to both school years in his decision, the IHO's reimbursement/direct payment award only addressed the 2018-19 school year (see IHO Decision at pp. 14, 15, 19). Accordingly, a finding must be made regarding the parent's claims related to the 2017-18 school year.

However, considering the district's posture on appeal, a remand does not seem the appropriate course. More specifically, the district concedes that it did not offer the student a FAPE for the 2017-18 school year, admitting that it did not put on a case for either school year (Answer ¶16). Additionally, according to the information available in the hearing record, the last IEP developed for the student was developed in August 2016, bearing out the parent's claim that the district did not provide a program recommendation for the 2017-18 school year (see Parent Exs. B at p. 1; F). Finally, the district also affirmatively states in its answer that "[it] does not contest that Petitioner met her prong two burden, and that there are no equitable considerations which would bar relief" (Answer ¶16). Accordingly, the district concedes that it did not offer the student a FAPE for the 2017-18 school year, that the NPS was an appropriate placement for the student for the 2017-18 school year, and that equitable considerations are not a bar to an award of tuition reimbursement. Generally, a finding that the services offered by the district were inadequate or inappropriate, that the services selected by the parents were appropriate, and that equitable considerations support the parents' claim would result in an award of tuition reimbursement (Carter, 510 U.S. 7; Burlington, 471 U.S. at 369-70; R.E., 694 F.3d at 184-85). The only reason provided in the district's answer as to why I should not order reimbursement or direct funding for the cost of the student's tuition at the NPS is that any tuition award for the 2017-2018 school year should include a reduction to account for time spent at the NPS in "prayer" (Answer ¶18). Based on the district's concessions, and the limited issue presented in this matter, rather than remand the matter for a hearing, I will address the district's singular reason presented for not awarding the parent the cost of the student's tuition at the NPS for the 2017-18 school year.



## B. Unilateral Placement

While the district concedes that the NPS was an appropriate placement for the student for the 2017-18 school year, the district requests a reduction in the amount of the award. In particular, the district asserts that the IHO found the student "received religious instruction in the form of daily prayer from 8:30 to 9:00 am" (Answer ¶17; see IHO Decision at pp. 15, 18). According to the district, the student's report card shows that he also participated in prayer during the 2017-18 school year (Answer ¶18). Based on this, the district suggests that "any tuition award for the 2017-2018 [school year] should include a reduction to account for prayer" (id.).

Initially, in requesting a reduction for the 30 minutes per day the student spent in prayer at the NPS, the district failed to point out that the IHO had also found that the district did not refute the testimony of the parent's witness "that the student d[id] not receive religious instruction at the private school beyond daily prayer from 8:30 to 9:00 am" (IHO Decision at p. 18).<sup>6</sup> Additionally, the district did not reference the IHO's determination that the daily prayer was not a basis for finding a reduction in an award of tuition for the 2018-19 school year, the IHO's application of the 3-part test set forth by the Supreme Court in Lemon v. Kurtzman, 403 U.S. 602 (1971), or the IHO's reliance on the Supreme Court's reasoning in Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993) (see IHO Decision at pp. 15-18). The district has not provided any basis or rationale to depart from the IHO's determinations regarding the impact of the 30 minutes of daily prayer time the student participated in during the 2018-19 school year to the award of tuition at the NPS for that school year and has not challenged the IHO's analysis of the issue or provided an alternative analysis to contrast with the IHO's (see 8 NYCRR 279.4[a], [f] [parties must "clearly specify the reasons for challenging the impartial hearing officer's decision, identify the findings, conclusions, and orders to which exceptions are taken]).

There is no dispute that the student participated in prayer at the NPS during both the 2017-18 and 2018-19 school years (Parent Exs. H at p. 4; I at pp. 2-3). The director of educational resources at the NPS testified that during both the 2017-18 and 2018-19 school years prayer occurred for 30 minutes every morning, during which time some students received related services on some days of the week instead of attending daily prayer (Tr. pp. 40, 48-49). The parent testified that during the 2017-18 school year the student did not participate in prayer twice per week because he received one session each of articulation therapy and reading instruction during prayer time, and during the 2018-19 school year he was pulled out during prayer time once per week to receive speech-language therapy (Tr. pp. 62-65). Accordingly, adopting the analysis used by the IHO for the 2018-19 school year, which the district conceded to by not providing any reason in its answer to depart from that analysis, the limited amount of time that the student spent in prayer during the school day does not provide a basis for reducing an award of tuition at the NPS for the 2017-18 school year.

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<sup>6</sup> The IHO specifically referenced the NPS director and the parent's testimony that the instruction provided to the student in Hebrew was considered a foreign language and was not religious in nature (IHO Decision at p. 14; Tr. pp. 33-34, 65-66). With respect to the time the student spent in a Judaic Studies class, the director testified that there was a lot of writing and story-based instruction in that class and that it was primarily used to develop students' critical thinking skills (Tr. p. 34).

Finally, while a full analysis of the parent's unilateral placement of the student at the NPS is unnecessary in light of the concessions by the district, a brief review of the student's needs and how they were addressed at the NPS follows.

### **1. The Student's Needs**

Although not in dispute on appeal, a brief discussion of the student's special education needs is provided in order to review whether the NPS provided specially designed instruction appropriate to meet those needs during the 2017-18 school year.

A June 2016 psychological evaluation report indicated that at the age of two the student received a diagnosis of "primary motor stereotypies," described as "rhythmic, repetitive, involuntary and predictable in location and pattern on the body" (Parent Ex. G at pp. 2, 16). The student's stereotypies were characterized by grimacing, pacing back and forth, rubbing his hands together, and lifting his arms above his head (id.). During preschool the student exhibited a limited attention span and delays in fine motor skills, social/emotional functioning and play, and modulation of sensory input for which he received special education itinerant teacher (SEIT), occupational therapy (OT) and counseling through the district's Committee on Preschool Special Education (id. at p. 2). Evaluations of the student were conducted by a psychologist, a neurodevelopmental pediatrician, and a psychiatrist and although the student demonstrated some features characteristic of an autism spectrum disorder, there was no consensus that he met the criteria for a formal diagnosis at that time (id. at pp. 2, 16).

During the 2015-16 school year the student attended a public school for kindergarten and received integrated co-teaching (ICT) services, OT, counseling, and 1:1 aide services (Parent Ex. G at pp. 2-3). The parent also obtained private speech-language therapy, OT, and counseling for the student; however, despite the "intensive level of intervention" the student "continued to struggle in school academically, behaviorally and socially" (id. at p. 3).

According to the August 2016 IEP developed for first grade, the student was a multisensory learner and his intellectual functioning was within the average range (Parent Ex. F at pp. 1-2).<sup>7</sup> The IEP further noted that the student was meeting grade level in reading and math and was slightly below grade level in writing (id.). The student sometimes struggled with answering inferential questions and staying focused during independent reading time (id.). Also, the student struggled with independently planning a detailed story that included a beginning, middle and end, and had difficulty staying motivated/engaged and on task/on topic during independent writing time (id.). In addition, he struggled with explaining his mathematical thinking to his peers (id. at p. 2). The student benefited from having paraprofessional support for all academic activities during the school day in order to complete given tasks (id.).

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<sup>7</sup> The IEP reflected a meeting date of August 4, 2015 which appears to be a typographical error, as the implementation date for the IEP was September 2016 and the present levels of performance reflected academic assessment levels from March 2016 (Parent Ex. F at pp. 1, 16).

Socially, the August 2016 IEP indicated that the student worked well with peers and adults when in the presence of his paraprofessional (Parent Ex. F at p. 2). While the student was able to identify a variety of feeling states and could read some nonverbal cues, his attention span waned quickly during small group discussions (*id.*). He required numerous redirections in order to remain on task or topic, and he presented with difficulties relating to transitions and developing coping skills when feeling overwhelmed in social situations (*id.*). The student enjoyed conversations with adults and peers and benefited from support in establishing and maintaining attention during activities (*id.*). While he was able to articulate his thoughts regarding things he had learned, he benefited from strengthening his ability to clearly articulate his feelings (*id.*). At that time, the parent expressed concerns about the student's attention span throughout the school day, as well as his executive functioning skills, his difficulty with transitions at morning drop off, and his ability to advocate for himself and develop coping strategies to meet his needs during the school day (*id.*).

Physically, the August 2016 IEP indicated that the student's activities of daily living skills were within age appropriate norms and he was able to transition between academic subjects with consistent adult support and reminders (Parent Ex. F at p. 2). The student required a full-time health paraprofessional to ensure his physical safety and due to "his diagnosis of [p]rimary [m]otor [s]tereotypies" (*id.*). Also, at that time, the student received OT to address visual motor integration and visual perceptual skills, self-care (i.e., fastening fasteners, donning and doffing his jacket, using utensils appropriately) (*id.* at p. 3). The IEP indicated the student was motivated to participate in most therapeutic activities and did well in OT (*id.* at pp. 3-4).

The August 2016 IEP listed under the student's management needs that he benefitted from preferential seating to increase focus, repeated directions and visual/verbal prompts, repetition of new material and consistent review of previously taught material, explicit scaffolded instruction, small group instruction, 1:1 conferring, and a health paraprofessional (Parent Ex. F at p. 4).<sup>8</sup>

## **2. The Nonpublic School**

According to the director of educational resources at the NPS (director) there were approximately 200 students enrolled in the NPS, encompassing both the core program (160 students) and the Providing Alternative Learning Strategies (PALS) program (40 students) (Tr. pp. 22-23, 58; *see* Parent Ex. J at p. 1). The student attended the NPS during the 2017-18 (second grade) school year in the PALS program and received academic instruction (including English language arts, mathematics, science, and social studies), instruction in specials such as art, physical education, and technology, direct reading instruction, OT, speech-language therapy, and religious instruction including prayer (Tr. pp. 31-32; Parent Exs. I; P; Q). The hearing record described the PALS program as being for students with special needs and indicated that the school's "overarching goal [was] to provide the tools, supports and strategies necessary for students to perform with independent success in a mainstream learning environment during their years at [the NPS] and after they graduate" (Tr. p. 23; Parent Ex. J at p. 1).<sup>9</sup> The typical PALS class size for kindergarten

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<sup>8</sup> The hearing record did not indicate where the student attended school for first grade during the 2016-17 school year (*see* Tr. pp. 1-74; Parent Exs. A-C; F-R).

<sup>9</sup> An undated description of the PALS program described it as "three-pronged," and comprised of interactive,

through fifth grade was six students, with a special education lead teacher, and either a second special education lead teacher or an assistant teacher with training and experience in special education (Parent Ex. J at p. 2). The PALS program was also comprised of a full staff of highly trained and experienced related service providers including an occupational therapist, an executive functioning coach, a social worker, a speech-language pathologist, school psychologists, and an Orton-Gillingham (O-G) reading specialist (*id.*).<sup>10</sup> Students accepted to the PALS program generally had language-based disabilities in reading, writing, or math, speech-language impairments, other health impairments including attention deficit disorder, anxiety, or high functioning autism spectrum disorder (Tr. pp. 23-24).

With respect to how the NPS met the student's special education needs, the director testified that the student's biggest academic difficulty involved decoding skills, which affected fluency and writing skills; all of which were addressed in the PALS classroom (Tr. pp. 36-37; Parent Ex. P).<sup>11</sup> At the private school, each classroom teacher in the PALS program received training in Orton-Gillingham, a multisensory approach to address decoding difficulties, and had an Orton-Gillingham certified specialist on staff (Tr. p. 37). The general studies teacher noted in the 2017-18 report card that the student received four sessions per week of small group Orton-Gillingham reading instruction per week (Parent Ex. I at p. 7). Additionally, phonemic awareness skills were addressed daily through a variety of auditory activities (*id.*). To address the student's writing deficits, the NPS provided supports and services to improve his organization, distractibility, and letter reversals; for example, in order to assist the student in independently writing longer sentences, organizing his paragraphs, and organizing his thoughts, he received graphic organizers and conferenced with teachers (*id.*). In addition to teacher redirection to remain focused in responding to creative/abstract writing prompts, the student benefitted from review of the main idea of the prompt (*id.*). To address letter reversals in the student's writing, he was provided with a visual representation of the alphabet and teacher intervention (*id.*). For math, the student used "Touch Math," described as "a visual computational strategy where dots are correlated with numbers to help students add" (*id.* at p. 8). The student used mnemonics, visuals, and tangibles to record and identify place value to the hundreds (*id.* at pp. 8-9). Repetition and teacher encouragement were provided to assist the student in adding up to three-digit numbers with regrouping and ensuring his comprehension of the topics being covered (*id.* at p. 8). Overall, pre-teaching, repetition, reviewing, and providing various strategies (i.e., visuals or songs to understand and solve math problems) was necessary for the student to improve his math skills (*id.* at p. 10). The report card reflected that the student continued to require small group instruction

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integrated, and individualized components (Parent Ex. J at p. 1). The interactive component involved "learning by doing," using a hands-on, multisensory approach to the curriculum where students acquired skills through direct experience (*id.*). The integrated component involved a blend of self-contained, co-taught, and mainstream learning whereupon students were provided with support as well as a challenging academic environment (*id.*). The individualized component of the PALS program offered curriculum that mirrored the school's mainstream curriculum but was modified and differentiated (*id.*). Students received personalized schedules that were adjusted according to their academic, social, and emotional needs (*id.*).

<sup>10</sup> Documentary evidence described Orton-Gillingham reading instruction as "sequential, cumulative, multisensory and teacher directed" (Parent Ex. I at p. 7).

<sup>11</sup> The director testified that his contact with the teachers during 2017-18 provided him with sufficient basis to testify at the hearing about how the student presented in the classroom that school year (Tr. p. 36).

with individual teacher time and attention, and modifications of lessons, especially those containing reading and writing; additionally, the student benefited from a low student/teacher ratio, frequent reinforcement, a controlled pace, repetition, review and reinforcement of skills, which were provided at the NPS (see id. at pp. 4-10).

Additionally, twice per week during the 2017-18 school year the occupational therapist worked on improving the student's self-regulation, core strength and coordination, handwriting, and executive functioning skills (Tr. p. 63; Parent Ex. I at p. 7). The speech-language pathologist worked on improving the student's pragmatic language and social communication, and articulation skills (Tr. p. 63; Parent Ex. I at p. 7). Social skills training was also carried out by the social worker, speech-language pathologist and the classroom teachers, and the NPS also used positive behavioral interventions and supports (Tr. pp. 38, 50-51). During lunch, two grades of core and PALS students ate together at which time specialists and administration staff facilitated social interaction among the students (Tr. pp. 42-43).

Although not dispositive, review of the hearing record shows that the student made progress during the 2017-18 school year. Specifically, review of the student's report card showed that he made progress in reading, writing, and math (Tr. pp. 42, 53; see Parent Ex. I at pp. 1, 4-10). Socially, the 2017-18 report card also indicated that the student's social circle had grown throughout the school year and he had become more comfortable conversing with both familiar and less familiar school staff (Parent Ex. I at p. 10). He made many friends both in the classroom and in the grade and although he preferred specific peers, he was generally inclusive of all classmates (id.). During grade-wide activities, the student became more comfortable throughout the course of the year and sat with a mixture of classmates and grade mates (id.). Overall, the report card indicated that the student's academic, and social/emotional gains were evident (id.). With regard to OT, the occupational therapist indicated in the report card that the student had made steady progress during the school year, in that he exhibited improved overall strength and coordination, organization, and ability to follow and execute up to three-step instructions, as well as recognize errors in letter formations and correct them independently when prompted (id. at p. 7). The speech-language pathologist reported that the student had demonstrated several improvements in his pragmatic skills; specifically that he was becoming more aware of social cues and was able to better monitor his body language and tone of voice during an exchange (id.).

Based on the above, the NPS provided specially designed instruction to address the student's needs as identified in the June 2016 psychological evaluation report and June 2016 IEP and the student made progress at the NPS during the 2017-18 school year. Accordingly, without any specific argument that the NPS was not appropriate, the hearing record supports finding that the NPS was an appropriate unilateral placement for the student for the 2017-18 school year.

## **VII. Conclusion**

On appeal, the district concedes that it did not offer the student a FAPE for the 2017-18 school year, that the NPS was an appropriate placement for the 2017-18 school year, and that equitable considerations do not bar relief. As to the only issue raised on appeal by the district as a reason not to award the parent's requested relief, under the circumstances presented the student's attendance for 30 minutes of daily prayer at the NPS for the 2017-18 school year does not provide

a basis for reducing or denying the cost of tuition at the NPS. This is especially so where the district has not provided a reason for departing from the IHO's decision regarding the same issue with respect to the 2018-19 school year.

I have considered the parties' remaining contentions and find that I need not address them in light of my determinations herein.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision dated December 21, 2019 is modified to the extent that the district shall reimburse the parent and/or directly pay the cost of the student's tuition, related services, and transportation at the NPS for both the 2017-18 and 2018-19 school years.

**Dated:**            **Albany, New York**  
                         **May 28, 2020**

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**STEVEN KROLAK**  
**STATE REVIEW OFFICER**