



# **The University of the State of New York**

## **The State Education Department**

**State Review Officer**

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**No. 23-281**

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

### **Appearances:**

The Law Firm of Tamara Roff, PC, attorneys for petitioners, by Tamara Roff, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Frank J. Lamonica, 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. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at Darchai Menachem for the 2023-24 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]-[j]).

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

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

### **III. Facts and Procedural History**

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail. According to the hearing record, a CSE last convened on May 3, 2022, to develop an IEP for the student for the 2022-23 school year (Parent Ex. A at p. 2).<sup>1</sup> The May 2022 CSE recommended that the student attend a 12:1+1 special class in a community school and receive related services (id.). The parents disagreed with the recommendations contained in the May 2022 IEP, as well as with the particular

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<sup>1</sup> The hearing record does not include an IEP (see Tr. pp. 45-46). Information concerning the district's recommended program in the prior school year is taken from the parents' due process complaint notice.

public school site to which the district assigned the student to attend for the 2022-23 school year and, as a result, notified the district of their intent to unilaterally place the student at Darchai Menachem (id.). The hearing record also indicates that an IHO in a proceeding involving the 2022-23 school year determined that the district did not offer the student a free appropriate public education (FAPE), and Darchai Menachem was an appropriate unilateral placement for the 2022-23 school year (id.). The IHO in the prior proceeding ordered the district to fund the student's placement at Darchai Menachem and the district did not appeal the IHO's decision (id.). In a due process complaint notice, dated August 29, 2023, the parents alleged that the district failed to convene a CSE to develop an IEP or offer a placement for the 2023-24 school year, and as result the district failed to offer the student a FAPE for the 2023-24 school year (see Parent Ex. A). As relief, the parents again sought funding from the district for the unilateral placement of the student at Darchai Menachem for the 2023-24 school year (id. at pp. 2-3).

### **A. Impartial Hearing Officer Decision**

An impartial hearing convened on October 23, 2023 (Tr. pp. 1-52).<sup>2</sup> In a decision dated October 27, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year (IHO Decision at p. 7).

The IHO also made factual findings and discussed the parents' unilateral placement of the student at Darchai Menachem (id. at pp. 6-7). The IHO found that Darchai Menachem "provide[d] primarily religious instruction with a concentration in Jewish studies for Orthodox Jews" and that testimony from the school's director of special education revealed that "'nearly half' of the schedule [wa]s so dedicated" (id. at p. 6). With regard to the student's needs, the IHO noted "the critical nature of the student's [m]athematic[s] deficits and the student's noted loss of focus" (id. at p. 7). The IHO emphasized that "the student's schedule place[d] [m]ath as the very last course of the day for a mere 40 minutes" and that the student received math instruction for only four out of six days of his schedule at Darchai Menachem (id.). The IHO contrasted the math instruction the student received with the "daily courses devoted to morning prayer lasting 45 minutes, daily courses devoted to Bible Study lasting 45 minutes, daily courses devoted to Talmudic studies lasting 30 minutes, and 10-minute courses in afternoon prayer 5 out of 6 days a week, all occurring earlier in the student's day" (id. at pp. 6, 8). Next, the IHO noted that "there [we]re no [s]cience classes taught to th[e] student at Darchai Menachem" and that the director of special education at Darchai Menachem "testified that [s]cience [wa]s a core subject for students this age" and also testified "that it [wa]s inappropriate not to provide [s]cience to this student" (id. at pp. 6, 8-9).

The IHO described the student's needs and indicated that the student received speech-language therapy and counseling at Darchai Menachem, but was not receiving his recommended occupational therapy (OT) (id.). According to the IHO, "[d]espite this student's profound academic deficits, this unilateral placement has determined it more appropriate to provide religious instruction for more than half the day as opposed to focusing on core academic instruction individualized for this student" (id. at p. 9). The IHO opined that Darchai Menachem's plan to offer science instruction in the future was "irrelevant to the fact that the program [wa]s currently failing to offer this student an appropriate education" and that an argument that "a future

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<sup>2</sup> A prehearing conference was held on October 2, 2023 (IHO Ex. I).

modification of the programming that adds a critical subject area will then render the current placement appropriate [wa]s in effect a tacit concession that the current placement [wa]s inappropriate" (id.). The IHO then discussed the program description of Darchai Menachem in the hearing record noting that the school held itself out as "a special education program for children struggling with behavior issues, learning disabilities, communication and/or social challenges whose mission is to provide core academic, social, and life skills through individual and small group instruction tailored to each child's individual needs" (id.). The IHO stated that "[c]onspicuously absent from the [p]rogram [d]escription [wa]s any reference to the overwhelmingly religious nature of the program" (id.). Next, the IHO stated that "[d]espite Darchai Menachem's professed mission to provide core academic skills to its students and the deceitful obfuscation of its true religious nature in its [p]rogram [d]escription, ...the record reflects that the school prioritizes religious instruction over academics" (id. at pp. 10, 14).

The IHO recounted his earlier findings, emphasizing the provision of "primarily religious instruction with a concentration in Jewish studies for Orthodox Jews" and that less than half of the student's schedule was "devoted to secular studies" (IHO Decision at p. 10). The IHO then discussed the testimony of the director of special education at Darchai Menachem which revealed that the student received six hours of 1:1 instruction per week in math, English language arts (ELA) and "social emotional" from a "teacher whose educational background is in Talmudic Studies" (id.). The IHO again noted that there was no science instruction and the director of special education testified that it was inappropriate to not provide science instruction to the student (id.).

With regard to the student's progress at Darchai Menachem, the IHO acknowledged the testimony of the director of special education which indicated that the student was making some progress (IHO Decision at p. 11). However, the IHO found that "an Achievement Test Report dated September 20, 2023, offered into evidence by the [p]arent, show[ed] that the student ha[d] failed to master more than half of the benchmarks evaluated" and that "[a]part from the Achievement Test Report ...the record [wa]s devoid of any progress reports, academic grades, or report cards for this student since he started attending Darchai Menachem" (id.). The IHO determined that "the parent's unilateral placement ...offering a majority of religious instruction" was not "appropriate for this student's individual needs" (id.). He further elaborated that he did "not find it appropriate that a school who[ose] professed mission [wa]s to provide core academic skills actually dedicate[d] more than half of its allotted time to religious instruction and failed to offer any instruction in [s]cience education" and that it was not appropriate "that this student's deficits in [m]athematics [we]re addressed disproportionately to the instruction offered in prayer, Talmudic Studies, and Bible Study"(id.). The IHO also opined that "[w]hile some loving parents may find it appropriate and desirable to send their child to an institution that prioritizes religion over academics and entirely neglects the teaching of [s]cience curriculum, that same parent cannot then ask the government to finance that child's inappropriate unilateral placement under the guise of a [s]pecial [e]ducation lawsuit" (id.). The IHO then offered a caveat that he was not making a "presumptive conclusion that any academic institution offering some religious instruction [wa]s de facto inappropriate," as he was "fully aware that some courts have allowed tuition reimbursement for a unilateral placement at a private religious school" (id.). Nevertheless, in this matter, "the totality of the circumstances" reflected "that at Darchai Menachem, core academics appear[ed] to be merely a pretext to a program rooted primarily in religious instruction" (id. at p. 12).

After finding the parents' unilateral placement inappropriate, the IHO addressed equitable considerations "for the purposes of completeness of the record" (IHO Decision at p. 12). In so doing, the IHO reiterated his prior findings and indicated that he would have found "ample equitable factors that would weigh against full direct funding of tuition" (*id.* at p. 13). The IHO further stated that "[a]lthough the [p]arent[s] submitted evidence that they provided the [d]istrict with [n]otice" of their intention to unilaterally place the student, they "also offered documentary evidence and testimony that the unilateral placement... include[d] a substantial amount of religious instruction" (*id.*). The IHO then stated that had he awarded any funding for the student's attendance at Darchai Menachem, he would have denied funding for the amount of religious instruction, which he determined to be 51 percent of the student's program (*id.* at pp. 13, 15).

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

The parents appeal and assert that the IHO failed to engage in a thoughtful and thorough analysis of the hearing record. In finding the unilateral placement inappropriate, the parents argue that the IHO failed to consider the parents' evidence of specially designed instruction and gave undue weight to the amount of religious instruction the student received. The parents also assert that the IHO's analysis of equitable considerations was flawed and should be reversed. As relief, the parents request a finding that their unilateral placement was appropriate and that equitable considerations favor direct funding for the cost of the student's attendance for the 2023-24 school year.

In an answer, the district argues that the IHO engaged in a thoughtful and thorough analysis, that his determinations were correct, and that the IHO's decision should be upheld in its entirety.

#### **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]).<sup>3</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. Unilateral Placement**

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2023-24 school year so that the determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]).

The parents' primary claim on appeal is that the IHO erred by giving undue weight to the religious instruction that the student received at Darchai Menachem. As discussed more fully below, the legal standard for determining the appropriateness of a unilateral placement pursuant to a Burlington/Carter analysis is whether the unilateral placement provided instruction specially designed to meet the unique needs of the student. Additionally, the program provided by the parents' unilateral placement must be reasonably calculated to enable the student to receive educational benefit. The IHO articulated the correct legal standards in his decision; however, upon application of those standards his analysis of the appropriateness of the parents' unilateral placement improperly focused far more on the amount of religious instruction the student received and the omission of the related service of OT and instruction in the area of science rather than whether the evidence tended to show that the special education programming provided by Darchai

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<sup>3</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" (Endrew F., 580 U.S. at 402).

Menachem constituted instruction specially designed to address the student's needs when viewed in light of the totality the circumstances.

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). 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 (Carter, 510 U.S. 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. v. Bd. of Educ. of Hyde Park, 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). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see 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 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).

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

The director of special education and wellness at Darchai Menachem (director) provided direct testimony by affidavit that the IHO admitted into evidence after determining its authenticity (Tr. pp. 32-34; Parent Ex. R).<sup>4</sup> The director testified that the student was evaluated at the beginning of the year to determine his academic needs and that the student would continue to be assessed and progress reports compiled at different points throughout the school year (Parent Ex. R ¶ 14). The director further testified that the student was functioning "about [two] grade levels behind in most academic areas" and "require[d] an academically supportive environment, with a small class" to address his academic needs and behavioral challenges (id. at ¶ 15).

An "Achieve Pre Test" (achievement pre-test) was administered to the student by Darchai Menachem staff on September 20, 2023 (Parent Ex. I). The director testified that the student "was assessed using the Achieve E[nglish] L[anguage] A[rts] and Math tests" and that at the start of the year, students were assessed by the classroom teacher and "Division Supervisor" (Parent Ex. R ¶ 14). The results of the September 2023 achievement pre-test showed that the student's abilities were at the non-mastery level in all areas of math except for geometry where the student's abilities were at the partial mastery level (Parent Ex. I at pp. 1-2). Regarding English language arts (ELA), the student's abilities were assessed at the non-mastery level in the areas of author's purpose and plot, drawing conclusions, library reference skills, summarizing, and vocabulary (id.).

According to a September 2023 teacher progress report, the student presented with delays in academic and social areas that deeply affected his performance in school and presented as delays in maintaining friends, executive functioning, and an ability to be around others (Parent Ex. E at p. 1). According to the teacher progress report, the student had "excessive outbursts about uncontrollable situations" and would take it out on his peers and/or teachers (id.). In addition, the student had difficulty accepting when things did not go his way, which prevented him from behaving according to classroom expectations (id.). The teacher progress report indicated that the student did not express himself verbally, but rather became verbally and physically aggressive and needed continued intervention in regulating his emotions, learning to express himself appropriately, and remaining "up to par" in classroom expectations (id.).

Academically, the September 2023 progress report stated that the student displayed weakness in areas of mathematics, including problem solving, multiple step word problems, algebraic thinking, and number sense and that he lost focus and patience very easily, would get easily agitated by challenging equations, and would give up on the rest of the questions (Parent Ex. E at p. 1). With respect to reading, the progress report stated that the student struggled with higher order thinking skills, summarizing, and understanding the main idea; demonstrated deficits with understanding author's purpose, character point of view, and perspective; and due to his limited word knowledge and vocabulary, displayed difficulty with age-appropriate reading

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<sup>4</sup> The director appeared at the impartial hearing, where she authenticated her affidavit and submitted to further direct and redirect questioning from the parents' counsel and was cross-examined by the district's attorney (Tr. pp. 30-44). For purposes of this decision, statements made in the director's sworn affidavit of testimony will be referred to as testimony (see Parent Ex. R).

comprehension skills (id. at p. 2). The teacher progress report noted that on a grade level writing passage the student "displayed [a] lack of" punctuation, grammar, and spelling (id.). It further noted that the student had difficulty with sequencing sentences, staying on topic and comprehending given tasks (id.). According to the progress report, the student displayed poor penmanship skills, illegible handwriting and weakness with staying within the lines when writing a composition (id.). In addition, the progress report indicated that the student was a visual and auditory learner and benefitted from receiving visual cues during verbal lessons, learned best when lessons were geared toward his interests and when he was emotionally regulated, and benefitted from frequent breaks (id.).

The director testified that the student had recently advanced from fourth to fifth grade math, but still displayed weaknesses in many areas such as problem solving, geometry, multiple step word problems, and pre-algebra (Parent Ex. R ¶ 19). She added that the student had a hard time maintaining focus, which caused him to give up easily in the middle of working on math problems (id.).

In ELA, the director testified that the student struggled with higher order thinking skills, summarizing and understanding the main idea of a text, identifying the author's and character's point of view, perspective, understanding settings, and comparing and contrasting characters (Parent Ex. R ¶ 22). The teacher progress report noted that the student's limited word knowledge and vocabulary impacted his reading comprehension leaving him far below grade level and that he was reading at a fifth-grade level (id. at ¶¶ 22, 23). The director further testified that the student struggled with writing passages; was unable to sequence his thoughts; had difficulty staying on task when writing; displayed significant delays in punctuation, spelling and grammar; had poorly formed and frequently illegible handwriting; and was then-currently overall at a fifth grade level in writing (id. at ¶ 25).

Regarding the student's social development, the September 2023 progress report stated that the student lacked the ability to interact with peers at an appropriate level, had a history of maladaptive behaviors that had caused him to earn a reputation amongst his peers of being problematic, was unable to lose games (with appropriate behavior) and frequently blamed others for minor issues, struggled with perspective taking and tolerating things not going his way, and exhibited behaviors including combativeness, argumentativeness, and rigidity and was easily provoked into starting fights (Parent Ex. E at p. 3). The report recommended that the student continue to work with a special education provider in a 1:1 setting with minimal distractions (id.).

An October 2023 counseling progress report stated that the student presented with immature social skills including poor conversational skills such as eye contact, active listening, and appropriate expression of feeling and emotions (Parent Ex. H). The counseling report indicated that these deficiencies resulted in the student becoming frustrated and often resulted in verbal and physical aggression when the student did not get his way (id.). According to the counseling report, the student's social skills deficiencies, as well as his poor emotional regulation, made it difficult for him to initiate and maintain relationships with his peers and he had limited tolerance of others who saw matters differently than him (id.). His classmates and peers often avoided interacting with him as his social transactions were found to be unpleasant (id.). The counseling report stated that the student's behaviors included "sore lo[sing]" and his tendency to be easily drawn into a scuffle with peers when feeling invalidated (id.). The student was noted to

be argumentative and oppositional with his teachers, although they had been able to develop "a somewhat workable rapport" with him (*id.*). According to the counseling report, the student responded well to positive motivation (*id.*). The report "highly recommended" that the student continue to receive in-school counseling services and noted that the ability of the counselor to collaborate with other school staff was key in enabling the student to develop a better sense of self-efficacy and a better reputation with his peers (*id.*).

The director testified that the student's social skills were significantly delayed and noted that he lacked the ability to interact with peers at an appropriate level, had a history of displaying maladaptive behaviors, required assistance in the areas of anger management and flexibility, exhibited "a lot" of anxiety, could be "very uptight" when things did not go his way, was very competitive and had a hard time coping with disappointment and losing, did not like it when flaws were pointed out, had difficulty making friends as he liked to argue a lot, emotionally struggled to comprehend why he had difficulties, and exhibited behaviors including screaming, non-compliance, ignoring staff, and "getting very personal and negative" (Parent Ex. R ¶ 28). The director further testified that the student exhibited delays in regulating his behaviors and emotions as well as some difficulties in executive functioning as compared with his peers, but she also noted that the student responded well to the executive functioning support provided by the school (*id.* at ¶¶ 7, 15 ).

A September 2023 OT assessment student report stated that the student exhibited difficulties in sustaining attention during classroom tasks, a significant weakness in activity tolerance, and difficulty staying at his desk for long periods of time (Parent Ex. G at p. 1). Assessment results indicated that the student had an average attention span of approximately ten minutes before becoming distracted (*id.*). According to the report, evaluation of the student's gross motor skills revealed below-average upper body strength, that notably affected the student's ability to complete fine motor tasks (*id.*). Assessment of the student's handwriting using the Evaluation Tool of Children's Handwriting (ETCH), revealed illegible and inconsistent writing with fine motor control issues which affected the quality of the student's written work (*id.*). The report noted that preliminary assessment results from the Sensory Profile Questionnaire suggested that the student had sensory challenges, particularly in the areas of sensor-seeking behaviors and self-regulation (*id.*).<sup>5</sup> The report further notes that the student could become very irritable and showed increased sensitivity to noises and became very distracted on a frequent basis in class (*id.*). According to the report, the student displayed deficits with structure and organization and had a hard time managing his classroom/school locker and desk (*id.*). The occupational therapist who completed the report recommended that the student receive two 30-minute sessions per week of OT (*id.* at p. 2).

The student's needs were also detailed in a seventh grade speech-language assessment that indicated the student presented with a "receptive expressive" language disorder characterized by reading comprehension and spelling deficits (Parent Ex. F at p. 1). Informal testing found that the student had difficulty identifying the semantic relationship between words as well as explaining those relationships (*id.*). According to the speech-language assessment, the student demonstrated

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<sup>5</sup> For all other skills measured on the September 2023 OT assessment report, no assessment tool or method of evaluation was indicated (*id.* at pp. 1-2).

significant social pragmatic difficulties that hindered his ability to make appropriate friendships with his peers and impeded his ability to express his wants and needs with his peers and caregivers (id.). The assessment further noted that these breakdowns in communication affected the student's ability to develop safe and healthy relationships that would advance his social and academic development in the classroom and beyond (id.).

## **2. Specially Designed Instruction and Progress**

The 2023-24 program description of Darchai Menachem, entered into evidence by the parent, indicated that the school provides a special education program for children struggling with behavior issues, learning disabilities, communication and/or social challenges (Parent Ex. J at p. 1). The program's stated mission is to provide core academic, social, and life skills through individual and small group instruction tailored to each child's individual needs (id.). According to the program description, support is provided for students both within the classroom and small groups known as pods and outside the class in specially designed work areas (id.). The program description notes that Darchai Menachem generally serves students with behavioral/social skills issues such as students diagnosed as having an autism spectrum disorder (ASD); attention deficit hyperactivity disorder (ADHD); dyslexia; dysregulation syndrome; pediatric mental health diagnoses such as anxiety, depression and bipolar disorder; and emotional dysregulation (id.). The program uses a school-wide positive behavior modification system that includes personal behavior plans, consistent data collection, and feedback and the program description notes that behavior intervention plans are developed by a team including the students' parents/guardians (id.). Additionally, the program supports parents with regular group counseling and training sessions as well as offering family support as needed (id. at p. 2).

The Darchai Menachem 2023-24 seventh grade daily schedule shows that the school operated Sunday through Friday, with Friday being a half day of program (Parent Ex. S).<sup>6</sup> The director testified that the student was in a class with 14 students, one "main teacher," and three assistants and further noted that the student's "teacher for general studies" held a Master's Degree in special education and was a New York State licensed special education teacher (Parent Ex. R ¶¶ 10, 11, 16). She also testified that the school had a licensed behavior analyst (LBA), who held a Master's Degree in education and was a NYS certified special education teacher, who "overs[aw]" the class (id. at ¶ 12). The student's related services providers included a certified speech-language pathologist, licensed mental health counselor, and a licensed occupational therapist (Parent Ex. R ¶¶ 34, 37; see Parent Exs. F at p. 2; G at 1; H).

The September 2023 teacher progress report included annual goals in math (division, adding and subtracting fractions, decomposing word problems), reading (determining main idea and supporting details, describing character/setting/events, comprehending informational texts), and writing (writing passages with proper punctuation and grammar, writing where development and organization are appropriate to task/purpose/audience, recalling information from experiences or from provided sources to answer questions) (Parent Ex. E at pp. 3-4).

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<sup>6</sup> At the impartial hearing, the director confirmed that parent exhibit S was the correct schedule for the 2023-24 school year, when the student was attending seventh grade, despite the document itself indicating that it was for the 2022-23 school year (Tr. pp. 21-22, 34).

The director testified that the student received counseling and speech-language therapy (Parent Ex. R ¶ 32). The student also received 1:1 academic instruction for six hours per week with the ELA and math specialist who held a degree in Talmudic studies and had "nearly completed" his educational requirements for a Master's Degree in behavioral science human services (Parent Ex. R ¶ 13; see Parent Ex. S).

In addressing the student's math needs, the director testified that remediation was done via an individualized work plan through either small groups within the classroom or 1:1 support and instruction, which allowed the student to progress at a more gradual pace (Parent Ex. R ¶ 20). As the student was a visual learner, his instructors provided him with graphic organizers, math manipulatives, and a self-monitoring checklist (id.; see Parent Ex. E at p. 1). The director added that the Common Core curriculum, Spectrum Math (fifth grade level) was used along with the associated unit assessments, which helped to address the student's challenges in math and "accommodate[ed] his problem solving" (Parent Ex. R ¶ 20).

The director stated that to assist the student with his reading and comprehension, he was taught in small class groups and in 1:1 settings; the student was provided graphic organizers, visual aids, and the strategy "stop and jot[]" in which he was prompted to stop after every paragraph to summarize the text in his own words (Parent Ex. R ¶ 23; see Parent Ex. E at p. 2). After summarizing text, the student was prompted to think about who the character was and how the character felt about a certain situation in order to support the student's reading comprehension and higher order thinking skills (Parent Ex. E at p. 2). The director added that the student responded well to the attention and support of the 1:1 and small group instruction and that in classroom discussion the teacher guided the student through the skills of following plot, using context clues to determine meaning of words, and interpreting visual information (Parent Ex. R ¶ 23). According to the director, the student's writing issues were addressed through small class groups and 1:1 instruction where the student worked to self-reflect and self-express through his journaling (id. at ¶ 26).

In addressing the student's social deficits, the director testified that the teachers at Darchai Menachem worked to build a positive relationship with the student so that they were able to support him when he was struggling and being combative or starting fights (Parent Ex. R ¶ 30). Additionally, the director noted that the school counselor saw the student twice a week and worked with the student to address those issues, the LBA advised staff on how to handle and interact with the student in order to develop his social skills, the student was provided ample 1:1 intervention and school-to-home collaboration, and staff preemptively planned for changes and addressed them ahead of time through lesson planning and explaining and preparing the student (id.). According to the director, the school was introducing a program called "Centervention," which provided an online, student led emotional learning program that started with an "emotion check" and included whole class teacher led activities (id.). The director noted that topics included perspective taking, self-regulation, and appropriate behavior (id.). Additionally, the director stated that the school had a school-wide points system and a class-wide system to encourage appropriate behavior (id.). She also described an independent group contingency that involved the use of tokens that students earned as reinforcement for positive behavior and an interdependent group contingency which involved the class collectively earning tokens to redeem for a group trip (id.). The director also testified that in addition to her regular meetings, the division supervisor also met with the teacher

and related service providers to discuss the student's needs and his educational program (id. at ¶ 14).

The student's mother provided an affidavit of testimony and described how the teachers at Darchai Menachem were constantly in contact with her when any concerns regarding the student arose (Parent Ex. Q ¶ 22). The IHO questioned the parent during the impartial hearing and the mother's testimony clarified that the student received speech-language therapy even though it was not listed on the 2023-24 standard schedule that was admitted into evidence because such schedule was for everybody and did not delineate the student's specific therapies (Tr. pp. 25-26; see Parent Ex. S). The director testified that the student received "1 hour/ 2 sessions per week" of both direct speech-language therapy, where the student worked on expressive and receptive language, expressing himself and communicating adequately in order to help with communication and social skills and identifying the semantic relationship of words, and indirect support consisting of advice and goals for the class teachers (Parent Ex. R ¶¶ 33, 35). The director further testified that the student received speech-language therapy twice a week on Tuesdays and Thursdays from 4:00 to 4:30 (Tr. p. 35).<sup>7</sup> The seventh-grade speech-language assessment included goals that targeted the student's ability to identify and explain the semantic relationship of words, spell words correctly, stay on topic and demonstrate appropriate eye contact while engaged in a conversation, and express his needs and concerns (Parent Ex. F at pp. 1-2).

To address the student's needs identified in the September 2023 OT assessment report, the occupational therapist recommended short-term goals that targeted the student's ability to increase his sustained attention during classroom tasks to a minimum of 25 minutes, improve his upper body strength by 20 percent, improve his handwriting, and develop and consistently use sensory self-regulation strategies to minimize disruptions due to sensory processing challenges (Parent Ex. G at p. 2). The parent testified that the student did not receive OT and acknowledged, after reviewing the September 2023 OT assessment student report, that OT was a recommendation for the student "by the author of this report" (Tr. pp. 27-28; see Parent Ex. G at p. 2). The parent explained that the student did not like to participate in therapy and that the school team had been trying to "get him on board" with OT, but that at that point, the student had been refusing to go to those sessions (Tr. pp. 28-29). She stated that it was her understanding that the school was working with the student to eventually provide OT where possible (Tr. p. 29).

Consistent with the parent's description, the director testified that the student was very reluctant to go out of the classroom and so they decided "at the moment" to focus on his counseling and speech-language therapy and explained that the occupational therapist was providing indirect support to the class regarding the student's handwriting and his regulation (Tr. p. 36). She described the indirect support as meeting with the class teacher, class support and "whoever's working with [the student]" to make sure that everyone was aware of his needs and could use the recommendations in his OT report throughout the week without the student having to be pulled out of class for direct sessions (id.). The director also testified that the student received two 30-minute sessions per week of counseling where he worked on improving his social skills so he could

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<sup>7</sup> The director explained that speech-language therapy did not appear on the schedule admitted into evidence because that was an overall schedule for the class and that since the student was only receiving counseling and speech-language therapy, they did not include his personalized schedule (Tr. p. 35).

form better relationships with peers, addressing his tendency to be oppositional and argumentative with teachers, and improving his emotional regulation skills (Parent Ex. R ¶¶ 36, 38).

With regard to science instruction, the director testified that it was her understanding that science was not being provided at the time, but added that it was under discussion, that she believed it was a core subject and should be added to the curriculum, and that "hopefully" by January 2024 it would be "rolled out across the school" (Tr. pp. 39-42; see Parent Ex. S).

Turning to the student's progress, the director testified that the student had responded well to math instruction and had made some progress throughout the 2023-24 school year thus far, demonstrating improvement in basic multiplication and division (Parent Ex. R ¶ 21). The director further testified that the support of the 1:1 instruction provided the student with the confidence he needed to be successful in his academics (id.). Regarding reading and comprehension, the director testified that although the student's distractibility and behavior challenges impacted his ability to progress, he had shown some progress (id. at ¶ 24). The director testified that although the student's progress in writing was slow, he had made measurable improvements with individualized and supportive instruction (id. at ¶ 27). The director also testified that as a result of intervention, the student was starting to understand the impact of his behavior on others and that his relationships with his peers were slowly progressing (id. at ¶ 31). The director testified that through his work in counseling, the student had improved his ability to avoid maladaptive responses (id. at ¶ 38).

The parent testified that she had seen the student "make strides" and that he was getting the behavioral interventions and attention he required to work on overcoming his challenges around perseverating and perceiving others' behavior as unfair (Parent Ex. Q ¶ 23).<sup>8</sup> According to the September 2023 teacher progress report, the student was making progress in perspective taking, being able to see the bigger picture when playing and interacting with peers and could identify the social goal of an activity as interacting with peers rather than to win the game, something which he was unable to do before (Parent Ex. E at p. 3). The seventh-grade speech-language assessment report noted progress in the student's ability to listen to a story and respond more accurately to "WH questions" (Parent Ex. F at p. 2). The October 2023 counseling progress report noted that the student had shown some progress in his ability to better assess situations and in developing the ability to avoid maladaptive responses and reactions when provoked (Parent Ex. H). The report indicated that counseling services, along with speech therapy, had proven to be effective in "helping [the student's] social interactions as well as his emotional regulations reach closer to age-appropriate levels" (id.).

I find that the IHO erred in characterizing the hearing record as "devoid of any progress reports" (IHO Decision at p. 11), when both the parent and director testified about the student's social and academic progress at Darchai Menachem, which was not refuted by the district, and the student's speech-language assessment and counseling progress report noted the student's gains in communication and social skills (see Parent Exs. F; H; R; Q). Moreover, 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

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<sup>8</sup> It is not clear from the parent's affidavit whether the progress she discussed occurred during the school year at issue in this case, 2023-24, or during the time since the student started attending Darchai Menachem in fall 2022 (see Parent Ex. Q ¶ 23).

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, a finding of progress is, nevertheless, a relevant factor to be considered (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]).

Based on the foregoing evidence and my independent review of the hearing record, I find that the IHO erred in concluding that Darchai Menachem was not an appropriate unilateral placement when viewed under the totality of the circumstances. In addition to the student's social, academic and communication progress at Darchai Menachem, the student received 1:1 and small group instruction, the school developed goals for the student under which he was progressing, and his teachers adapted instruction to provide the student with supports like graphic organizers and other visual aids. Together, these factors all support the appropriateness of the parents' unilateral placement of the student and indicate that it was reasonably calculated to enable the student to receive educational benefits. Although the omission of OT is less than ideal, a parent need not show that a unilateral placement meets state education standards or requirements and need not show that it furnishes every special service necessary to maximize a student's potential, in order to qualify for reimbursement under the IDEA; rather a parent has the burden to establish that the unilateral placement provides specially designed instruction to meet the student's unique needs, as well as support services as necessary to allow the student to benefit from instruction (T.K. v. New York City Dep't of Educ., 810 F.3d 869, 878 [2d Cir. 2016])[reversing the administrative hearing officers who found that the related services at a unilateral placement were inadequate when the totality of the evidence demonstrated it was appropriate and would enable the student to make progress]; Frank G., 459 F.3d at 364).<sup>9</sup> As for the IHO's and the district's concern regarding a lack of instruction in the area of science in this orthodox Jewish school, the issue is related more to a dispute over whether the private school provides a sound basic education to its students, which is not a determination which can or should be made in this forum that resolves special education disputes only and, thus far, I can only say that the judicial authority on the topic strongly suggests that the parents cannot be penalized and required to effectively disenroll the student from the school (Parents for Educ. & Religious Liberty in Sch. v. Young, 79 Misc. 3d 454, 470 (Sup. Ct. Alb. Cnty 2023)). The problem here is somewhat different because the public school district in this case was provided with an opportunity to provide both a FAPE and a sound basic education to the student, but when it failed to provide a FAPE, the parents were left to create their own solution. That their solution may not have perfectly covered every area of the public school curriculum does not necessarily mean that appropriate special education to address the student's disability is not being provided under the Endrew F. standard.

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<sup>9</sup> Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Review of the hearing record establishes that the parents' unilateral placement—in its totality—designed an educational plan that would provide the student with instruction specially designed to meet his educational needs.

## **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"])).

Reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Turning to equitable considerations in the instant case, the IHO found that funding for religious instruction "would violate the federal regulations regarding IDEA funding, the Establishment Clause of the First Amendment" (IHO Decision at p. 14). For the reasons explained below, the IHO erred in these findings as they run afoul of the current trend in case law on the

issue of public funding for religious instruction (see Application of a Student with a Disability, Appeal No. 23-133).<sup>10</sup>

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 Catalina 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];<sup>11</sup> 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. v. Lower Merion Sch. Dist., 919 F. Supp. 793, 818 (E.D. Pa. 1996), citing Lemon v. Kurtzman, 403 U.S. 602 [1971]). Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases summarized above, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be

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<sup>10</sup> The IHO also found that funding for religious instruction would violate the Blaine Amendment to the State Constitution (IHO Decision at p. 14). The Blaine Amendment of the New York State Constitution prohibits reimbursement in that it states that: "Neither the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning." (N.Y. Const. art. XI, § 3). Notwithstanding this language, the State Constitution also provides that: "nothing in this constitution contained shall prevent the legislature from providing for the . . . education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the mentally retarded . . . as it may deem proper" (N.Y. Const. art. VII, § 8[2]; see Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 96-036).

<sup>11</sup> In L.M. v. Evesham Twp. Bd. Of Educ., the district court did not decide whether the parent was eligible for tuition reimbursement because the court remanded the case to determine whether the student was offered a FAPE and if the unilateral placement was appropriate (256 F. Supp. 2d at 305).

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 [found] 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]).

As noted above, it is uncontroverted in the instant appeal that the district failed to offer the student a FAPE for the 2023-24 school year. Based on this, the parents had no choice but to pursue remedial relief to correct the district's misfeasance. Also, the parents under the IDEA can place the student at any school of their choosing, provided that it is appropriate to meet the student's needs. Contrary to the IHO's determinations, direct funding for the cost of the student's attendance at Darchai Menachem is not precluded by the Establishment Clause of the First Amendment according to the most 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. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a free appropriate public education. 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. Neither tuition reimbursement nor direct funding involve the imprimatur of State approval upon the school selected by the parents, nor does it have as its primary effect the advancement of religion. Neither scenario creates a financial incentive for children to undertake religious education. The district is simply incurring expenditures for appropriate unilateral placements, which it would not have been compelled to make had it offered its students appropriate educational placements in the first instance.

As described in detail above, I find that the IHO erred in reducing the amount of direct funding based on the amount of religious instruction provided at Darchai Menachem. The IHO also found that the parents submitted timely written notice of their intention to unilaterally enroll the student at Darchai Menachem and seek public funding (IHO Decision at p. 13). The district has not appealed the IHO's determination that the parents provided timely notice, therefore this determination has become final and binding on the parties (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at \*6-\*7, \*10 [S.D.N.Y. Mar. 21, 2013]). The district also has not alleged, nor is there any evidence in the hearing record that the parents failed to cooperate with the district, in fact, the district did not contest that it failed to timely convene an annual review for the student. Accordingly, there is no basis in the hearing record for the IHO's determination that equitable considerations weighed in favor of reducing the amount of the parents' requested relief.

## **VII. Conclusion**

In summary, the IHO erred in determining that Darchai Menachem was not an appropriate unilateral placement and that equitable considerations warranted a reduction in the amount of tuition funding.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated October 27, 2023, is modified by reversing those portions that found that the parents' unilateral placement at Darchai Menachem was not appropriate and that equitable considerations warranted a reduction in the amount of direct funding for the cost of the student's attendance; and

**IT IS FURTHER ORDERED** that the IHO's decision, dated October 27, 2023, is modified to provide that the district shall directly fund Darchai Menachem in the amount of \$105,000 for the cost of annual tuition.

**Dated: Albany, New York  
January 25, 2024**

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**JUSTYN P. BATES  
STATE REVIEW OFFICER**