The University of the State of New York

The State Education Department
State Review Officer
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No. 23-304

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

Appearances:
Law Offices of Lauren A. Baum, PC, attorneys for petitioner, by Matthew Finizio, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by 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. Petitioner (the parent) appeals from the decision of an impartial hearing officer (IHO) which denied her request to be fully reimbursed for her daughter's tuition costs at the Hamaspik School 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]-[*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

Briefly, the student has received a diagnosis of Down Syndrome and began receiving special education and related services at a young age (Parent Ex. M ¶ 3). The student attended a district elementary school until September 2021, at which time the parent unilaterally placed the student at the Hamaspik School (Parent Exs. L ¶ 9; M ¶ 3).[1] According to the parent, she was not

[1] The Hamaspik School is described in the hearing record as an ungraded program that "caters" to students who have received a Down Syndrome diagnosis and provides instruction in classes with six to eight students, one teacher, and classroom paraprofessionals, with 1:1 paraprofessional services available depending on student needs (Parent Exs. D at p. 1; L ¶ 5; N ¶ 6). The Hamaspik School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

"invited to an IEP meeting" nor did she receive a public school placement for the student for the 2023-24 school year and, (Parent Ex. M ¶¶ 4-5).

In a letter dated August 20, 2023, the parent notified the district that a CSE had not been held for the student and the district had not provided them with an IEP or a public school placement and indicated that they intended to place the student at the Hamaspik School at district expense (Parent Ex. B).

In a due process complaint notice dated September 4, 2023, the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) because it failed to convene a CSE meeting, develop an IEP, and provide a public school placement for the 2023-24 school year (Parent Ex. A at p. 1). The parent further asserted that the Hamaspik School provides an appropriate education program for the student that meets her daughter's needs and allows the student to make academic, social and emotional progress (id. at p. 2). As relief, the parent sought tuition reimbursement and funding from the district for the unilateral placement of the student at the Hamaspik School for the 2023-24 school year (id.).

On September 6, 2023, the parent signed a contract to enroll the student in the Hamaspik School for the 2023-24 school year (Parent Exs. J at pp. 1, 8; M ¶ 6).

An impartial hearing convened on November 1, 2023 (see Tr. pp. 9-51). In a decision dated November 9, 2023, an IHO determined that the district failed to offer the student a FAPE for the 2023-24 school year, that the parent met her burden to show that the Hamaspik School provided an educational program that met the student's needs, and that there were no equitable considerations that would preclude an award of tuition reimbursement (IHO Decision at pp. 11, 15, 18). The IHO found that the parent incurred an obligation to pay the student's tuition at the Hamaspik School and was entitled to an award reimbursing the parent for the amount that she had paid in tuition and directing the district to directly fund the student's remaining tuition costs (id. at p. 18). However, the IHO found that the student received religious instruction at the Hamaspik School during a class titled "Davening"; the IHO then determined it was not the district's obligation to provide funding for religious instruction (id. at p. 16). Therefore, the IHO reduced the award of tuition by the prorated amount of time that she calculated reflected the time that the student had spent in religious instruction (id. at pp. 16, 18).

IV. Appeal for State-Level Review

The parent appeals, arguing that the IHO erred insofar as she reduced the award of tuition reimbursement for the portion of the school day the student received religious instruction at the Hamaspik School. More specifically, the parent contends that the IHO erroneously determined that Carson as next friend of O. C. v Makin, 596 U.S. 767 [2022], which held that a school district's refusal to fund religious instruction could constitute a violation of the Free Exercise Clause of the First Amendment of the United States Constitution and the Equal Protection Clause of the Fourteenth Amendment, was not factually relevant to the parent's request for tuition at the Hamaspik School. The parent further contends that "[r]educing the cost of tuition based on some religious programming provided restrains the [p]arent's free exercise of religion and coerces the parent[] into choosing between an inappropriate public placement or some other nonsectarian program merely based upon its religious programming" (Req. for Rev. at p. 5). The parent emphasizes that the reason she placed the student at the Hamaspik School was because the district

failed to offer the student a FAPE by failing to convene the CSE to develop an IEP and failing to offer an assigned public school to implement the student's IEP during the 2023-24 school year. The parent further argues that the IHO failed to consider the secular benefit of the student's Davening class at the Hamaspik School.

In its answer, the district asserts that the parent's appeal does not raise any IDEA claims and instead asks for a determination of constitutional law, which an SRO is without jurisdiction to decide.[2] The district argues that the IHO was correct in ruling that Carson "was 'factually unrelated' to this case" because "Carson did not involve the IDEA nor any special education claim" (Answer ¶ 7). According to the district, a prior SRO decision, Application of a Student with a Disability, Appeal No. 23-133, is "factually different, non-binding, and is distinguishable" from the instant matter because "the record contains no clear evidence of how [the Davening class] translates to secular courses" (id. ¶ 9). The district further argues that Zobrest is factually distinguishable from the current matter because the parent has not paid the student's tuition. The district requests that the IHO's determination be affirmed.

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

[2] To the extent that the district asserts that an SRO lacks jurisdiction to address the constitutional issues raised by the parents in their appeal, it must be noted that the IHO denied funding for the religious portion of the student's school day based in part on the district's argument that "the federal and New York State Constitution prohibits reimbursement for religious instruction[]" (Tr. p. 43). Accordingly, although it is true that issues of this nature are more appropriately resolved by the courts, if I were to accept the district's position on appeal that the impartial hearing process should not address issues of constitutional law, the parent's appeal would have to be granted and the IHO's reduction in tuition overturned without reaching any of the merits of the parties' other arguments.

for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

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

provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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

The primary issue presented on appeal is whether the IHO erred in reducing the award of tuition reimbursement at the Hamaspik School for the portion of the school day the student received instruction in a Davening class.[4]

The IHO determined that the Hamaspik School's Davening class was "religious in nature," and reduced the tuition award "to reflect the time spent on religious instruction," which she calculated to be approximately 6.25 percent of the student's time spent at school, based on the student's schedule (IHO Decision at p. 16; see Parent Ex. E). Review of the student's schedule shows that during the 2023-24 school year the Davening class occurred daily for twenty-minute periods (Parent Ex. E). The IHO rejected the parent's argument that an award of tuition reimbursement/direct funding should not be prorated because of the recent Supreme Court decision in Carson, instead the IHO determined that Carson was "factually unrelated to the situation at hand" (IHO Decision at p. 15). The IHO cited M.L. by Leiman v. Smith, 867 F.3d 487 (4th Cir. 2017) to support her ruling that "[a] school district has no duty under the IDEA to provide religious instruction" (id.).

[3] 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).

[4] The district does not cross-appeal from the IHO's findings that it failed to offer the student a FAPE, that the Hamaspik School was an appropriate unilateral placement, and that equities favored the parent. In addition, the district does not cross-appeal from the IHO's order directing the district to fund the student's unilateral placement at Hamaspik School. Therefore, these determinations have become final and binding on the parties and will not be reviewed on appeal (34 CRF 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]).

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 [laying out the relevant caselaw through the Supreme Court's decision in Carson).

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

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

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

Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[6] Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases summarized above, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380, 392-93 [D. Mass. 1998], citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this case, the IHO relied on a decision by the Fourth Circuit Court of Appeals, M.L. v. Smith, to reach her determination to reduce the student's tuition reimbursement/direct funding for the periods the student spent in her Davening class (IHO Decision at p. 15). In M.L., the parents of a student with Down Syndrome requested an IEP for their son that both addressed his needs under the IDEA and also addressed "his religious and cultural needs" (M.L., 867 F.3d at 490-91). The Fourth Circuit held that the IDEA "does not require [an educational outcome] that furthers a student's practice of his religion of choice" (id. at 499). However, M.L. is factually distinguishable from the instant case because in M.L. the parties "agreed that the IEP would be sufficient but for the Plaintiff's desire for instruction in Orthodox Judaism" but in this case the parent never requested instruction in Orthodox Judaism, rather she sought an IEP from the district and the district failed to convene a CSE to develop an IEP for the student for the 2023-24 school year (compare M.L., 867 F.3d at 497, with IHO Decision at pp. 10-11). Moreover, because the Fourth Circuit in M.L. only addressed the district's obligation to offer a FAPE, it explicitly did not reach the issue of whether awarding publicly-funded tuition to a private "special education program that serves the Orthodox Jewish Community" would be a violation of the Establishment Clause (M.L., 867 F.3d at 490, 499 n.11). As noted above, the Supreme Court has held that the IDEA is a neutral program and some district courts have found that tuition reimbursement is appropriate under the Establishment Clause (see Zobrest, 509 U.S. at 10; Matthew J., 989 F. Supp. at 392-93; Christian G., 919 F. Supp. at 818). As such, I find this case is distinguishable from M.L. and the IHO erred in relying on M.L. in her analysis.

Further, it is uncontroverted that the district failed to offer the student a FAPE for the 2023-24 school year. Based on this, the parent had no choice but to find an alternative placement for

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

the student and the parent, under the IDEA, has the right to place the student at a school of her choosing, provided that it is appropriate to meet the student's needs. As noted above, the IHO found that the Hamaspik School was an appropriate unilateral placement and that equitable considerations weighed in favor of an award of tuition reimbursement and direct funding of the student's placement, and these determinations have not been challenged on appeal. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition. The authority summarized above, including the IHO's misplaced reliance on M.L., presents no basis for preventing the parent from obtaining full reimbursement for the services based on her individual choice to place the student at a nonsecular school.

Although not necessary considering my determination above, I will briefly address the parent's assertion that the student's Davening class provided the student with a secular benefit so that it "did not have the primary effect of advancing religion" (Req. for Rev. at p. 9). According to the description in the "Notes" on the student's 2023-24 class schedule, the Davening class entailed "[r]ead aloud (focusing on vocabulary/comprehension) or shared reading (focus on fluency)" (Parent Ex. E). The evidence in the hearing record shows that the student exhibited delayed reading skills and as of June 2023, was working on improving her phonological processing and decoding skills (Parent Ex. F at pp. 3-4). Also, in her shared reading program, the student worked on increasing skills such as early literacy and listening comprehension (id. at p. 4). Additionally, the director testified that the goal of the Davening class was for students to improve their articulation skills, including sounding out words as clearly as possible and working on saying sentences more clearly (Tr. p. 28). According to the student's speech-language progress report, prepared in May 2023, the student's "speech consist[ed] of several articulation errors and phonological processes, which further contribute[d] to decreased intelligibility" (Parent Ex. I at p. 2). Additionally, the report indicated that the student's speech intelligibility was affected by dysfluencies (id. at p. 3). Accordingly, based on the limited information in the hearing record as to the content of the student's Davening class, it appears that the school was working on areas to address the student's secular needs within the Davening class.

However, during cross-examination of the Hamaspik School director, the district's attorney asked what text was used during the student's Davening class, to which the director testified that each class used a different text, and she did not know what text the student's teacher was specifically using (Tr. pp. 27-28). According to the director, during Davening class some of the classes "use[d] Jewish prayers," some classes used "the blessing that you make after eating food," and that it could be "a range of topics that [wa]s used during that time" (Tr. p. 29). When asked if the Davening class consisted of "religious education" or "reading and vocabulary education that just happen[ed] to use religious texts" the director answered "[c]orrect . . . the focus on that [class wa]s primarily articulation . . . and a lot of vocabulary and comprehension as well," which "c[ould] be done on religious texts" (Tr. p. 39). However, the IHO explicitly found that the director was not credible "to the extent that she suggested the [Hamaspik School's] Davening class is not religious in nature" (IHO Decision at p. 15). In this instance, the limited nature of the hearing record does not provide sufficient evidence to overturn the IHO's credibility determination on this issue, therefore, there is insufficient basis to find that the student's Davening class was not "religious in nature" as determined by the IHO (see IHO Decision at pp. 15-16).

In summary, I find that under the particular facts of this case, as supported by the hearing record, awarding the parent tuition for the costs of the student's attendance at the Hamaspik School

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. Tuition reimbursement does not 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. Tuition reimbursement does not create a financial incentive for children to undertake religious education. It simply makes parents whole, by reimbursing them for expenditures which they would not have been compelled to make had the boards of education in question offered their children appropriate educational placements in the first instance, upon a showing by the parents that the selected unilateral placement provides specialized instruction appropriate to meet their child's unique special education needs.

Based on the foregoing, the IHO's determination to reduce the amount of tuition to which the parent was entitled is unsupported by the foregoing legal principals and therefore, is reversed.

VII. Conclusion

Based upon the foregoing, the parent is entitled to full tuition reimbursement or funding for the student's attendance at the Hamaspik School for the 2023-24 school year.

I have considered the parties' remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated November 9, 2023, is hereby modified by reversing that portion which found that tuition reimbursement and funding should be reduced for a portion of the school day; and

IT IS FURTHER ORDERED that the IHO's decision, dated November 9, 2023, is modified to require the district to reimburse the parent for or directly fund the total cost of the student's tuition at Hamaspik School for the 2023-24 school year.

Dated: **Albany, New York**
February 5, 2024

STEVEN KROLAK
STATE REVIEW OFFICER