



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-035

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:

Liz Vladeck, General Counsel, attorneys for petitioner, by Cynthia Sheps, Esq.

Law Offices of Martin Marks, attorney for respondent, by Martin Marks, 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 district) appeals from the decision of an impartial hearing officer (IHO) which ordered it to reimburse the respondent (the parent) or directly fund the parent's son's tuition costs at the Staten Island Hebrew Academy (SIHA) for the 2020-21 school year. The appeal must be dismissed.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

The 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.

Briefly, a CSE convened on April 27, 2020 and, finding the student eligible for special education as a student with autism, developed an IEP for the student with an implementation date of September 8, 2020 (see generally Parent Ex. C).¹ In a letter dated August 27, 2020, the parent

¹ The student's eligibility for special education as a student with autism is not in dispute (see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

disagreed with the recommendations contained in the April 2020 IEP, and as a result, notified the district of her intent to unilaterally place the student at SIHA for the 2020-21 school year (fifth grade) (see Parent Ex. D). In a due process complaint notice dated December 30, 2021 the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2020-21 school year (see Parent Ex. A).²

The parties convened for eight status conferences between March 3, 2022 and June 30, 2023 (Tr. pp. 1-64). An impartial hearing convened on July 19, 2023 and concluded on July 24, 2023 after two hearing dates devoted to the merits (Tr. pp. 65-179). In a decision dated December 22, 2023, the IHO determined that the district failed to offer the student a FAPE for the 2020-21 school year, that SIHA was an appropriate unilateral placement, and that equitable considerations weighed in favor of the parent's request for an award of tuition reimbursement (IHO Decision at pp. 9-15).³ As relief, the IHO ordered the district to reimburse the parent and/or directly pay for the cost of the student's tuition at SIHA for the 2020-21 school year (id. at p. 15).

IV. Appeal for State-Level Review

The district appeals and argues that the IHO erred in finding that the parent met his burden of demonstrating the appropriateness of his unilateral placement of the student at SIHA. The district further argues that the IHO erred in failing to reduce the tuition award on a prorated basis for any portion of the school day dedicated to religious studies.

In an answer the parent asserts that the IHO's decision should be upheld in its entirety and the district's request for review should be dismissed.

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.

² The parent indicated during the September 22, 2022 impartial hearing that the December 2021 due process complaint notice contained a typographical error in that the proposed resolution was for the 2020-21 school year, not the 2019-20 school year as indicated (Tr. p. 22). The IHO suggested the parent submit an amended due process complaint notice to correct the typographical error for clarity purposes (Tr. p. 23). The parent attempted to introduce an amended due process complaint notice during the July 19, 2023 impartial hearing, however, the district objected and the IHO indicated the amended due process complaint notice identified as "Parent Exhibit O" would be "ke[pt] . . . out" and it would be stipulated on the record that the relief sought by the parent was for the 2020-21 school year (Tr. pp. 69-71). A review of the hearing transcripts shows that Parent Exhibit O was not admitted into evidence during the impartial hearing (Tr. pp. 1-179). Therefore, although the district included Parent Exhibit O as part of the hearing record on appeal, it has not been considered.

³ The IHO also issued a July 14, 2022 order denying consolidation of this proceeding with a then-pending proceeding for the 2019-20 school year; in such order the IHO mistakenly indicated that the due process complaint notice dated December 30, 2021 was for the 2019-20 school year (see July 14, 2022 IHO Decision on Consolidation).

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]).⁴

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

In its request for review, the district does not appeal from the IHO's determinations that it failed to offer the student a FAPE for the 2020-21 school year or that the equitable considerations (other than as related to the proportion of religious instruction delivered) weighed in favor of the parent for an award of tuition reimbursement and direct funding of the student's tuition costs (IHO Decision at p. 9). Accordingly, these determinations have become final and binding on the parties (see 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]). On appeal, the crux of the dispute

⁴ 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).

between the parties relates to the appropriateness of the parent's unilateral placement of the student at SIHA for the 10-month 2020-21 school year.

A. Unilateral Placement

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. Student Needs

In order to evaluate the appropriateness of the student's unilateral placement, a discussion of the student's needs is necessary. The hearing record contains the student's April 2020 IEP as well as progress reports in the areas of academics, counseling, speech-language therapy, and occupational therapy (OT) from the student's private school during the 2020-21 school year (Parent Exs. C; F-I). Although the parent argues that the IEP has procedural and substantive deficits, the IHO did not make a finding specific to the student's present levels of performance; during the impartial hearing, testimony from the student's private school staff indicated that the private school reports were included in creating the student's IEP (see Tr. p. 99).⁵ Therefore, a review of the student's 2020-21 IEP and private school progress reports will be summarized to describe the student's needs.

The April 2020 IEP contained 2017 evaluation results that indicated the student's full-scale IQ fell in the extremely low range and placed the student's performance in reading, spelling, and numerical operations below the first percentile (Parent Ex. C at p. 1). With respect to academics, the April 2020 IEP included information from an undated "teacher report" in areas of reading, math, and writing (id. at pp. 1-2).⁶ As recorded in the IEP, a teacher indicated that the student was reading at a third-grade level, could identify character traits, did well with vocabulary and putting words into sentences, and could complete cloze reading passages using his vocabulary words (id. at p. 1). However, the student had difficulty understanding figurative language, and deeper meaning in text such as poetry, and by teacher report he was "very literal" and gave little attention to punctuation or phrasing and lacked expression in dialogue (id.). In math, the IEP indicated that the student had strong multiplication skills, could identify proper and improper fractions and mixed numbers, simplify fractions, complete one-step word problems or multi-step problems using addition or subtraction (id.). The IEP also reflected areas of mathematical weakness reported by the teacher, which included identifying more than one step in a word problem and recalling the steps of long division (id. at p. 2). Lastly, as related to writing the IEP cited the student's strengths as reported by his teacher, which included his ability to write in complete sentences and use proper punctuation, add details to his writing to make it more interesting and write a proper paragraph using a graphic organizer (id.). With regard to writing weakness, the IEP reflected the teacher's report that the student "had very weak spelling skills," needed a graphic organizer to write paragraphs and short essays, and did not use grade appropriate vocabulary in his writing or speaking (id.).

⁵ The IHO made a finding that the district did not meet its burden of providing the student an IEP tailored to meet his individual needs (IHO Decision at p. 9).

⁶ The head of school at SIHA testified that the private school worked together with the district to provide updated reports and the district used the reports to amend and create the student's April 2020 IEP (Tr. p. 99).

In the area of speech-language development, the IEP indicated that the student had demonstrated more fluent reading skills, decoded more proficiently, and comprehended what he was reading (Parent Ex. C at p. 2). The IEP included information that the student had recently started to ask questions on topic related to reading and retold past events with greater accuracy (id.). Additionally, the IEP included information that the student continued to "be very concrete and ha[d] difficulty with fantasy or abstract ideas" (id.). The IEP noted that the student now read handouts and tests provided but fatigued quickly and needed tests administered over several days (id.).

Turning to the student's social development, "[a]s per the teacher report" the April 2020 IEP indicated that the student had formed friendships in his grade-level class, played with other student's outside when invited, was comfortable speaking within a small group during class, and asked initial and follow-up questions during a conversation (Parent Ex. C at p. 2). The IEP further reflected the teacher's report which indicated that the student did not initiate conversations with his classmates or understand their jokes or game rules (id.). The IEP included information "[a]s per the counseling reports" that the student had tremendous growth in his social skills in playing with classmates and engaging in classroom activities; however, he often needed prompting (id.). The IEP noted that, although the student had shown much progress in his social skills, he continued to "sit on the side during lunch instead of conversing with his classmates" (id.). According to the IEP, the counseling reports indicated that the student needed to interact with peers more consistently and that, during the current reporting year, the student began working with a paraprofessional and this had been helpful (id.).

In the physical development section, the April 2020 IEP stated that the student had autism but otherwise was in good physical health (Parent Ex. C at p. 3). The April 2020 IEP stated that the student worked hard and made progress in OT (id.). The IEP further indicated that the student was working on visual skills to improve his reading, writing, and eye-hand coordination; sensory processing skills to improve his ability to sustain attention; and fine motor skills to improve his use of classroom tools and his and legibility when writing (id.).

The April 2020 IEP stated that the student had not been receiving hearing education services and had not used the FM unit during the past school year and noted that the hearing education goal would be carried over from the previous IEP as the student had not received services the past year (Parent Ex. C at p. 3). The April 2020 IEP indicated that the parent wanted to keep the service and the FM unit on the IEP until the student had a re-evaluation (id.).

In addition to the district's April 2020 IEP, the hearing record includes progress reports from the student's private school, SIHA, produced during the 2020-21 school year that described his performance relative to academics, counseling, speech-language therapy, and OT (Parent Exs. F-I). Similar to the student's April 2020 IEP, the November 2020 speech and language progress report stated that the student continued to be "very literal and ha[d] difficulty with abstract concepts" (compare Parent Ex. H at p. 1, with Parent Ex. C at p. 2). Additionally, the report stated that the student had made excellent progress since the last report, "engaged better in a conversation," and had started to participate within the classroom setting, but "still d[id] not ask questions of the teacher to clarify something he d[id]n't understand" (Parent Ex. H at p. 1). Further, the report stated that the student continued to have deficits in processing reading materials, restating what he read, and topic maintenance (id.).

The February 2, 2021 private school academic progress report described the student's strengths and weaknesses in reading, writing, math, and social skills and reported the student's weaknesses in vocabulary use, reading, understanding the figurative language of idioms, spelling, and long division skills in math, which were also included as areas of need in the student's April 2020 IEP (compare Parent Ex. F at pp. 1-2, with Parent Ex. C at pp. 1-2). Additionally, the February 2021 academic progress report noted the student's reading to be "choppy and not fluent," his handwriting as not on grade level, and stated that in the classroom his needs included adjusting his volume when speaking, organizing materials, and moving around the classroom during "downtime and recess" without waiting for permission or instruction (Parent Ex. F at pp. 1-2).

The June 2021 counseling report from the student's private school provided information on the student's social/emotional development and noted that teachers reported the student had increased raising his hand, his participation, asking and answering questions, and demonstrated progress in his social skills (Parent Ex. G at p. 1). However, the report stated that the student "continue[d] to sit on the side during lunch instead of conversing with his classmates" as reported previously in the student's April 2020 IEP (compare Parent Ex. G at p. 1, with Parent Ex. C at p. 2). The counseling report stated, consistent with the management needs of the student's April 2020 IEP, that the student responded to strategies that included use of sticker charts, daily schedules, and checklists and that he had a paraprofessional as well (compare Parent Ex. G at p. 1, with Parent Ex. C at p. 3).

Similar to the IEP, the June 2021 OT progress report described the student's progress and areas addressed in therapy, and noted that the student followed multi-step directions when focused (compare Parent Ex. I at p. 1, with Parent Ex. C at p. 3). The June 2021 OT progress report indicated that the student worked on letter formation, and reported he could complete a five-sentence paragraph with accurate letter formation (Parent Ex. I at p. 1).

2. SIHA

The student attended SIHA, a religious, non-public school for the 2020-21 school year and was placed in a special needs program (Nachas) that "combined self-contained and inclusion-based instruction" (Tr. p. 141; Parent Exs. B at p. 1; D at p. 1; K). According to the program description, the Nachas educational model consisted of a maximum of eight students within the self-contained program and no more than four students within the inclusion program in a general education setting with a maximum of 15 students (Parent Ex. B at p. 1). In addition, there was a certified special education teacher in both settings (id.). The program description indicated that students in Nachas were provided individualized, differentiated instruction, and placed in learning groups based on their needs (id.). The program employed methodologies and strategies for students with challenges in areas of auditory processing, expressive language, receptive language, reading, and executive functioning (id.). The students within the special needs program had opportunities to mainstream within academic classrooms and were mainstreamed in non-academic and specialty subjects/activities that included: morning prayer, recess, lunch, art, music, drama, gym, assemblies, and field trips (id. at p. 2). The head of school at SIHA (head of school) testified that the Nachas program offered students the least restrictive environment with the goal for students to be included for the majority of the day in the general education class (Tr. p. 92). If that was too difficult for a student, the second level of support consisted of providing push-in assistance of a

"para or an assistant teacher for redirection," and if a student still was not benefitting, pull out instruction within a small group, or 1:1 if necessary (Tr. p. 92).

According to the head of school, during the 2020-21 school year, the school had around 120 students in kindergarten through eighth grade with a range of abilities from learning disabilities to gifted, with 15-20 percent of the students a part of the special education program (Tr. pp. 76-77, 79). The head of school reported that the school evaluated students to make sure that they were "a good fit both ways" and chose students for the special education program who could benefit from the social aspects of general education and "not take away from the general ed[ucation] students' experience" (Tr. p. 79). In general, the head of school testified that the special education program "accommodated and appropriately educate[d]" the students within the program and "m[et]" or exceeded "the mandates . . . in [the] students' IEP[s]" (*id.*). Further, the head of school described general needs of the students within the special education program that included students with diagnoses such as autism spectrum disorder, attention deficit hyperactivity disorder (ADHD), and/or speech and language impairments (Tr. pp. 79-80). The head of school testified that the related service providers, regular education, and special education teachers were all New York State certified; additionally, the school offered related services that included physical therapy (PT), speech-language therapy, OT, and counseling, as well as services from "a [board certified behavior analyst] BCBA and [applied behavior analysis] ABA when needed" (Tr. pp. 77, 80).

During the 2020-21 school year, the student received related services of speech-language therapy three times per week, OT three times per week, and counseling one time per week and attended the special education program (Tr. pp. 81-82; Parent Ex. E).⁷ In describing the student, the head of school testified that he was "[v]ery sweet. Eager to please," "[h]a[d] a communication deficit," and was well liked by the students and teachers (Tr. p. 81). The head of school reported the student to be behind in academics, math, reading, writing, communication abilities, and comprehension; testified that he needed multiple goals and supports in order for him "to learn from his class and from his teachers"; and reported the team met at least weekly "to discuss growth, [and] goal amendments" (Tr. p. 82).

In discussing the student's needs and supports, the hearing record is at times unclear if the head of school was describing the student's then-current functioning within the special education program at the time of the impartial hearing or recalling the student's functioning during his fifth grade 2020-21 school year. The head of school reported that she thought of the student currently within the program and stated that he had "been able to be more mainstreamed at this point" (Tr. p. 83). The head of school described that books were adapted to his reading level in the fifth grade, and noted that "for most of math and [English Language Arts (ELA)], he . . . needed to be pulled out" and stated "[w]e tr[ie]d to get him more included in all the other subject areas" (Tr. p. 83).⁸ The head of school explained that every student within the program had their own curriculum that

⁷ According to the student's 2020-21 fifth grade class schedule, the student's speech-language therapy sessions were each 40 minutes, the student's OT included two 50-minute sessions per week and one 40-minute session; and counseling sessions were one time weekly for 50 minutes (Parent Ex. E). The class schedule did not identify if the student's related service sessions were provided individually or in a group (see generally Parent Ex. E).

⁸ The head of school testified that the student was mainstreamed for science class, music, drama, and art, as well as extracurricular activities (Tr. p. 102).

the staff tried "to match up as much as possible to the classroom" a student was placed in (Tr. p. 93). She noted that the student was "very gifted with" science but not in math (Tr. p. 93). The head of school testified that the school supported the student's social/emotional skills by providing counseling services and having teachers involved at lunch and recess in initiating conversations and games (Tr. pp. 93-95). Specifically, the head of school testified that the student was on the autism spectrum and that his speech and language impairment impacted his ability to learn during the 2020-21 school year (Tr. p. 100). She described the student's difficulties focusing and remaining on task and on topic during conversations (Tr. p. 100).

The student's special education teacher testified that, for the 2020-21 school year, the student was provided pull out services for many classes, specifically in math and ELA, and provided push-in services for science class (Tr. p. 144). The special education teacher described that the student received 45-to 60-minute sessions of 1:1 pullout instruction for math and for ELA in the areas of reading and writing (Tr. pp. 144-45). The special education teacher reported that she directly instructed the student in math, reading, writing, and social skills (Tr. p. 153; see Parent Ex. F). The special education teacher described the student's deficits related to understanding figurative language, expanding his vocabulary, reading and comprehending grade level text, spelling and grammar, and completing word problems in math (Tr. pp. 145-47).

Although the district argues that the SIHA program did not provide the student support to meet his unique needs, the head of school described supports provided by the school including graphic organizers and small class sizes noting that class sizes did not exceed 18 students; she reported that during the 202-21 school year the classes were "probably . . . around 15" (Tr. p. 101). In addition, the student's special education teacher testified that she provided supports for the student that included use of graphic organizers, color coding, drill and practice, and systemic instruction in phonics using the Orton-Gillingham program to support the student's reading and writing (Tr. p. 147).

Documentary evidence included in the hearing record shows the student had a schedule that included daily religious instruction; weekly related services of OT, speech-language therapy and counseling; recess, lunch and academic instruction daily in ELA, and math; and academic instruction four times weekly in science and social studies (Parent Ex. E). Additional documentary evidence reflects that during the 2020-21 school year, the student worked on specific goals to address his needs in areas of reading, writing, math, social skills and work ethic, speech and language development, visual motor skills, fine motor development, sensory processing, and peer interactions (Parent Exs. F at pp. 1-2; G at p. 2; H-I).

In light of the above, the hearing record demonstrates that SIHA's program was individualized for the student and provided the student with specially designed instruction targeted to meet his specific special education needs. I now turn to the district's more particularized arguments regarding the unilateral placement.

3. Progress

Regarding the district's argument that the parent failed to present evidence of the student's year end progress in areas of academics and speech-language, it is well settled that, while a finding of progress is a relevant factor (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]), it is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364).

Here, although the district is correct that the hearing record did not include year-end progress reports in all areas for the 2020-21 school year, the record did include a November 17, 2020 speech-language progress report, and a February 2021 academic progress report, in addition to the testimony of the special education teacher at the impartial hearing on July 24, 2023 regarding the student's 2020-21 school year progress (Tr. pp. 148, 152-53; Parent Exs. F; H). Additionally, the hearing record included June 2021 progress reports in areas of counseling and OT (Parent Exs. G; I).

In the area of social skills and work ethic, the February 2021 academic report noted progress in the student's ability to ask for help when frustrated and needing fewer social prompts (Parent Ex. F at p. 2). The June 2021 counseling progress report stated that the student "ha[d] shown much improvement in both his academics and social skills" and noted that teachers reported the student "rais[ed] his hand and participat[ed] much more" and "answer[ed] questions and ask[ed] pertinent questions to the subject matter" (Parent Ex. G at p. 1). Additionally, the counseling report stated the student had "shown progress in opening up and letting his counselor know how he [wa]s feeling" and had "gotten better at verbalizing his wants and needs to adults" (*id.*). The November 2020 speech and language progress report stated that the student had made "excellent progress since his previous report" and "now raise[d] his hand to respond to teachers questions" and "appear[ed] to be processing more information" and "now engag[ed] others into conversation" (Parent Ex. H at p. 1). The June 2021 OT progress report stated the student continued to make progress in his sensory processing skills and sustained attention to task and "[wa]s improving in all areas of fine motor skills as demonstrated by his improvement in strength and functionality of his grasp while writing" (Parent Ex. I at p. 1). Additionally, the progress report indicated that the student's spacing and alignment was up to par and as stated previously, the student could follow multi-step directions when focused (*id.*).

The special education teacher reported that she measured the student's progress through teacher-made assessments and discussions with classroom teachers (Tr. pp. 147-48). The special education testified that the student made progress in math multiplication and division skills and in reading comprehension and vocabulary (Tr. p. 148).⁹

⁹ The special education teacher testified that in preparing for her testimony she reviewed her June 2021 report; however, as noted above, the hearing record only includes her report from February 2021 (Tr. p. 152; Parent Ex. F).

The head of school reported that, during the 2020-21 school year, she observed the student around once a week within the classroom setting for between 20-30 minutes and reviewed portfolio work along with the assistant principal 15-30 minutes biweekly, in the areas of reading, writing, and math (Tr. pp. 114-17). The head of school stated that "based on [her] knowledge of the child throughout the years, . . . he [had] progressed beautifully, year to year, in terms of his social skills and his academic abilities" (Tr. p. 107).¹⁰ During the hearing when asked to detail the student's progress for the 2020-21 school year, the head of school reported from her "recollection" the student gained "a lot of number sense," that "Singapore Math greatly helped [the student]" understand algorithms, the student increased communication in socialization, and increased his academic skills in reading, comprehension, and following the cues of his teachers and students (Tr. pp. 125-26).

Specifically, in her testimony, the head of school described the progress the student had made using the Orton-Gillingham methodology to learn the rules of spelling and pronunciation and noted this approach overall supported the student's reading and comprehension as well (Tr. pp. 112-13, 126-27). Additionally, the head of school reported that the student struggled with vocabulary and testified regarding the progress he made in using words in everyday language and independently, in addition to the progress made in the use of graphic organizers to support his writing and staying on topic (Tr. pp. 127-28). Further, the parent testified that, during the 2020-21 school year, the student made "very good progress" related to his "reading skill, mathematical skill, [and] social skill" (Tr. p. 172).

Thus, while evidence of the student's progress during the 2020-21 school year is not robust, review of the hearing record sufficiently demonstrates that the student made some progress in academics, social skills, communication, and fine motor skills and in his ability to follow multi-step directions and ask and answer questions (Parent Exs. F-I).

4. Hearing Services

In their request for review, the district argues that the parent's unilateral placement was not appropriate as it did not provide the student with hearing education services or an FM unit as indicated on the student's IEP.

The April 2020 CSE recommended that the student receive two 30-minute sessions per week of individual hearing education services, as well as use of a "FM unit" daily (Parent Ex. C at pp. 11, 12). Additionally, as stated above, the IEP included a statement that "[the student] ha[d] not been using the FM unit this year" and reported, "[h]e also ha[d] not been receiving [h]earing [e]ducation [s]ervices" (*id.* at p. 3). The IEP further reported that the parent wanted the services and FM unit to remain on the IEP until the student was re-evaluated (*id.*). As stated previously, the 2020-21 IEP indicated the CSE explained to the parent that the hearing education services goal would remain the same as the previous IEP as the student did not receive hearing services during the year (*id.*). The IEP included one hearing education services goal that stated the student would

¹⁰ Although the hearing record did not include the student's report card or grade information, as related to progress, the head of school reported that she had reviewed the student's grades for the year in question and the student had made noticeable progress, he was promoted to the next grade, and his IEP goals were amended because most were met (Tr. p. 98).

alert the teacher if he had difficulty hearing the lesson, ask the teacher to repeat or rephrase if he had difficulty understanding a concept, and use auditory training skills to follow multi-step directives and answer questions related to grade level texts (id. at p. 5).

Notwithstanding the recommendations on the April 2020 IEP, generally, parents need not show that a unilateral placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). Further, the April 2020 IEP did not include any information regarding the student's hearing, nor indicate why he was recommended for an FM unit (see generally Parent Ex. C at p. 3). With regard to the student's needs relating to special factors, the IEP indicated that the student did not need a particular device to address his communication needs and noted that the section related to a student who was deaf or hard of hearing needing a particular device or service was "[n]ot [a]pplicable" (see id. at p. 4).

During the impartial hearing, the head of SIHA testified that the student did not receive hearing services as indicated on his April 2020 IEP during the 2020-21 school year or use the "device" offered to him (Tr. pp. 119-121).¹¹ The head of school reported "the FM unit that was recommended did a disservice" as the student did not like the FM unit and it distracted him (Tr. p. 121). The head of SIHA testified "we didn't find [the FM unit] was needed" and the student did not have a hearing impairment, but instead presented with a communication impairment (Tr. pp. 121-22). Further, the head of SIHA recalled having someone come into the school to try the FM unit with the student and that the student did not want to wear it (Tr. p. 122). The head of SIHA stated that "it wasn't something we felt . . . worthy of fighting with [the student] on" and he "was doing fine with all the other services" (id.). During the impartial hearing, the head of SIHA testified that she did not recall if the student had a hearing evaluation; she noted that teachers did not bring up a concern regarding the student not hearing the teachers or other students and did not recall the parent or the school having an issue with the student not using the FM unit (Tr. p. 123).

As related to hearing education services and use of the FM unit, the parent testified that the student "had an FM unit when he started at the school"; however, the parent was not clear on the year or time period during which the student used the FM unit (Tr. p. 166).¹² The parent explained that the student was initially "prescribed th[e] FM unit . . . because he was diagnosed with some . . . type of auditory processing disorder" and, according to the teacher, when the student first began using the FM unit he was able to focus better (Tr. p. 167).¹³ However, the parent testified that the teacher reported after a short period of time that the student did not always want to use the FM unit and when not using it "there was no difference in his ability to focus" (id.). The parent testified

¹¹ The head of SIHA, when first testifying, could not recall the name of the assistive technology referred to as an "FM unit" within the student's April 2020 IEP and described the FM unit as a "device" to be used in a larger classroom "to gauge" the student's attention; the head of SIHA noted that the private school's classroom was "a small classroom, it really wasn't needed" (Tr. p. 120).

¹² Although the parent's testimony was unclear on when the student used the FM system, she indicated that "after a short certain while" that the student no longer needed or used the FM unit; within the December 30, 2021 due process complaint notice, the parent alleged that, at that time, the student "use[d] a FM unit every day in all of his classes" (Tr. pp. 165-67; Parent Ex. A at p. 2).

¹³ The hearing record did not specify whether the teacher referred to during the parent's testimony was the regular education teacher or the special education teacher at SIHA (see Tr. p. 167).

that during a "PTA meeting," the teacher reported that the student outgrew the need for the FM unit and no longer needed the device (id.).¹⁴ The parent did not recall evaluations completed by the private school as to whether the student required continued hearing education services during the 2020-21 school year (id.).

Although it is unclear the time period that the student received hearing education services or used an FM unit, the student's April 2020 IEP did not report on the student's hearing or provide any information on the student's previous use of an FM unit. Further, the progress reports from SIHA for the 2020-21 school year did not include information about the student's hearing needs or previous use of an FM unit (see generally Parent Exs. F- I).¹⁵ Instead, testimony from both the head of SIHA and the student's parent reflected that the student previously used the FM unit but that it no longer provided a benefit and tended to distract the student (Tr. pp. 121-22, 167).

Based on the above, the lack of hearing services or provision of an FM unit at SIHA do not provide a basis for departing from the IHO's determination that, based on the totality of circumstances, the evidence demonstrated that SIHA provided educational instruction specially designed to meet the unique needs of the student.

B. Religious Instruction

The district argues that the IHO's awarded relief should be reduced for the portion of the student's program at SIHA dedicated to religious study. The district argues that the federal regulations and the State Constitution preclude it from using federal and State monies to fund religious instruction and that the IHO's awarded tuition should be reduced for the portion of the student's school schedule devoted to religious instruction.¹⁶ Further the district alleges that

¹⁴ Neither the district's nor the parent's attorney questioned the special education teacher about the student's hearing needs, hearing education services, or use of an FM unit at the private school (see generally Tr. pp. 139-56).

¹⁵ Although the student did not receive hearing education services at his private school during the 2020-21 school year, the student's November 2020 speech-language progress report included goals related to answering questions, and asking the teacher for clarification, similar to the hearing education services goal on the student's 2020-21 IEP (compare Parent Ex. H at p. 1, with Parent Ex. C at p. 5).

¹⁶ The district asserts that the State Constitution prohibits such 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" disabled "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).

student's Judaic studies constitute a segregable service that exceeded the level required for a FAPE. Specifically, the district argues that 18 percent of the student's schedule for the 2020-21 school year was allocated for Judaic studies and thus the awarded tuition should also be reduced by 18 percent.

However, the district's argument does not consider the current trend in case law on the issues of public funding for religious instruction, which permits district funding of nonpublic school tuition without reduction for aspects of religious instruction (see Application of a Student with a Disability, Appeal No. 23-133 [laying out the relevant caselaw through the Supreme Court's decision in Carson v Makin, 596 U.S. 767 [2022]].¹⁷

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

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. 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

¹⁷ The Establishment Clause of the First Amendment to the United States Constitution prohibits Congress from making any law respecting the establishment of religion (U.S. Const. amend. I. Federal regulation governing IDEA funding states in relevant part that "No State or subgrantee may use its grant or subgrant to pay for any . . . Religious worship, instruction, or proselytization" (34 CFR 76.532). It has been held that such federal regulation is not a separate limitation on the IDEA but is merely coextensive with the requirements of the Establishment Clause (Zobrest v Catalina Foothills Sch. Dist., 509 U.S. 1, 7 n.7 [1993]).

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

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at 818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).¹⁸ Focusing on the indirect aid and individual choice factors, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380, 392-93 [D. Mass. 1998], citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this matter, it is uncontroverted that the district failed to offer the student a FAPE for the 2020-21 school year. Based on this, the parent had no choice but to find an alternative placement for 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 determined above, SIHA was an appropriate unilateral placement. Contrary to the district's argument, direct funding for the cost of the student's attendance at SIHA is not precluded by any federal or State regulation or the State's Constitution 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 FAPE. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it. The remedy is available to all parents who otherwise meet the criteria set forth in those decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. 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

¹⁸ The second prong of the test set forth in Lemon v. Kurtzman, which has since been abandoned, was that the government action could not have a primary effect of advancing or inhibiting religion (403 U.S. 602, 612-13; see (Kennedy v Bremerton School Dist., 597 U.S. 507, 142 S. Ct. 2407, 2411 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"])).

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. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

I will also address the district's assertion that the student's Judaic studies class constituted a segregable service that exceeded the level required under the IDEA and for a FAPE. Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding the reasonableness of the costs of the program or whether any segregable costs exceeded the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100). More specifically, while parents are entitled to reimbursement for the cost of an appropriate private placement when a district has failed to offer their child a FAPE, it does not follow that they may take advantage of deficiencies in the district's offered placement to obtain all those services they might wish to provide for their child at the expense of the public fisc, as such results do not achieve the purpose of the IDEA. To the contrary, "[r]eimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71 [emphasis added]; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148). Accordingly, while a parent should not be denied reimbursement for an appropriate program due to the fact that the program provides benefits in addition to those required for the student to receive educational benefits, a reduction from full reimbursement may be considered where a unilateral placement provides services beyond those required to address a student's educational needs (L.K., 674 Fed. App'x at 101; see C.B. v. Garden Grove Unified Sch. Dist., 635 F. 3d 1155, 1160 [9th Cir. 2011] [indicating that "[e]quity surely would permit a reduction from full reimbursement if [a unilateral private placement] provides too much (services beyond required educational needs), or if it provides some things that do not meet educational needs at all (such as purely recreational options), or if it is overpriced"]; Alamo Heights Indep. Sch. Dist. v. State Bd. of Educ., 790 F.2d 1153, 1161 [5th Cir. 1986] ["The Burlington rule is not so narrow as to permit reimbursement only when the [unilateral] placement chosen by the parent is found to be the exact proper placement required under the Act. Conversely, when [the student] was at the [unilateral placement], he may have received more 'benefit' than the EAHCA [the predecessor statute to the IDEA] requires"]).

Here, the district cites no support for the proposition that the subject matter of a particular class period could cause the class to be treated as a segregable special education service for these purposes, rather than as the type of feature that is "inextricably linked to the substitution" of a private program for a public one (Bd. of Educ. of City Sch. Dist. of City of New York v. Gustafson, 2002 WL 313798, at *7 [S.D.N.Y. Feb. 27, 2002] [finding features such as small class size or greater personal attention were not segregable]). With regard to the degree to which the services are segregable, the authority relating to excessive services applies most frequently when the services are delivered in a separate location or by a provider not affiliated with the main tuition-based program and/or where the costs of the services are itemized or separately billed (see, e.g.,

Application of a Student with a Disability, 23-130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071). Here, there is no evidence in the hearing record that the Judaic studies class was segregable in this regard. Even if the proportion of the student's schedule devoted to Judaic studies could plausibly be calculated based solely on the student's schedule, this would raise still more questions regarding the incorporation of religion in other aspects of the day and/or the educational benefits that the student may have received through the periods devoted to Judaic instruction beyond the religious aspect. Rather, "the situation does not permit a fair approximation of the value of the services received" compared to the program overall and, therefore, equity supports full reimbursement (Gustafson, 2002 WL 313798, at *7).

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's determinations that the student's program provided by the Staten Island Hebrew Academy for the 2020-21 school year was appropriate and that the equities weighed in favor of the parent for full reimbursement and/or direct funding of the cost of the student's tuition at the Staten Island Hebrew Academy for the 2020-21 school year, the necessary inquiry is at an end.

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

THE APPEAL IS DISMISSED.

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

**SARAH L. HARRINGTON
STATE REVIEW OFFICER**