



The University of the State of New York

The State Education Department

State Review Officer

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No. 24-037

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

Appearances:

The Law Offices of H. Jeffrey Marcus, attorneys for petitioner, by H. Jeffrey Marcus, Esq.

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

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from the decision of an impartial hearing officer (IHO) which denied their request to be reimbursed for their son's tuition costs at the Beit Rabban Day School (Beit Rabban) for the 2021-22 and 2022-23 school years. Respondent (the district) cross-appeals from the IHO's determination that equitable considerations favored reimbursement and from the IHO's award of compensatory educational services. The appeal must be sustained. The cross-appeal must be dismissed.

II. Overview—Administrative Procedures

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

§§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[l]).

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

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

III. Facts and Procedural History

The student has been the subject of prior administrative proceedings involving the 2019-20 and 2020-21 school years (Parent Ex. A at p. 2; B at p. 3; SRO Ex. A at p. 3).¹ The hearing

¹ After I conducted a preliminary review of the hearing record to ensure its adequacy for a full review of the issues raised on appeal, I directed the submission of an additional document that had been referenced by the parents (8 NYCRR 279.10[b] [permitting a State Review Officer to seek additional evidence if he or she determines that such additional evidence is necessary]). Omitted from the parents' documentary evidence but frequently

record reflects that during the 2018-19 school year, the student was found eligible for special education and related services as a preschool student with a disability (Parent Exs. E at p. 3; O at ¶¶ 11-12; P at ¶ 7; SRO Ex. A at p. 4).² The hearing record further indicates that for the 2018-19 school year, an April 2, 2019 Committee on Preschool Special Education (CPSE) recommended that the student receive 10 hours per week of special education itinerant teacher (SEIT) services, two 30-minute sessions per week of individual occupational therapy (OT), and two 30-minute sessions per week of individual physical therapy (PT) (SRO Ex. A at p. 4). A CSE convened on June 20, 2019 for the student's "turning five" meeting for school age programming and determined to declassify the student as a result of a finding of ineligibility (*id.*). The parents filed a due process complaint notice on September 4, 2019 (Case No. 187728), and, following an impartial hearing, an IHO found that the district did not offer the student a free appropriate public education (FAPE) for the 2019-20 school year (*id.* at pp. 1, 3, 4, 7). In a decision dated July 7, 2020, the IHO in that matter ordered the district to fund an independent neuropsychological evaluation and an independent OT evaluation and to continue to provide the student with 10 hours per week of SEIT services, two 30-minute sessions per week of individual OT, and two 30-minute sessions per week of individual PT until the CSE reconvened to review the independent evaluations (*id.* at p. 9).³

According to the hearing record, a CSE convened on December 1, 2020 to consider the independent evaluations and found the student eligible for special education and related services as a student with autism (Parent Ex. B at p. 4).⁴ The hearing record also indicates that the December 2020 CSE recommended a 12:1 special class with the related services of counseling, OT, PT, and parent counseling and training (*id.*). The parents rejected the IEP developed by the December 2020 CSE, unilaterally enrolled the student at Beit Rabban for the 2020-21 school year and filed a due process complaint notice on December 9, 2020 (Case No. 204856) (*id.* at pp. 1, 3, 4).⁵

On February 10, 2021, the parents electronically signed an enrollment contract with Beit Rabban for the 2021-22 school year (Parent Ex. G at pp. 3-5).

referenced in other documents was a July 7, 2020 IHO decision, which concerned the student's 2019-20 school year (Parent Exs. A at p. 2; B at p. 4; C at p. 2; D at p. 2; P at ¶ 18; IHO Ex. III at p. 5). The hearing record in this matter indicated that the student received SETSS as pendency in a prior proceeding and during this matter that was obtained from a bank of compensatory education that the parent secured as relief in a prior proceeding (*see* Parent Ex. O ¶¶ 19, 39-40). The undersigned determined that all unappealed IHO decisions that were referenced in the hearing record were necessary for a full and fair decision to be made on this matter. As such, the July 7, 2020 IHO decision is admitted into the record as SRO Exhibit A.

² No IEPs were offered into evidence during the impartial hearing.

³ The parents' provider testified that she provided the student with SEIT services during the 2019-20 school year as pendency (Parent Ex. O at ¶19).

⁴ 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]).

⁵ Beit Rabban 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).

In a 10-day written notice to the district dated August 25, 2021, the parents stated that the IHO in Case No. 187728 ordered that the student continue to receive 10 hours per week of SEIT services and related services, "which form[ed] the basis of pendency to date" (Parent Ex. C at p. 2). The parents also stated that, as of the date of their letter, an IHO had not been assigned to Case No. 204856 (id. at p. 3). The parents then alleged that the CSE had not convened to recommend a program or placement for the 12-month, 2021-22 school year, and that the parents intended to enroll the student at Beit Rabban for the 2021-22 school year "with special education support and related services" and to seek reimbursement from the district (id.).

On January 28, 2022, the parents electronically signed an enrollment contract with Beit Rabban for the 2022-23 school year (Parent Ex. K at pp. 3-4).

In a decision dated April 18, 2022, an IHO found that the district failed to offer the student a FAPE for the 2020-21 school year (Case No. 204856) (Parent Ex. B at p. 11). The IHO in that proceeding further found that the student's remote instruction provided by Beit Rabban as well as the 10 hours per week of home-based individual SETSS constituted an appropriate unilateral placement (id. at pp. 7-8). The IHO also noted that the student's SETSS provider testified that 10 hours per week of SETSS was sufficient for the student during remote instruction, however she believed that, when the student returned to in-person instruction, he would require 20 hours per week of SETSS pushed into the classroom as recommended in the independent neuropsychological evaluation (id. at p. 8; see Parent Exs. E at p. 20; O at ¶¶ 31-32). The IHO then further determined that the student required 12-month services to prevent regression, and that equitable considerations favored direct funding of the cost of the student's attendance at Beit Rabban (Parent Ex. B at p. 11). Additionally, the IHO found that the parents were entitled to an award of compensatory education consisting of 20 hours per week of special education teacher support services (SETSS) for a 12-month school year, to be paid at a market rate less any hours already paid under pendency for the school year at issue (id.).⁶

According to the parents, a CSE convened on May 16, 2022 to develop an IEP for the 2021-22 school year (Parent Exs. A at p. 3; D at p. 3).^{7, 8} Reportedly, the May 16, 2022 IEP recommended an integrated co-teaching (ICT) class with the related services of counseling, OT, PT and parent counseling and training (id.). According to the parents, the CSE also developed an IEP on May 27, 2022 for the 2022-23 school year, which continued the recommendations of the

⁶ The April 18, 2022 IHO decision does not state what services the student received as pendency during the proceedings held under Case No. 204856.

⁷ According to the affidavit of the student's SETSS provider, the district never developed an IEP for the 2021-22 school year and the May 16, 2022 IEP was developed for the 2022-23 school year (Parent Ex. O at ¶¶ 33-34). However, the affidavit of the SETSS provider also stated "Upon receipt of the May 16, 2021 IEP," which appears to be a typographical error as it is preceded by paragraphs describing events in May 2022 (compare Parent Ex. O at ¶37, with Parent Ex. O at ¶¶ 34-36). This paragraph is also similarly worded to the August 23, 2022 10-day written notice and the affidavit of the student's mother, which both referenced a May 27, 2022 IEP (compare Parent Ex. O at ¶37, with Parent Exs. D at p. 3; P at ¶ 40).

⁸ According to the affidavit of the student's mother, the district never developed an IEP for the 2021-22 school year and the May 16, 2022 IEP was developed for the 2022-23 school year (Parent Ex. P at ¶¶ 36, 38).

prior May 2022 IEP but removed the recommendation for 12-month services (Parent Exs. A at pp. 3-4; D at pp. 3-4).

In a 10-day written notice letter dated August 23, 2022, the parents advised the district that they were rejecting the May 27, 2022 IEP (Parent Ex. D at p. 4). The parents further stated that they were unilaterally enrolling the student at Beit Rabban for the 2022-23 school year "with special education support and related services" and would "seek reimbursement from all costs and tuition associated with this placement" (*id.* at pp. 1, 4).

A. Due Process Complaint Notice In This Proceeding

By due process complaint notice dated September 11, 2023, the parents alleged that the district failed to offer a FAPE to the student for the 2021-22 and 2022-23 school years (Parent Ex. A at pp. 1, 3-5). Specifically, the parents alleged that the May 16, 2022 IEP was untimely for the 2021-22 school year and that the recommended programming was inappropriate for the student for the 2021-22 and 2022-23 school years (*id.* at pp. 3-4). The parents also asserted that the student's enrollment at Beit Rabban along with 20 hours per week of SETSS pushed into the classroom constituted an appropriate unilateral placement and that equitable considerations warranted funding and/or reimbursement for the costs of the student's unilateral placement (*id.* at pp. 1, 5-6). As relief, the parents requested funding for "ABA-based [t]utoring" to compensate for the district's failure to provide the student "with an appropriate program over the summers of 2021-2022 and 2022-2023," direct payment to Beit Rabban "to compensate for the failure to recommend a program and/or appropriate program for the 2021-2022 or 2022-2023 school years," and prospective or retrospective funding for 12-month "push-in special education teaching and related service support" required by the student for the 2021-22 and 2022-23 school years (*id.* at p. 6).⁹

B. Impartial Hearing Officer Decision

On October 12, 2023, the parents' attorney appeared for a prehearing conference before an IHO with the Office of Administrative Trials and Hearings (OATH) but the district did not appear (Tr. pp. 1-9). During the prehearing conference, the parents' attorney stated that the district had been ordered to fund 20 hours per week of "ABA based tutoring" by an IHO in a prior proceeding and that the parents provided "about half of that" (Tr. pp. 3-4). The parents' attorney further stated that she was "going to present testimony that it was close but not enough and ask[] for the remaining hours as compensatory" (Tr. p. 4). Upon further discussion, the parents' attorney requested an additional status conference (Tr. pp. 4-7). On October 25, 2023, the IHO convened the status conference but neither party appeared (Tr. pp. 10-14). The IHO scheduled the impartial hearing on the merits of the parents' claims for November 16, 2023 (Tr. p. 12). On November 16, 2023, the parents appeared before the IHO for the impartial hearing date but, again, the district did not appear (Tr. pp. 15-28). The parents' documentary evidence was admitted without objection, which included affidavits in lieu of direct testimony from the student's mother and from the student's privately obtained SETSS provider (Tr. pp. 19, 22-24). Both witnesses were available

⁹ The parents withdrew their claims for transportation and/or reimbursement for transportation expenses during the impartial hearing (Tr. p. 21; *see* Parent Ex. A at p. 6).

for cross-examination, however, none occurred because the district did not appear, as noted above, and the IHO did not have any questions for either witness (Tr. pp. 22, 24).

In a final decision dated December 26, 2023, the IHO found that the district failed to establish that it offered the student a FAPE for the 2021-22 and 2022-23 school years (IHO Decision at pp. 7-8). With regard to the unilateral placement, the IHO further found that the parents did not establish that the student's special education needs were met by the program at Beit Rabban (id. at p.8). The IHO noted that Beit Rabban was "a general education parochial school without any special education instruction or services" and that the parents "failed to provide any witness testimony from anyone directly associated with [Beit Rabban]" (id. at pp. 8-9). The IHO also found that the student's special education needs were being addressed by a "push-in SETSS" provider who was not part of the program at Beit Rabban (id. at p. 9). For those reasons, the IHO determined that the parents' unilateral placement at Beit Rabban was not appropriate (id.). The IHO next determined that it was not necessary to address equitable considerations; nevertheless, he found that if the parents' unilateral placement had been appropriate, equitable considerations would have favored full tuition reimbursement and/or direct funding (id.).

Turning to the parents' request for compensatory relief, the IHO found that the hearing record established that the student was denied appropriate services for an extended period of time and that an award of additional services would place the student in the position he would have been in had the district complied with its IDEA obligations (IHO Decision at pp. 9-10). The IHO found that the parents' evidence demonstrated that the student required the support of 20 hours per week of 1:1 SETSS "to remain in a general education private school" (id. at p. 10). As relief, the IHO awarded 10 hours per week of SETSS for the 2021-22 and 2022-23 school years, based on a 46-week, 12-month school year for a total of 920 hours (id. at p. 11). The IHO further ordered that the compensatory educational services were to be provided by a qualified special education teacher of the parents' choosing at an enhanced market rate and that the bank of hours would not expire (id.).

IV. Appeal for State-Level Review

The parents appeal and argue that the IHO erred in finding that Beit Rabban was not appropriate, that the IHO failed to apply the correct legal standard, and that the student's enrollment at Beit Rabban with the addition of SETSS constituted an appropriate unilateral placement. The parents further allege that the IHO incorrectly found that a unilateral placement must be a secular, special education school, and that the IHO erred in finding that testimonial evidence from a witness from Beit Rabban was required in order to find it appropriate. The parents also argue that their evidence was un rebutted, and that the IHO erred in concluding that the only source of special education support was provided by the parents' SETSS teacher. The parents contend that the student was able to function in an academically and socially challenging general education school because of the support he received from the SETSS teacher. The parents also argue that Beit Rabban provided specially designed instruction, a small class size, and small group instruction, with modified and individualized curriculum and behavioral strategies. The parents also allege that the IHO erred in failing to weigh equitable considerations. As relief, the parents request reimbursement for the student's tuition at Beit Rabban for the 2021-22 and 2022-23 school years.

In an answer and cross-appeal, the district argues that the IHO correctly found Beit Rabban was not appropriate and that the student did not receive special education instruction or services or related services from Beit Rabban. The district further asserts that the student's SETSS provider testified that she was previously contracted by the district and that she provided 10 hours per week pursuant to pendency in prior school years. For the school years at issue, the district alleges that the SETSS provider has been paid through a compensatory education award from a prior proceeding. The district also argues that the hearing record lacks any documentation or testimony specific to the student's receipt of any individualized special education instruction or related services provided by Beit Rabban.

The district cross-appeals the IHO's finding that equitable considerations favored reimbursement and argues that if Beit Rabban is found appropriate, the parents' award of reimbursement should be reduced by the amount of religious instruction provided at Beit Rabban. The district further cross-appeals the IHO's award of 920 hours of SETSS arguing that there is no evidence in the hearing record of the parents' financial obligation for the SETSS or of the parents' inability to pay. The district further asserts that the parents are not seeking funding for privately obtained SETSS, they are seeking district funding for compensatory education services to make up for a gap in the parents' unilateral placement which did not provide 20 hours per week of SETSS that the parents seek as part of their requested relief.

In an answer to the district's cross-appeal, the parents argue that the district waived any and all arguments regarding the appropriateness of the parents' unilateral placement by failing to appear at the impartial hearing. Next the parents assert that the district's claims related to equitable considerations are without merit and that there was no evidence to support a reduction in reimbursement. The parents further argue that the district's claim that tuition reimbursement should be reduced by the amount of religious instruction the student received is in direct contravention to established law. The parents also allege that the district's claim that Beit Rabban provided services in excess of those required to offer a FAPE is factually untrue and unsupported by the case law the district relied on in its answer and cross-appeal. The parents further argue that the district did not raise any claims related to equitable considerations during the impartial hearing. Turning to the district's claims related to compensatory education, the parents argue that the parent did not privately obtain or contract for the SETSS provided to the student during the 2021-22 and 2022-23 school years. The parents assert that the SETSS were provided by the district as compensatory education and not outside services contracted for by the parents, and therefore the parents are not required to incur a financial obligation.

V. Applicable Standards

Two purposes of the IDEA (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. v. Rowley, 458 U.S. 176, 206-07 [1982]).]

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 CFR 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

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

student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).¹⁰

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

At the outset, the district has not appealed from the IHO's finding that it failed to offer the student a FAPE for the 2021-22 and 2022-23 school years, therefore, that determination has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). In addition, the parents have not appealed from the IHO's decision to the extent it did not award all of their requested relief. State regulations governing practice before the Office of State Review require that the parties set forth in their pleadings "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specify that "any issue not identified in a party's request for review, answer, or answer with cross-

¹⁰ 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).

appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see 8 NYCRR 279.4[a]). Further, an IHO's decision is final and binding upon the parties unless appealed to a State Review Officer (34 CFR 300.514[a]; 8 NYCRR200.5[j][5][v]). The IHO did not address the parents request for compensatory ABA-based tutoring for the district's failure to provide services during summer 2021-22 and summer 2022-23 and the IHO did not award 20 hours per week of prospective or retrospective funding of 12-month, push-in special education teaching and related service support for the 2021-22 and 2022-23 school years as requested in the due process complaint notice (Parent Ex. A at p. 6). As a result, the parents' appeal is limited to the issue of whether or not the IHO correctly determined that Beit Rabban was not an appropriate unilateral placement.¹¹ Consequently, the parents' other claims have been abandoned and will not be further discussed (8 NYCRR 279.8[c][4]).

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).

¹¹ The parents also incorrectly assert in their request for review that the IHO failed to make findings related to equitable considerations. The IHO found that Beit Rabban was not an appropriate unilateral placement and then noted that it was unnecessary to reach the issue of equitable considerations (IHO Decision at p. 9). However, the IHO nevertheless made alternate findings that equitable considerations would have favored reimbursement (id.).

The Second Circuit has set forth the standard for determining whether parents have carried their burden of demonstrating the appropriateness of their unilateral placement.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is reasonably calculated to enable the child to receive educational benefits. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes every special service necessary to maximize their child's potential. They need only demonstrate that the placement provides educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction.

(Gagliardo, 489 F.3d at 112, quoting Frank G., 459 F.3d at 364-65).

1. The Student's Needs

Although not in dispute on appeal, discussion of the student's needs is necessary to determine whether Beit Rabban provided specially designed instruction to meet those needs. Based on the hearing record, the student's needs at the time of the 2021-22 school year can best be gleaned from a November 2020 neuropsychological evaluation, conducted pursuant to a prior IHO order described above (Case No. 187728) (Parent Ex. E).

The November 2020 neuropsychological evaluation included a description of the student's educational history; a list of tests and rating scales administered to the student, his teacher, and his parents; behavioral observations; a discussion of assessment data and interpretation; and a summary with recommendations (Parent Ex. E). The educational history recounted the student's difficulty with self-regulation including challenges with transitions and following rules, and provided examples of his poor social skills, such as lack of eye contact and struggles with reciprocal conversations, and maladaptive behaviors, such as destroying peers' work and engaging in physical aggression toward peers (id. at pp. 1-2). The psychologist who conducted the evaluation observed that during testing the student was distracted "by everything in the environment," as well as his own thoughts, and had difficulty maintaining attention (id. at pp. 3-4). The psychologist described the student as "hypertalkative[]" and reported that, although the information he shared during testing was related to presented tasks in some way, it took considerable effort to redirect him, and his associations negatively affected his task completion (id.). The psychologist shared that the student was self-directed and more dependent in the learning environment than his intelligence would indicate (id.). At the time of the evaluation the student was six years old and attending kindergarten at Beit Rabban (id. at p. 1).

Administration of the Wechsler Intelligence Scale for Children – Fifth Edition (WISC-V) yielded a full scale IQ of 125 which fell in the "[v]ery [h]igh" range of intellectual functioning

(Parent Ex. E at p 5). The psychologist reported that the student had acquired vocabulary at a "very superior rate" and that his abstract reasoning skills "belie[d] his young age" (*id.* at p. 12). In addition, she noted that the student scored in the "[s]uperior range" on a subtest that measured a student's fund of general knowledge (*id.* at p. 13). In contrast, the psychologist reported that on a subtest measuring comprehension the student had difficulty answering open ended questions, in that he did not always provide a full rationale and relied on the listener to fill in the blanks (*id.*). She noted that the student assumed understanding on the part of the listener which led to communication failures (*id.*). In terms of nonverbal intellectual skills, the psychologist reported that the student's ability to reproduce abstract designs with blocks and reproduce visual puzzles was in the very superior range, as was his ability to solve visual matrices (*id.*). She characterized the student's nonverbal reasoning skills as "very strong" (*id.*). The psychologist stated that the student was "intellectually gifted" with the notable exception of processing speed, where the student scored in the "[v]ery [l]ow range" (*id.* at pp. 5, 11-12). Turning to academics, based on the student's performance on the Wechsler Individual Achievement Test, Third Edition (WIAT-III) the psychologist reported that the student's early reading skills were "superior," and he was able to recognize letters of the alphabet, associate sounds and letters, and sight words (*id.* at pp. 7, 16). With regard to spelling, the psychologist reported that the student scored "below aptitude, below grade level, and below average" and noted that he had a tendency to write letters and numbers backwards (*id.*). In addition, the student was below average in writing (*id.* at p. 19). The psychologist estimated the student's math skills to be "about at the first grade level" (*id.* at pp. 7, 16). On the Test of Pragmatic Language, Second Edition (TOPL-2), the student scored at the 18th percentile which, according to the psychologist, indicated significant pragmatic language deficits (*id.* at p. 13).

Completion of the Autism Spectrum Rating Scales, individually, by the parents yielded mixed results. According to the psychologist, the father's pattern of scores indicated that the student had few behavioral characteristics that were similar to those exhibited by students with autism spectrum disorder (ASD) (Parent Ex. E at p. 9). In contrast, the mother's responses indicated, among other things, that the student had difficulty using appropriate verbal and non-verbal communication for social contact, engaged in unusual behaviors, had problems with attention and impulse control, used language in an atypical manner, engaged in stereotypical behavior, had difficulty attending and tolerating changes in routine, and had difficulty relating to others (*id.*). Responses provided by the mother yielded elevated ratings on numerous scales and the psychologist reported that based on the student's mother's pattern of scores the student had symptoms directly related to the DSM-5 criteria for ASD (*id.* at p. 10).¹²

However, completion of the Conners 3 - Parent Rating Scale individually by the parents yielded consistent results. Responses from both parents resulted in elevated scores with respect to hyperactivity/impulsivity and a "[r]estless-[i]mpulsive" global index scale score that was "very elevated" (Parent Ex. E at p. 14). The psychologist stated that based on the parents' ratings "an ADHD classification [wa]s strongly indicated" (*id.*). In addition, the psychologist reported that completion of the Behavior Rating Inventory of Executive Function, Second Edition (BRIEF-2) by the mother identified concerns on the following scales: inhibit, self-monitor, shift, working memory, and organization of materials (*id.* at p. 15). Specifically, the mother's responses indicated

¹² DSM-5 is presumed to refer to the Diagnostic and Statistical Manual of Mental Disorders - Fifth Edition.

that the student could be overly active and interrupt and disrupt group activities (inhibit), was "less" aware of the impact of his behavior on others (self-monitoring), was rigid and had trouble moving from one activity to another (shift), and had trouble organizing things (organization) (id.). The psychologist suggested that the student met the description of "[o]verfocused ADD according to some researchers"(id.).¹³

In addition to the above difficulties, the psychologist suggested that sensory integration issues could have had an impact on the student's behavioral and emotional development (Parent Ex. E at p. 16). She noted that the student had a visual motor disorder and could not transfer what was "in his mind's eye to here-and now-constructions" such as writing, craft making and play constructions (id. at p. 18). She stated that being right was important to the student and that being wrong was a blow to his self-confidence, which resulted in anger (id.). The psychologist indicated that the student's tendency to explode could be fearful to him and also result in remorse and shame (id.). According to the psychologist, the student exhibited performance anxiety (id.). In addition, the student had significant trouble identifying, understanding, and expressing his own feelings (id.). The psychologist indicated that on a Theory of Mind subtest the student had difficulty understanding that others had their own thoughts, ideas, and feelings and how emotions relate to social context (id.). As a result of the above, the student misread the body language, feelings, and behaviors of others (id.).

The psychologist concluded that the student demonstrated superior intelligence but also performed below average in spelling and writing and presented with significant behavioral dysregulation and behavior that was "extremely" difficult to manage in the classroom (Parent Ex. E at p. 19). She diagnosed the student as having autism spectrum disorder, level 1, without intellectual impairment, with marked deficits in social communication and interactions (id.).¹⁴

A Beit Rabban progress report for the 2021-22 school year suggests that the student's needs remained largely the same entering the 2022-23 school year. That is to say, academically, the student was meeting expectations in mathematics, reading, and interdisciplinary studies and meeting some expectations and progressing toward others in writing (Parent Ex. I at pp. 1, 3, 5-6). However, the student continued to require assistance with self-regulation, organization, and

¹³ As described by the psychologist, the characteristics of overfocused ADD include excessive worrying, negativity, having the same thought over and over again, difficulty seeing options in situations, difficulty taking a different point of view, difficulty shifting attention, obsession and lack of flexibility, and quirkiness (Parent Ex. E. at pp. 15-16).

¹⁴ The psychologist opined that the student required placement in a "specialty private school program" which addressed the needs of bright children with ASD (Parent Ex. E at p. 19). She further opined that the student required an educational program with homogenous grouping; a structured and predictable environment; and positive structure where professionals consistently enforced rules, developed a clear system of positive and negative consequence, used effective limit setting, and used a higher rate of positive reinforcement than negative consequences in interactions with students (id. at p. 20). The psychologist stated that if a nonpublic school that specialized in the education of extremely bright students with ASD could not be accessed then the student would need significant support to remain at Beit Rabban, specifically 20 hours of 1:1 SETSS per week (id.). The psychologist further opined that the student required a functional behavioral "[a]nalysis" by a behavior analyst/Board Certified Behavior Analyst, a behavioral intervention plan, direct and individualized instruction, pediatric OT with sensory integration training, social skills training, small group pragmatic language therapy, a 12-month program and parent counseling and training for the student's parents (id. at pp. 20-21).

transitions; had difficulty focusing and demonstrated limited participation in group activities; and continued to demonstrate rigidity and verbal outbursts (see Parent Ex. I).

2. Specially Designed Instruction

As for a unilateral placement for the 2021-22 and 2022-23 school years, the parents combined the student's attendance at Beit Rabban, a general education nonpublic school, with 10 hours per week of SETSS pushed into the classroom (see Parent Exs. F; O at ¶¶ 39-40; P at ¶ 43).¹⁵ The 10 hours per week of SETSS were publicly funded from a bank of compensatory education that was awarded as relief in the prior matter relating to the 2020-21 school year (see Parent Exs. B at p. 11; O at ¶¶ 39-40). Generally, a parent may obtain outside services for a student in addition to a private school placement as part of a unilateral placement (see C.L., 744 F.3d at 838-39 [finding the unilateral placement appropriate because, among other reasons, parents need not show that a "private placement furnishes every special service necessary" and the parents had privately secured the required related services that the unilateral placement did not provide], quoting Frank G., 459 F.3d at 365). Although the SETSS delivered to the student were not part of the unilateral placement in that the parents did not take the financial risk in securing the services, the parents also were not required to forego equitable relief already secured from the public system in order to pursue further tuition reimbursement for the general education component that was part of the larger whole. It appears that the IHO considered the appropriateness of Beit Rabban separately from the 10 hours per week of SETSS provided by the parents. In finding Beit Rabban inappropriate, the IHO held that Beit Rabban did not offer any special education support and that the student's needs were met by the provision of 10 hours per week of SETSS (IHO Decision at p. 9). I find that the IHO's analysis in this regard failed to take into account the totality of the circumstances (see Gagliardo, 489 F.3d at 112). Moreover, the hearing record reflects that, in combination with the SETSS, the program at Beit Rabban provided the student with specially designed instruction.

According to the program description, Beit Rabban provides a progressive approach to education "centered around the belief that children learn best through experience" (Parent Ex. F at p. 5). The Beit Rabban program brochure explains that the school's "[t]eachers act as facilitators of experiences that are designed to help students observe, participate and reflect in order to construct knowledge and understanding" (id.). In addition, the brochure asserts that by "[u]sing this method, children learn entrepreneurship in education; they become accustomed to taking initiative, collaborating with others and developing new inquiries and ideas" (id.).

At Beit Rabban, the student received instruction "in a small class with two teachers [and] push-in SETSS support" (Parent Ex. O at ¶ 30). According to the student's Beit Rabban schedule for the 2021-22 school year, the student received instruction in phonics/structured reading, literacy, mathematics, physical education, art, music, explorations, social/emotional learning, prayer, and religious studies (Parent Ex. H). The student's Beit Rabban 2021-22 "Term S2" progress report indicated the private school provided the student with support in his academic classes such as teacher check-ins, counters and a number line in mathematics, and a "special writing pen" for writing (Parent Ex. I at p. 5). With regard to the student's approach to learning, the progress report

¹⁵ There is no argument by the district that the SETSS services provided to the student were inappropriate or that they failed to address the student's needs.

indicated that staff worked with the student on making appropriate choices during classroom meetings including learning how to decipher which of his thoughts should remain unspoken (*id.* at p. 1). The progress report indicated that staff introduced visual aids for the student to reference throughout the day that included behavior and task-related expectations, worked on materials management (organization) with the student, and also worked with the student on transitioning between subjects and packing up at the end of the day (*id.*).

Turning to social/emotional development, the 2020-21 progress report indicated that, when the student felt that he was not being listened to, he became loud and upset and staff was working with him on taking deep breaths and using calm, clear words to express himself (Parent Ex. I at p. 2). According to the progress report, the school employed a strategy in which the student was allowed to take a two-minute break to hug a stuffed animal and return when his body was feeling calm (*id.*).

The student's 2022-23 classroom schedule at Beit Rabban included instruction in literacy, handwriting, mathematics, explorations, music, art, physical education, prayer, and religious studies, and participation in a community meeting (Parent Ex. L). The student's Beit Rabban 2022-23 "Term S2" progress report indicated the private school provided the student support in his academic classes such as advanced one on one conversations with a teacher to prepare him for transitions, changes, and upcoming activities; check-ins; assigning the student to work with specific peers; support to help the student focus and complete his math work in a timely manner; small group instruction and tasks broken down in writing, as well as repetition and practice of specific skills; and spelling reminders (Parent Ex. M at pp. 1, 5-6). With regard to the student's social emotional development, staff at Beit Rabban provided the student with space, a drawing break, or modified activity when upset; one-on-one support to monitor his behavior; and support to assist him with resolving peer conflicts (*id.* at p. 2). Beit Rabban also provided the student support in his religious education classes during the school years in question, as discussed more fully below. It is also clear that the SETSS provider pushed into the student's classroom at Beit Rabban and that she worked in collaboration with the student's teachers there to deliver instruction to the student (Parent Ex. O at ¶¶ 26, 30, 39-48).¹⁶

The foregoing demonstrates that the student's placement in a general education class with one-to-one support was appropriate and I find the unilateral placement included both specially designed instruction to address the student's needs with routine access to nondisabled peers. Given the student's cognitive functioning and academic ability, he required typical peer models in the classroom. The parents' unilateral placement provided the student with necessary access to nondisabled peers and was therefore appropriate when taking into account the totality of the circumstances and the fact that parents are not held as strictly to full compliance with the IDEA when seeking reimbursement for a private placement. Further, the evidence in the hearing record

¹⁶ This case is not analogous to cases which began with a more aggressive defense by the district at the impartial hearing level and had much poorer record development by the parents with regard to the instruction and unilateral placement components, and in which the general education classes were largely or completely isolated from any specialized instruction (see, e.g., *Stevens v. New York City Dep't of Educ.*, 2010 WL 1005165, at *10 [S.D.N.Y. Mar. 18, 2010] [finding in adequate evidence to support reimbursement at a York Preparatory School general education program and a separate Jump Start supplemental academic support program]).

shows that the student made progress during the 2021-22 and 2022-23 school years as discussed below.

3. Progress

It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

The Beit Rabban 2021-22 progress report indicated that the student enjoyed math and grew as a mathematician during the school year (Parent Ex. I at p. 5). The progress report noted that during the second part of the school year the student required fewer teacher check-ins and he worked with focus and completed math work independently (id.). With regard to reading, the progress report indicated that the student had grown as a reader and whereas he previously needed to be convinced to pick up a book during quiet reading he now eagerly searched for books (id.). In terms of writing, the progress report described the student's growth during the 2021-22 school year as "exponential" (id.). It noted that the student began the school year needing a "special writing pen" and extra encouragement to write only a few words and by the time of the progress report he was able to work independently on his writing and fill out his writing planner quickly and efficiently (id. at pp. 5-6). With regard to social/emotional skills, the 2021-22 progress report reflected that the student was progressing toward expectation in the areas of expressing feelings appropriately, transitioning between activities smoothly, and in demonstrating self-control (id. at pp. 1-2). The progress report indicated that the student met expectation in the areas of showing empathy for others, interacting cooperatively with peers, managing conflict situations appropriately, demonstrating respect for teachers and in following classroom expectations (id.). In the narrative portion of the 2021-22 progress report on social/emotional skills, it was noted that the student enjoyed speaking with his teachers, had a funny sense of humor, and had shown tremendous growth in making friendships (id. at p. 2). The student had several friends whom he enjoyed playing with at recess and being partnered with during work times (id.). The student was also described as "less focused on one person at a time" and that he had learned he could be "great friends with one student, while also maintaining other relationships" (id.). The student's continued difficulty with flexibility was also noted (id.). The student could sometimes get stuck and was unwilling to move on from his ideas or wants in the classroom, particularly when he felt his teachers were not listening to him (id.). The student could become loud and upset, and staff were working with the student on taking a deep breath and using calm, clear words to express himself (id.). It was further noted that the student was now able to take a two-minute break to hug a stuffed animal, and then return when his body was feeling calmer (id.).

For the 2022-23 school year, the Beit Rabban progress report noted that, in reading, the student was a much more confident reader than earlier in the school year and that his willingness to read aloud and with a partner had increased since the fall, and he was more receptive to correction by the teacher (Parent Ex. M at p. 5). The progress report further indicated that the student's comprehension skills had continued to grow, and he was more adept at identifying the problem and solution of a text (id.). According to the progress report, the student also continued to grow as a writer and no longer needed reminders to use the word wall or phonics posters when working on phonics dictations (id.). The progress report also indicated that the student was progressing toward expectation in all areas of measured social/emotional skills (id. at pp. 1-2). Although, the student had been marked as meeting expectation in nearly all skill areas during the prior school year, there is nothing in the narrative portion of the 2022-23 progress report that would indicate the student failed to make progress in the area of social/emotional skills (id.).¹⁷ Notably, the student's skills had improved over the course of the school year in that he had "grown in his repertoire of solutions and used the community meeting and wheel of choice at times to solve problems" (id. at p. 2). The progress report also noted growth in the student's social relationships (id.). Specifically, the student was described as seeking out peers and quickly becoming wrapped up in conversations when he entered the classroom (id.). The student was enthusiastic about working with a few individual preferred peers and he was described as using the strategies he learned from staff when interacting with his preferred peers (id.).

While the evidence of the student's progress is not dispositive, in this instance it lends further support to a finding that, based upon the totality of the circumstances, the unilateral placement of the student at Beit Rabban with the addition of 10 hours per week of SETSS pushed into the classroom was appropriate for the 2021-22 and 2022-23 school years.

B. Equitable Considerations

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

¹⁷ The checklist rubric included in the progress reports shows that the student was no longer meeting expectation in the social/emotional skills areas (compare Parent Ex. I at pp. 1-2, with Parent Ex. M at p. 1). Notwithstanding the difference, the narrative description indicated that the student continued to make social/emotional progress during the 2022-23 school year and the differences in the checklist could have been attributable to different teachers having different expectations or a reflection of expectations increasing with each grade level.

justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Turning to equitable considerations in the instant case, the district cross-appeals the IHO's findings that the parents would have been entitled to full reimbursement and/or direct funding for the cost of the student's attendance at Beit Rabban, if he had found Beit Rabban was an appropriate unilateral placement. The district specifically argues that a tuition award should be reduced in this matter on the grounds that the amount of religious instruction the student received at Beit Rabban "exceed[ed] the level that the [s]tudent required to receive a FAPE" and included segregable classes, the cost of which, could be reasonably determined (Answer & Cr.-Appeal ¶¶ 11, 12).

Among the factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). An IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed 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 does not provide any support for the proposition that the subject matter of a particular class period could cause the class to be treated as a segregable special education service for these purposes, rather than as the type of feature that is "inextricably linked to the substitution" of a private program for a public one (Bd. of Educ. of City Sch. Dist. of City of New

York v. Gustafson, 2002 WL 313798, at *7 [S.D.N.Y. Feb. 27, 2002] [finding features such as small class size or greater personal attention were not segregable]). With regard to the degree to which the services are segregable, the authority relating to excessive services applies most frequently when the services are delivered in a separate location or by a provider not affiliated with the main tuition-based program and/or where the costs of the services are itemized or separately billed (see, e.g., Application of a Student with a Disability, 23-130; Application of a Student with a Disability, Appeal No. 21-086; Application of a Student with a Disability, Appeal No. 14-071).

The district points to the student's schedule and argues for a reaction based on the amount of time the student spent in particular classes; however, there is no indication in the hearing record that costs for any of the student's classes equates to funding for any other class. Additionally, as the hearing record provides no concrete information as to the school's method for financing its activities, there is no reasoned way to know what portion of the student's tuition, if any, was actually used to pay for the portions of the school day devoted to religious instruction. Even if the proportion of the student's schedule devoted to Judaic studies and prayer 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 and prayer 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).

Along those lines, the parents assert that the skills addressed during the student's religious instruction were skills that were "transferable to his secular subjects" (e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012], adopted as mod at, 2012 WL 4344301 [D Conn Sept. 21, 2012], affd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]).

The student's progress report for the 2021-22 school year reflected that the student's Hebrew language class addressed skills such as understanding basic instructions and questions, understanding non-routine conversation in concrete contexts, reading with accuracy, using routine phrases and questions throughout the day, using newly acquired vocabulary, describing actions, preferences and desires in present tense, identifying names and sounds of letters and vowels, and writing using script letters (Parent Ex. I at p. 3). The student's participation in other religious instruction classes addressed social and behavioral skills such as participating actively and respectfully, expressing personal understandings and feelings, formulating questions and interpretations of texts and practices, and extracting personal lessons from texts and practices (id. at p. 4).

During the 2022-2023 school year, the student's religious instruction classes included reading accuracy and fluency, demonstrating understanding of vocabulary and grammar, reading comprehension, critical thinking about text, working with others, and learning to problem solve (Parent Ex. Ex. M at p. 3). The student's Hebrew language class addressed skills such as understanding of routines and instructions, grasping the main idea of spoken language, reading comprehension and decoding, writing and speaking in full sentences with appropriate grammar, spelling, and punctuation (id.). In other religious instruction classes, the student was working on

skills such as participating in class activities respectfully, analyzing text for meaning, understanding his own feelings about prayer, retelling narratives while describing characters and their relationships, formulating questions about texts he read, and extracting lessons from texts he read (id. at p. 4).

Based on the foregoing, the hearing record does not support the district's position. The evidence in the hearing record demonstrates that the student's religious instruction classes included skills that were transferable and reinforced skills addressed by secular subjects and are not excessive segregable services upon which a reduction in the tuition reimbursement may rely. The district has not challenged the student's religious instruction on any other grounds, therefore there is no equitable basis for a reduction in reimbursement for the cost of the student's attendance at Beit Rabban.

C. Compensatory Education

The district cross-appeals the IHO's award of compensatory education consisting of 920 hours of SETSS. The district argues that the parents are seeking funding for compensatory education to make up for deficiencies in the unilateral placement, which does not provide SETSS to the student. Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). The purpose of an award of compensatory education is to provide an appropriate remedy for a denial of a FAPE (see E.M., 758 F.3d at 451; P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [holding that compensatory education is a remedy designed to "make up for" a denial of a FAPE]; see also Doe v. E. Lyme Bd. of Educ., 790 F.3d 440, 456 [2d Cir. 2015]; Reid v. Dist. of Columbia, 401 F.3d 516, 524 [D.C. Cir. 2005] [holding that, in fashioning an appropriate compensatory education remedy, "the inquiry must be fact-specific, and to accomplish IDEA's purposes, the ultimate award must be reasonably calculated to provide the educational benefits that likely would have accrued from special education services the school district should have supplied in the first place"]; Parents of Student W. v. Puyallup Sch. Dist., 31 F.3d 1489, 1497 [9th Cir. 1994]). Accordingly, an award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]).

At the conclusion of the impartial hearing, the parents requested compensatory relief consisting of "an order directing the [district] to fund or provide [the student] with 20 hours of SETSS" per week for a 46-week, 12-month school year for both the 2021-22 and 2022-23 school years, "totaling up to 1840 hours of SETSS services by a provider of the [p]arent[s]' choosing" (Parent Post-Hr'g Br. at p. 20). In summarizing the evidence, the IHO acknowledged that the total

compensatory education award sought by the parents was made up of a request for the district to "replenish the bank of compensatory hours for the 10 hours of SETSS used during the 2021-2022 and 2022-2023 school years and that the Student be awarded an additional 10 hours per week on a 12-month basis for the 2021-2022 and 2022-2023 school years due to the [district's] failure to follow the directive to provide the Student with 20 hours per week as recommended by both the Special Education Teacher and the Psychologist" (IHO Decision at p. 7, citing Parent Ex. O ¶ 50). The IHO based his award on the latter request; that is, the IHO considered the 20 hours per week of SETSS recommended for the student and subtracted from that the 10 hours per week of SETSS that the student received during the 2021-22 and 2022-23 school years (see IHO Decision at p. 10). The IHO did not order compensatory education to "replenish" the compensatory award used during the school years at issue (see id.). The parents have not appealed the IHO's compensatory award, and, therefore, I find that the issue of whether the IHO should have awarded compensatory education to replenish or replace the bank of services used is not before me. Accordingly, this discussion focuses on the IHO's determination that an award of compensatory education was warranted above and beyond the services that were delivered to the student during the 2021-22 and 2022-21 school years.

The Second Circuit's approach to compensatory education thus far may have left room for unique circumstances where an award of compensatory education may be warranted where, for example, a student is unilaterally placed but the parent's request for tuition reimbursement is denied under a Burlington/Carter analysis (see Application of a Student with a Disability, Appeal No. 16-050), or where a student is unilaterally placed but additional related services were required in order for the placement to provide the student with a FAPE (see V.W. v. New York City Dep't of Educ., 2022 WL 3448096, at *5-*7 [S.D.N.Y. Aug. 17, 2022] [finding that awards of tuition reimbursement and compensatory education are not mutually exclusive and that an award of "both education placement and additional services may be necessary to provide a particular student with a FAPE"]). One court has recently endorsed a combined award of tuition reimbursement and compensatory education based on a denial of FAPE for the same time period (V.W., 2022 WL 3448096, at *5-*6). To the extent this blended approach is adopted, it then begins to blur the parents' responsibility in the hearing process to establish that the unilateral services they obtained for their child were reasonably calculated to enable the student to receive educational benefits in light of the child's circumstances, because it calls on school districts to simultaneously become responsible to correct the shortcomings or defects of a unilateral placement with compensatory education.¹⁸ I am not convinced that is what the Second Circuit intended in its approach on this topic thus far and analyzing relief in the manner requested by the parents would make it impossible to effectively differentiate the burden of proof with respect to the unilateral placement that has been placed on parents and the burden of proof with respect to compensatory education.

Moreover, on a factual basis, the hearing record does not show that relief in the form of compensatory education for services beyond what were delivered as part of the unilateral

¹⁸ As the Supreme Court explained, "when a public school system has defaulted on its obligations under the Act, a private school placement is 'proper under the Act' if the education provided by the private school is 'reasonably calculated to enable the child to receive educational benefits'; thus, the Rowley/Andrew F. standard shifts to parents when unilateral placements are involved, albeit with a "totality of the circumstances" test in the words of the Second Circuit or "all relevant factors" element in the words of the Supreme Court (Carter, 510 U.S. at 11, 16; Frank G. v. 459 F.3d at 364).

placement is needed to bring the student to the same position he would have occupied but for the school district's denial of a FAPE for the 2021-22 and 2022-23 school years.

Within the November 2020 neuropsychological evaluation, the psychologist indicated that, if the student remained at Beit Rabban, he should receive 20 hours of 1:1 SETSS per week (Parent Ex. E at p. 20). The student's special education teacher indicated that leading up to the 2021-22 school year, although she and the staff at Beit Rabban "believed [the student] required 20 hours in order to make appropriate behavioral and social emotional progress," she was cautious to not use the compensatory award from the prior matter up too quickly and, therefore, delivered 10 hours per week (Parent Ex. O ¶¶ 39-40). While perhaps the psychologist, the special education teacher, and staff at Beit Rabban believed that the student would need 20 hours per week of SETSS to receive educational benefit, the evidence in the hearing record shows that the student exceeded their expectations and made educational progress attending the unilateral placement and receiving the 10 hours per week of SETSS (see Parent Exs. I; M). The special education teacher indicated that the 10 hours per week of SETSS "were sufficient for [the student] to keep up with the class academically" and progress with social/emotional, behavioral, and communication skills (Parent Ex. O ¶¶ 43-45, 47).

The special education teacher testified that the student "would have made more progress" in the social/emotional behavioral realms with 20 hours per week, particularly to gain independence and skills at self-regulation (Parent Ex. O ¶¶ 40, 46 [emphasis in the original]). While the student may very well have made additional progress with more SETSS during the school years at issue, the purpose of compensatory education is not to maximize the student's potential (see Application of a Student with a Disability, Appeal No. 16-033; cf. Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Rather, an award of compensatory education should place the student in the position that he would have been in had the district acted properly (see Parents of Student W., 31 F.3d at 1497 [holding that "[a]ppropriate relief is relief designed to ensure that the student is appropriately educated within the meaning of the IDEA" and finding "[t]here is no obligation to provide a day-for-day compensation for time missed"]).

The special education teacher also indicated that the student "continue[d] to require intensive, individualized special education," (Parent Ex. O ¶ 49), but the student's prospective need for services does not justify a compensatory award to make up for gaps in the student's educational programming in the past.

Thus, the student made progress during the 2021-22 and 2022-23 school year and received educational benefit and therefore, the hearing record does not support a finding that additional relief in the form of compensatory education is warranted related to the same period of time. Generally, a request for compensatory education "should be denied when the deficiencies suffered have already been mitigated" (N. Kingston Sch. Comm. v. Justine R., 2014 WL 8108411, at *9 [D.R.I. Jun. 27, 2014], adopted at, 2015 WL 1137588 [D.R.I. Mar. 12, 2015]; see Somberg v Utica Community Schs., 2017 WL 242840, at *4 [E.D. Mich. Jan. 20, 2017] [declining to award full-time tutoring for years during which student was denied a FAPE, since the student "did make some advancement over the course of his time in high school, even though he was not presented with what he was due under IDEA"], aff'd, 908 F.3d 162 [6th Cir. 2018]; Phillips v. Dist. of Columbia, 932 F. Supp. 2d 42, 50 & n.4 [D.D.C. 2013] [collecting authority for the proposition that an award of compensatory education is not mandatory in cases where a denial of a FAPE is established]).

Based on the foregoing, I find that the IHO erred in awarding compensatory education in light of the parents' unilateral placement of the student for the 2021-22 and 2022-23 and the educational benefit that the student received as a result.

VII. Conclusion

In summary, the parents met their burden of demonstrating that their unilateral placement of the student at Beit Rabban with 10 hours per week of SETSS was appropriate for the student, and that no equitable considerations warrant a reduction or denial of the relief sought by the parents. In light of the unilateral placement of the student, the IHO's award of compensatory educational above what the student received was not warranted.

THE APPEAL IS SUSTAINED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the IHO's decision dated December 26, 2023, is modified by reversing those portions which found that Beit Rabban was not an appropriate unilateral placement and denied tuition reimbursement and direct tuition funding for the 2021-22 and 2022-23 school years;

IT IS FURTHER ORDERED that the IHO's decision dated December 26, 2023, is modified by reversing those portions which ordered the district to fund 920 hours of compensatory SETSS; and

IT IS FURTHER ORDERED that, upon the parents' submission of proof of payment, the district shall reimburse the parents for the costs of the student's tuition at Beit Rabban and shall directly fund any outstanding tuition owed by the parents for the 2021-22 and 2022-23 school years.

Dated: **Albany, New York**
 April 12, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER