The University of the State of New York

The State Education Department
State Review Officer
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No. 24-056

Application of a STUDENT WITH A DISABILITY, by her 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 Office of Steven Alizio, PLLC, attorneys for petitioners, by Steven J. Alizio, Esq. and Justin B. Shane, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Sarah M. Pourhosseini, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from a decision of an impartial hearing officer (IHO), which denied in part their request for tuition funding at the Shefa School (Shefa) for the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

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

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

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

III. Facts and Procedural History

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. Additionally, as the district declined to enter evidence during the hearing much of the student's educational history is derived from unrebutted allegations made by the parents.

According to the parents, during the 2020-21 school year (first grade), the student attended a general education classroom in a nonpublic school and received three sessions per week of special education teacher support services (SETSS), one session each per week of individual and group speech-language therapy, and two sessions per week of individual occupational therapy

(OT) (Parent Exs. B at p. 1; C at p. 7). Then, in April 2021, the district increased the student's SETSS to 10 sessions per week, including two hours per week of targeted reading instruction (id.).

The parents privately obtained a neuropsychological evaluation of the student in June 2021 because her "slow acquisition of academic skills continue[d] to persist in the face of informal and formal high-quality special education services and accommodations" (Parent Ex. C at p. 1). According to the neuropsychological evaluation report, the student's full-scale IQ was in the 58th percentile; however, she had deficits in attention and executive functioning, as well as some skills underlining reading such as phonemic awareness and rapid naming, which collectively undermined the student's acquisition of academic skills (id. at p. 9). The evaluator provided diagnoses of specific learning disorder with impairment in reading, specific learning disorder with impairment in writing, and attention deficit hyperactivity disorder, combined presentation, mild (id. at p. 10). The evaluator then recommended that the student be placed in "a small, self-contained classroom [] in a special education school with a low student-to-teacher ratio, placed with other bright students who also have learning difficulties" and that the student receive speech-language therapy services, assistive technology, and testing accommodations (id. at p. 11).

The student continued to be parentally placed in the general education classroom at a nonpublic school during the 2021-22 school year (second grade) and received services through an individualized education services plan (IESP) (Parent Ex. B at p. 1).

According to the parents, they sent a copy of the June 2021 neuropsychological evaluation report to the district in March 2022 and requested a new CSE meeting for the student (Parent Ex. B at p. 2). However, the district did not respond, and the parents enrolled the student at Shefa for the 2022-23 school year, for which they received funding through the district as part of a due process proceeding related to the 2022-23 school year (id.).

The district then convened a CSE meeting for the student in January 2023 (Parent Ex. B at p. 2). According to the parents, the June 2021 neuropsychological evaluation report was the lone piece of evaluative information before the January 2023 CSE; however, the CSE ignored the evaluator's recommendations and recommended that the student receive the support of integrated co-teaching (ICT) services along with two sessions per week each of group OT and group speech-language therapy (id.).

On August 22, 2023, the parents sent the district a notice indicating that they objected to the recommendations contained in a January 2023 IEP, that the district failed to offer the student a public school placement for the 2023-24 school year and as a result, notified the district of their intent to unilaterally place the student at Shefa for the 2023-24 school year at the district's expense (see Parent Ex. B).

A. Due Process Complaint Notice

In a due process complaint notice dated September 6, 2023, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year Parent Ex. A). The parents objected to both the ICT services recommendation contained in the January 2023 IEP and the district's failure to identify a public school site to implement the January 2023 IEP (id. at pp. 4, 5). As relief, the parent requested an interim order directing the district to

fund Shefa as the student's pendency placement, and district funding for the cost of the student's placement thereafter at Shefa for the 2023-24 school year along with the provision or funding for door-to-door transportation of the student to and from Shefa (id. at pp. 7-8).

B. Impartial Hearing Officer Decision

After prehearing conferences were held on October 12, 2023 and November 14, 2023, an impartial hearing convened and concluded on December 20, 2023, before the Office of Administrative Trials and Hearings (OATH) (Tr. pp. 1-48). During the hearing, the district conceded that it failed to offer the student a FAPE, declined to make an opening statement, and decided not to present any witnesses or evidence into the hearing record (Tr. pp. 23, 29, 30, 34-35). The district also declined cross-examination of the parent or the reading coordinator at Shefa (Tr. pp. 36, 42-43). After the evidentiary phase of the hearing concluded, the district made a brief closing statement and asked that any award be reduced in light of the student's schedule at Shefa which reflected prayer, Judaic studies, and assembly without any explanation as to how or why the identified classes should impact any award (Tr. pp. 43-44). In response, counsel for the parents noted that there was no evidence submitted into the hearing record regarding the alleged religious elements of the student's programming at Shefa and specifically noted that the district had the opportunity to cross-examine the Shefa reading coordinator but declined to do so (Tr. p. 44). The parents also argued that there was no legal basis for reducing tuition based on religious instruction (id. at pp. 44-45).

In a decision dated January 10, 2024, the IHO found that the district failed to offer the student a FAPE for the 2023-24 school year, that Shefa was an appropriate unilateral placement for the student for the 2023-24 school year, and that equitable considerations favored the parents (IHO Decision at pp. 7-12). However, the IHO reduced the award for tuition at Shefa, finding that the religious instruction aspects of the private schooling fell outside of the district's obligations and that funds allocated for special education should not "subsidize" religious instruction (id. at pp. 11-12). The IHO then found that the student's schedule reflected "non-secular segments," which the IHO identified as "Prayers, Judaic Studies, and Oneg/Assembly" (id. at p. 12). Relevant to this appeal, the IHO ordered the district to "fund the cost of [the s]tudent's placement in [Shefa] for the 2023-2024 school year in the sum of $57,125 minus the portion of the tuition for Oneg/Assembly, Prayer, and Judaic Studies" (id. at p. 13).

IV. Appeal for State-Level Review

The parents appeal, alleging that the IHO erred in reducing the award of funding for the student's placement at Shefa. The parents assert that the IHO's reduction has no basis in the law, that the IHO erred in addressing constitutional issues without them being properly addressed during the hearing, and that the hearing record did not include evidence of religious instruction being provided at Shefa and neither the district nor the IHO gave the parents an opportunity to address what secular benefits the student may have been provided with during the subjects found to be religious in nature. Finally, the parents appeal from the IHO's award as being vague and incapable of being implemented, noting that the IHO did not specify how the reduction would be made as there was no evidence of "what, if any, portion of [the student's] tuition goes directly to [the identified] aspects of the curriculum."

In an answer, the district contends, for the first time, that payment for religious instruction exceeds the district's obligation of providing the student a FAPE and the IHO was, therefore, correct in denying funding for the portions of the student's schedule attributed to being religious in nature. Additionally, while the district concurs with the parents that an administrative agency is not the proper venue for addressing constitutional issues, the district contends that the IHO's reduction based on religious education was warranted because federal regulations implementing the IDEA "preclude the [district] from using federal IDEA funds to pay for religious instruction," which is consistent with the State constitution (Answer ¶ 10). Finally, with respect to the parents' assertion that the IHO's order is vague and incapable of being implemented, the district contends that the portion of the student's schedule attributed to religious instruction constituted 14 percent of the total time the student spent in school and that a 14 percent reduction in tuition is therefore warranted.

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]).[1]

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).

[1] 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).

VI. Discussion

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2023-24 school year, that Shefa was an appropriate unilateral placement for the student for the 2023-24 school year, and that equitable considerations (other than as related to the proportion of religious instruction delivered at Shefa) weighed in favor of the parents. Accordingly, these findings have become final and binding on the parties and will not be further discussed (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]). The only issue presented on appeal is whether the IHO erred in reducing the amount of tuition awarded for the student's attendance at Shefa for the portions of the school day the IHO determined were nonsecular.

It must be noted that while the district agrees with the parents that constitutional matters should not be addressed in this administrative process and should be reserved for the courts, the district also contends that the IHO's decision to reduce tuition was justified based on federal regulation which prevents school districts from using IDEA funding for religious instruction (Answer ¶¶6, 10).[2] The pertinent federal regulation states that "[n]o State or subgrantee may use its grant or subgrant to pay for any . . . [r]eligious worship, instruction, or proselytization" (34 CFR 76.532).

The district's argument is flawed in several respects. First the party seeking equitable relief for the denial of a FAPE and who incurred the liability for the student's unilateral placement as a result is the parents and they are neither the State nor a subgrantee within the meaning of 34 CFR 76.532. Instead it was the subgrantee, namely the district, who caused the denial of a FAPE and left the parents to fix it with a self-help remedy and bear the risk that they might not succeed in their Burlington/Carter claims. Accordingly, the regulation does not apply to the facts of this case. Furthermore, the Supreme Court has held the federal regulation in question 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]). Accordingly, in asking for interpretation of this particular federal regulation as part of this administrative proceeding, the district is, in all practicality, nevertheless asking the administrative due process tribunal to draw conclusions based upon constitutional law principles, I will therefore provide the analysis below out of an abundance of caution while acknowledging that a federal or state court is the appropriate forum in which to resolve such disputes.

[2] The district also asserts that the New York State Constitution prohibits district payment for the portion of the school day attributed to religious instruction in that it states that: "[n]either 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; Answer ¶12). Notwithstanding this language, the State Constitution also provides that: "nothing in this constitution contained shall prevent the legislature from providing for the . . . education and support of the blind, the deaf, the dumb, the physically handicapped, the mentally ill, the emotionally disturbed, the [developmentally or intellectually 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).

Turning to the constitutional law issue raised by implication by the district, the current trend in case law on the issue of public funding for religious instruction 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)]).

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 in a Burlington/Carter analysis, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 (E.D. Pa. 1996), see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[3] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v.

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

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. at818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[4] Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases summarized above, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA," and the "funds would be paid without regard to [the school's] sectarian orientation" and directly to the parents individually (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380, 392-93 [D. Mass. 1998], citing Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481, 488 [1986]).

In this matter, it is uncontroverted that the district failed to offer the student a FAPE for the 2020-21 school year. Based on this, the parents had no choice but to seek remedial relief, and the parents, under the IDEA, had the right to place the student at a school of their choosing and seek funding for it, provided that it was appropriate to meet the student's needs. In this instance, as noted above, the district has not appealed from the IHO's determination that Shefa was, in fact, an appropriate unilateral placement for the student for the 2023-24 school year. Contrary to the IHO's determinations and the district's arguments on appeal, direct funding for the cost of the student's attendance at Shefa is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution—according to the 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 as discussed above. 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.[5] The remedy is available to all parents who otherwise meet the criteria set forth in those

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

[5] The IHO attempted to make a distinction between this matter and prior matters addressing religious instruction, noting that there could be a difference between reimbursement of tuition to parents and direct funding of the same tuition by a district (IHO Decision at p. 12). However, a recent district court explained that in analyzing a matter under Burlington and Carter there is little difference between reimbursement and direct payment as a remedy as both "'merely requires [the school district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4 [S.D.N.Y. Sept. 26, 2023], citing E.M. v. New York City Dep't of Educ., 758 F.3d 442, 453 [2d Cir. 2014]).

decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

I now turn to the district's argument to uphold the portion of the IHO's decision finding on the basis that the periods devoted to Judaic studies, prayer, and Oneg/assembly constituted a segregable service that exceeded the level required under the IDEA 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, neither the IHO nor the district 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).

In this instance, the IHO reduced the student's tuition at Shefa for the 2023-24 school year by an indefinite amount based solely on the IHO's interpretation of the student's schedule, finding that portions of the school day identified as prayer, Judaic studies, and Oneg/assembly constituted religious instruction (IHO Decision at pp. 11-12). However, the IHO did not identify a method for segregating the costs for those portions of the school day and any attempt to do so at this level of the proceeding can lead only to further problems. While the district argues for a reduction based solely on the amount of time spent in each class, it is worth noting that there is no indication in the hearing record that costs for any of the student's classes equates to funding for any other class—especially, where one class is identified as Oneg/assembly which, in itself, implies a larger class setting. Additionally, as the hearing record provides no concrete information as to the school's method for financing its activities, there was no reasoned way for the IHO to know what portion of the student's tuition, if any, were 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, prayer, and Oneg/assembly 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, prayer, and Oneg/assembly 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).

In fact, in reviewing the student's schedule, the student's school day included 10 minutes per day for prayer, four 45-minute and one 40-minute periods per week of Judaic studies, and one 35-minute period per week identified as Oneg/assembly (Parent Ex. E). The only other evidence in the hearing record regarding what occurred during the classes at issue is the Shefa program description, which included a description of Judaic studies and provided as follows:

> Students engage with Jewish learning and traditions through interactive learning experiences, such as joyous morning tefillah (Prayer), explorations of Shabbat and holidays, and the study of Torah. Students also learn about Jewish life around the world, Jewish history, and the State of Israel. The Judaic Studies curriculum is enhanced by the integration of music and the arts. As English language remediation is our priority and second languages can be especially challenging for students with language-based learning disabilities, Judaic Studies is taught primarily in English. Students gain exposure to key Hebrew vocabulary orally, through prayer and from the Judaic Studies curriculum. On Friday, Lower School students participate in Oneg Assembly, where they celebrate Shabbat and learn about the weekly Torah portion.

(Parent Ex. D at p. 3).

Based on the description of the Judaic studies class at Shefa, it was error, based upon the evidence, for the IHO to outright adopt the district's position that the Judaic studies class was entirely religious in nature. As identified in the program description, the class incorporated cultural education and history and at least some consideration was given to students' special education needs (see Parent Ex. D at p. 3). Although there is no evidence regarding what occurs during the periods described as prayer and Oneg/assembly, it is worth noting that those periods constituted a total of 85 minutes per week, while Judaic studies constituted a total of 225 minutes (3.75 hours) per week (Parent Ex. E). Overall, based on the limited evidence in the hearing record, the amount of time the student spent at school receiving instruction that could be described as solely religious was limited to at most approximately 14 percent of the student's school day as argued by the district—if Judaic studies is included—but, more likely falls around approximately four percent of the student's school day or less—as Judaic studies does not appear to be religious instruction based on the brief description included in the record (see Parent Exs. D at p. 3; E). Additionally, rather than weighing this as an equitable consideration, the amount of time the student spent receiving religious instruction should be weighed as a factor regarding the appropriateness of the unilateral placement (see e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012] [finding a unilateral placement inappropriate because the school did not provide special education supports and the student spent a substantial amount of time receiving religious education], 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]).

VII. Conclusion

Having reviewed the evidence in the hearing record, there is no basis for finding that federal regulation or the Establishment Clause bars the district from funding the religious portion of the student's educational program at Shefa and there is no evidence in the hearing record to support the IHO's finding that the time the student spent in Judaic studies, prayer, and Oneg/assembly was segregable from the student's overall educational program such that a specific direction could be made for reducing the costs of the student's tuition at Shefa for the 2023-24 school year.

I have considered the parties' remaining contentions and find them to be without merit.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated January 10, 2024, is modified by reversing that portion which found that funding for tuition should be reduced for a portion of the school day due to the provision of religious instruction; and

IT IS FURTHER ORDERED that the district shall fund the total cost of the student's tuition at Shefa for the 2023-24 school year.

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

JUSTYN P. BATES
STATE REVIEW OFFICER