



# The University of the State of New York

## The State Education Department

State Review Officer

[www.sro.nysed.gov](http://www.sro.nysed.gov)

No. 24-617

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

### **Appearances:**

The Harel Law Firm, PC, attorneys for petitioner, by Mordechai Buls, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Emily McNamara, Esq.

## **DECISION**

### **I. Introduction**

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request to be reimbursed for her son's tuition at the Big N Little: Or Hatorah Program (Or Hatorah) for the 2022-23 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**

A CSE convened on April 20, 2021, found the student continued to be eligible for special education as a student with a learning disability, and developed an IEP for the student with an implementation date of September 13, 2021 (Parent Ex. B).<sup>1</sup> At the time of the April 2021 CSE meeting, the student was attending Or Hatorah, was scheduled to be in an eighth grade class for the 2021-22 school year, and the student's family expressed concerns about the student's ability to obtain an academic diploma (id. at pp. 1, 3). The April 2021 CSE recommended that the student

---

<sup>1</sup> The student's eligibility for special education as a student with a learning disability is not in dispute (see 34 CFR 300.8[c][10]; 8 NYCRR 200.1[zz][6]).

be placed in a 12:1+1 special class for six periods per day and receive related services, including one 40-minute session per week of individual counseling, one 40-minute session per week of counseling in a group of three, and two 40-minute sessions per week of individual occupational therapy (OT) (id. at p. 15).

In a letter dated August 26, 2022, the parent advised the district that her son had not received an adequate "educational and school placement" for the 2022-23 school year (Parent Ex. H). The parent further informed the district that if the problem was not resolved she would place the student at Or Hatorah for the 2022-23 school year and would seek funding from the district (id.).

On September 5, 2022, the parent entered into a contract with Or Hatorah for the student's attendance for the 2022-23 school year at a total cost of \$120,000 (Parent Ex. C).

The student attended a ninth grade special class at Or Hatorah for the 2022-23 school year (Parent Exs. E-G; I at ¶¶10, 17-18).

#### **A. Due Process Complaint Notice**

In a due process complaint notice dated June 6, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year (Parent Ex. A). According to the parent, the student required placement in 12:1+1 special class as well as the implementation of a behavioral intervention plan (BIP) during the 2022-23 school year in order to make meaningful academic and functional progress (id. at p. 2). As relief, the parent requested that the district fund the costs of the student's tuition at Or Hatorah for the 2022-23 school year (id. at p. 3).

The district submitted a response to the parent's due process complaint notice, which included a copy of an August 10, 2021 prior written notice summarizing the recommendations of the April 2021 CSE and a copy of an August 10, 2021 school location letter (Due Process Response).

#### **B. Impartial Hearing Officer Decision**

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on August 28, 2024 (Tr. pp. 26-62).<sup>2</sup> In a decision dated October 27, 2024, the IHO found that the district did not meet its burden of proving it offered the student a FAPE for the 2022-23 school year, but denied the requested relief because the parent did not meet her burden of proving the unilaterally obtained program was appropriate for the student (IHO Decision at pp. 9-11).

Initially, the IHO rejected the district's contention that the parent's claims were barred by the statute of limitations (IHO Decision at p. 8). The IHO found that the parent knew or should

---

<sup>2</sup> Prehearing conferences were held on July 8, 2024 and July 16, 2024 (Tr. pp. 1-25). At the prehearing conferences, the district confirmed that the April 2021 IEP was the only IEP in effect for the 2022-23 school year (Tr. pp. 14-15).

have known that the district would not convene a CSE when the parent sent her 10-day notice on August 26, 2022 and, accordingly, that the claim accrued within two years prior to the filing of the due process complaint notice on June 6, 2024 (*id.*). The IHO then found that the CSE failed to develop an IEP for the student for the 2022-23 school year and thus, the district failed to meet its burden of proving that it offered the student a FAPE for the 2022-23 school year (*id.* at p. 9). Turning to the appropriateness of the unilateral placement, the IHO found that there was not sufficient information in the hearing record for the parent to have met her burden (*id.* at p. 10). Although not necessary, the IHO addressed equitable considerations and found that as the parent was only seeking funding for the secular portion of the nonpublic religious school's school day, a reduction of 8.6 percent for the portion of the school day that constituted religious instruction would have been appropriate (*id.* at p. 11. Overall, the IHO denied the parent's request for relief (*id.*).

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

The parent appeals, alleging that the IHO erred in finding that she did not meet her burden of proving that Or Hatorah was an appropriate placement for the student for the 2022-23 school year. The parent asserts that the supervisor of the nonpublic school testified regarding the student's needs and the program that the school created to address the student's needs. In addition, the parent asserts that the testimony and documentary evidence demonstrate that the student made progress at Or Hatorah during the 2022-23 school year.

The district submits an answer asserting that the IHO's findings should be upheld and asserting that the matter should be dismissed due to procedural violations in filing the appeal.<sup>3</sup> In particular, the district asserts that the parent failed to file the request for review until many days after service of the request for review in violation of State regulation.

The parent submits a reply to the district's procedural defense explaining the delay in filing the request for review.

#### **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.

---

<sup>3</sup> Although labeled as a verified answer and cross-appeal, there is no cross-appeal of the IHO's decision included in the district's filing that alleges error by the IHO. Accordingly, it will be treated as an answer.

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

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

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

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; see Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

## **VI. Discussion**

### **A. Compliance with Practice Regulations**

The district asserts that the parent's request for review should be dismissed because it was not filed within the time period provided in State regulation. The parent concedes that the request for review was not filed with the Office of State Review on time, but asserts that it was timely served on the district, that counsel attempted to file but the attempts were unsuccessful due to technical errors, and that the district was not prejudiced by the late filing.

According to the affidavit of service filed with the request for review, the request for review was served on the district on December 6, 2024. In a letter dated December 20, 2024, the Office of State Review advised counsel for the parent that the request for review had not been filed, referencing an earlier December 12, 2024 letter granting the district's request for an extension of time to service an answer in this matter and which had indicated that a request for review had not yet been filed. The December 20, 2024 letter from the Office of State Review explicitly directed

---

<sup>4</sup> The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

the parent make a complete filing by December 23, 2024. The request for review was then filed with the Office of State Review on December 23, 2024.

State regulation requires that a petitioner "shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8 [a]; see Davis v. Carranza, 2021 WL 964820, at \*12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at \*23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Although any errors with the filed pleadings do not warrant further action in this instance, counsel for the parent should take greater care in compiling documents for submission to the Office of State Review and is cautioned to comply with the procedural requirements in Part 279 for filing pleadings or counsel may be risk at risk of dismissal in future proceedings for failure to comply.

## **B. Unilateral Placement**

Turning to the student's unilateral placement, the IHO determined the parent did not present sufficient evidence to prove that the student's program at Or Hatorah was not tailored to his educational needs (IHO Decision at pp. 9-10). The parent argues on appeal that the Or Hatorah supervisor's testimony provided evidence of the student's needs and the program developed by Or Hatorah to meet those needs. Further arguing that the documentary and testimonial evidence show that the student made progress at Or Hatorah during the 2022-23 school year.

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). Citing the Rowley standard, the Supreme Court has explained that "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'" (Carter, 510 U.S. at 11; see Rowley, 458 U.S. at 203-04; Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see also 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 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 (id. 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., 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). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

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

While not in dispute, a discussion of the student's needs provides context for the issue to be resolved, namely, whether Or Hatorah provided specially designed instruction to the student which addressed his unique needs during the 2022-23 school year.

Information in the hearing record regarding the student's needs is available through the April 2021 IEP (Parent Ex. B). According to the April 2021 IEP, a June 2017 psychoeducational evaluation reported the student's full scale IQ score as 79, placing him in the very low range compared to peers, with specific difficulties in expressive language and nonverbal skills (id. at p. 1). The April 2021 IEP indicated that, at the time of the June 2017 psychoeducational evaluation, the student exhibited delays in expressive language skills and struggled significantly with some nonverbal skills (id.).

At the time of the April 2021 IEP, the student was attending an eighth grade class at Or Hatorah in a class of 13 students (Parent Ex. B at p. 1). The student was provided a behavior plan to address his attention and cognitive deficits (id.). The IEP further reported that the student lacked



readiness and refused to engage in all activities, he exhibited task avoidance, engaged in off task behaviors, challenged authority, and disrupted the classroom environment (id.).

The IEP reported the student's functioning from a March 2021 teacher report (Parent Ex. B at pp. 1-2). Overall, the student struggled with academic concepts, requiring modified materials, incremental instruction, and repetition (id. at p. 2). The student's reading comprehension was compromised by him needing to put in effort to decode texts (id.). Writing was challenging for the student due to physical difficulties and limited focus, and he was not developmentally ready to write full compositions (id.).

The student's expressive and receptive language skills were delayed due to his severe attention deficits (Parent Ex. B at p. 2). The student was described as struggling to appropriately express his needs, instead becoming unresponsive, as not speaking when feeling overwhelmed or frustrated, and as being able to converse on random topics but losing focus during conversations (id.). The student was described as struggling with following simple directions unless repeated to him numerous times, as being reliant on teacher prompts to initiate and complete tasks, and as having difficulty participating in any activities due to his attention issues (id.).

The student's short attention span was described as the primary hindrance of his functioning; he was unable to sustain focus for more than 5 minutes or sit still during learning activities, and he was "constantly" fidgeting (Parent Ex. B at p. 2). According to the IEP, the student struggled to regulate his emotions and needed adult support for this (id. at pp. 2-3). The IEP noted that, at times, he challenged authority and spoke disrespectfully (id. at p. 3). However, a February 2021 counseling report referenced in the IEP noted that the student was not defiant or disrespectful, but "demonstrate[d] total indifference towards classroom activities" (id. at p. 4). Socially, the student was friendly and enjoyed sports and group activities but he was distractible and inattentive, affecting classroom dynamics (id.). The report noted that the student was receiving private therapy to provide him with emotional support and that the student was struggling due to a loss in the family (id.).

The IEP reported that, according to a June 2021 OT report, the student struggled with planning and organizing skills both in and out of the classroom (Parent Ex. B at p. 5).<sup>5</sup> The IEP noted that the student's focusing improved when a weekly plan was created for the student and his assignments and folders were organized prior to each week (id.). In OT, concerns included the student's attention span, behavior, executive functioning, handwriting, and organizational skills (id.).

According to the April 2021 IEP, the student showed a lack of motivation and disinterest in learning, often attempting to escape structured tasks by leaving the classroom or engaging in other activities (Parent Ex. B at p. 6).

The IEP included five measurable annual goals to address the student's needs in the areas of reading, writing, math, and classroom participation (Parent Ex. B at pp. 7-14). The student's goals included improving reading comprehension, vocabulary, writing skills, and mathematical

---

<sup>5</sup> The CSE meeting was held in April 2021, accordingly it is assumed that the reports identified as being June 2021 were either earlier reports with the date inputted incorrectly or information added after the meeting.

abilities (id. at pp. 7-12). Additional goals focused on improving handwriting, sensory processing skills, and organizational skills (id. at pp. 12-13). The student was also expected to improve attendance and participation in sessions, and complete meaningful activities independently or with support, using praise, prompts, and reinforcement (id. at pp. 13-14).

The April 2021 CSE recommended placement of the student in a 12:1+1 special class for all subjects, as well as related services of individual counseling one time 40 minutes per week, group counseling one time 40 minutes per week, and individual OT two times 40 minutes per week (Parent Ex. B at p. 15). In addition, the student was recommended to receive testing accommodations including extended time, separate location, directions read and re-read, and on-task focusing prompts (Parent Ex. B at p. 17). Notably, the IEP stated that the student did not need positive behavioral interventions and a behavioral intervention plan to address behaviors that impeded his learning (Parent Ex. B at p. 6).

Other than the April 2021 IEP, the hearing record included information provided by the nonpublic school relating to the student's needs during the 2022-23 school year such as a functional behavioral assessment (FBA), an assessment of functioning using the Vineland Adaptive Behavior Scales, Third Edition (Vineland-III), a treatment plan, a teacher progress report, an OT progress report, and a counseling progress report (Parent Ex. G).

According to the 2022-23 school year private school FBA which was dated September 1, 2022 and indicated it was updated quarterly, the student's targeted problem behaviors included dishonesty, attention-seeking, low self-image, verbal aggression, foul language, crying, purposeful disturbances, instigating negative behavior, lack of joint attention, distractibility, unresponsiveness to challenges, prompt dependency, escape behaviors, defiance, off-task behavior, impulsivity, extreme competitiveness, uncooperativeness, mocking peers, disrespect, lack of social boundaries, and invading personal space (Parent Ex. G at pp. 2-3). The student's behaviors were influenced by challenges in the classroom and social settings, poor attention and cognitive skills, and difficulty in managing social interactions and emotions (id. at p. 3). Antecedents that triggered the student's problem behaviors included classroom and social settings, group instruction, and non-preferred tasks (id. at pp. 3-4). According to the FBA, outcomes maintaining these behaviors included escaping tasks, academic challenges, and group tasks, avoiding challenges, and gaining attention from teachers and peers (id. at p. 4). The student's skill deficits included attention difficulties, poor cognitive abilities, lack of social skills, poor communication, and poor regulation skills (id.).

According to baseline data, reported on the September 2022 FBA, the student struggled with attention, was disrespectful, lacked resilience, was prompt dependent with academic tasks, purposely disturbed his peers, was dishonest, and engaged in verbal and physical aggression (Parent Ex. G at pp. 4-5). The functional hypothesis suggested the student's behaviors were predominantly maintained by escape and attention (id. at p. 5). Previous interventions tried included special education, OT, and counseling, and numerous additional current interventions were identified (id. at pp. 5-6). The student's interests included outdoor activities, music, sports, and video games, with reinforcers being teacher praise and prizes (id. at p. 6).

The student was assessed using the Vineland-III Comprehensive Parent/Caregiver Form, which measured adaptive behavior (Parent Ex. G at p. 7). The student's adaptive behavior

composite score was 80, falling below the normative mean of 100, placing him in the 6th percentile (*id.*). The assessment covered three domains: communication (score of 78, 5th percentile), daily living skills (score of 83, 10th percentile), and socialization (score of 79, 8th percentile) (Parent Ex. G at p. 7).

Information produced by Or Hatorah included a treatment plan, dated September 15, 2022, which indicated it was updated quarterly (Parent Ex. G at pp. 12-18). The treatment plan indicated that, educationally, the student faced challenges in communication, including deficits in expressive, receptive, and pragmatic language, which affected his social interactions and classroom participation; in socialization including competitiveness, lack of cooperation, and verbal and physical aggression; with maladaptive behaviors including difficulty maintaining attention, classroom disruptions, reliance on teacher prompts, and imitating peers' negative behaviors; in cognitive skills including below-grade-level academic performance, poor executive functioning, and disorganization, with the student forgetting to do his homework and study for tests; and in attention as the student's attention span was limited, especially during non-preferred tasks, leading to frequent distractions (Parent Ex. G at pp. 12-13).

## **2. Or Hatorah**

According to the program supervisor at Or Hatorah, during the 2022-23 school year, the student was in a ninth grade special class with up to 12 students, all receiving special education services (Parent Ex. I at ¶17). The supervisor testified that the classroom had a special education teacher and an assistant present at all times during secular instruction (*id.* at ¶18). In addition, the supervisor testified that the student received counseling and OT services and had a BIP in place which was supervised by a board-certified behavior analyst (BCBA) (*id.*).<sup>6</sup> The supervisor further testified that the student had opportunities to integrate with general education peers during various activities, including religious studies, social skills programs, and mealtimes (*id.* at ¶6).

The student's behavioral intervention plan (BIP) produced by the nonpublic school outlined strategies for addressing the student's problem behaviors which consisted of prompt dependency, lack of joint attention, purposeful disturbances, crying, verbal aggression, and dishonest statements, similar to the problem behaviors identified in the nonpublic school FBA (Parent Ex. G at pp. 2-3, 5, 8-9). The BIP included prevention strategies, instructional plans, and behavior management strategies for each identified problem behavior (*id.* at pp. 9-10). The BIP identified prevention strategies such as teaching the student self-sufficiency, modeling calm behavior, providing movement breaks, and using social stories and role play (*id.* at p. 9-10). Instructional plans focused on reinforcing the student's alternative behaviors, such as using coping methods, remaining calm, and expressing emotions verbally (*id.*). Behavior management strategies included maintaining demands, redirecting to tasks, and reinforcing appropriate behaviors (*id.*). The student's reinforcers included outdoor breaks, iPad, video games, edibles, and sports (*id.* at p. 11). The BIP identified techniques to be implemented, including positive reinforcement, sensory toys, functional communication training (FCT), and social stories (*id.*). Coordination with the student's

---

<sup>6</sup> According to the student's 2022-23 schedule at the nonpublic school, the student was receiving the same related services at the same frequency and duration as recommended by the April 2021 CSE: individual counseling one time per week for 40 minutes, group counseling one time per week for 40 minutes, and individual OT two times per week for 40 minutes each session (Parent Ex. E).

other instructors was stressed, with a request for the release of information and sharing of the student's IEP (id.). The BIP noted that a curriculum plan aimed to address the student's social-emotional, communication, cognitive, and social deficits and that, as the student progressed, services would be faded and the student would be transitioned to a "less restricted educational setting" (id.).

Review of the September 2022 Or Hatorah treatment plan shows that it included annual goals for the student in mathematics and English Language Arts (ELA), which included specific targets for improvement in skills such as multiplication, division, and comprehension (Parent Ex. G at pp. 13-14). Progress was noted in communication and academic areas, but concerns remained about the student's ability to adapt behaviorally and socially in classroom settings (id. at p. 14). The treatment plan included a parent involvement component with strategies to reinforce communication and emotional expression at home and goals for the parent to work with the student on at home (id. at p. 14).

The September 2022 treatment plan included communication and social goals with reports of progress towards the goals noted as a percentage from June 2022 and June 2023 (Parent Ex. G at pp. 15-18). All of the goals that had a percentage as of June 2022 were marked as mastered in June 2023 (id.). The treatment plan included additional goals that were marked as new for June 2022 and for which the student had achieved percentages of between 0% and 20% as of June 2023 (id.). Overall, review of the student's communication goals shows that they focused on asking questions; increasing intraverbal skills by responding to questions and using new vocabulary; maintaining joint attention during lectures; as well as improving listener speaking skills by asking questions and responding appropriately in conversations (id. at pp. 15-16). The student's socialization goals focused on self-monitoring on-task behavior, identifying peer preferences, asking for help, and expressing needs appropriately (id. at pp. 16-17). The student was also working on emotional regulation, maintaining eye contact, expressing feelings, and accepting game outcomes, as well as respecting adults and peers, ignoring inappropriate behavior, and following social group rules (id. at pp. 17-18).

According to a June 2023 special education teacher progress report produced by Or Hatorah, the student had made progress in adding and subtracting polynomials but continued to struggle with other math concepts (Parent Ex. G at p. 19). The student had mastered math goals including solving real-world problems involving rational numbers and calculating areas of two-dimensional objects and had upcoming short-term objectives for the student to interpret expressions and produce equivalent forms, prove polynomial identities, solve multi-step problems with rational numbers, and write algebraic expressions for percentage problems (id. at p. 19).

The teacher progress reported that the student was performing below grade level in reading and reading comprehension (Parent Ex. G at p. 20). According to the report, the student's reading fluency has remained steady, but he continued to make decoding errors affecting comprehension (id.). The student had mastered reading goals including answering literal and inferential comprehension questions, predicting story outcomes, identifying the author's purpose, and using context clues for vocabulary (id.). The student's upcoming reading goals aimed for him to improve comprehension and analysis skills, including answering text-based questions, analyzing character perspectives, and improving reading rate and comprehension (id.). In writing, the report noted that the student was improving in expressing simple ideas but struggled with structure, spelling,

organization, and punctuation (id. at p. 21). The student had mastered writing goals including using English language conventions to formulate organized paragraphs and using chronological order and cause-effect structures (id.). The student's upcoming writing goals focused on creating keyword outlines, drafting structured essays, and using figurative language (id. at pp. 21-22).

Further, according to the June 2023 teacher progress report, the student's social-emotional functioning and classroom behavior showed improvement, with decreased class disturbances and better teacher relationships (Parent Ex. G at p. 22).

A December 2022 OT progress report indicated the student made moderate improvement in handwriting, focus, attention, and organizational skills, with ongoing challenges in these areas (Parent Ex. G at p. 23).

The student's report card detailed his performance related to various academic standards for the ninth grade over three trimesters for the 2022-23 school year with grades reported on a scale of 1-4 indicating, exemplary (4), proficient (3), developing (2), and emerging (1) (Parent Ex. G at pp. 26-31).<sup>7</sup> The student's performance was measured in reading literature, reading informational text, and writing, with the student showing improvement in most areas from "emerging" described as "[d]oes not demonstrate an understanding of concepts/skills taught this reporting period" to "developing" described as "[n]ot yet consistent in demonstrating understanding of concepts/skills taught this reporting period" from the first marking period to the third marking period (id. at pp. 26-29). By the third marking period the student was "proficient" described as "[c]onsistently demonstrate[ing] an understanding of concepts/skills taught this marking period" in three identified skills; citing textual evidence and analyzing a central theme for reading informational text and analyzing a central theme for reading literature (id. at pp. 26, 27). All other reading and writing skills were graded as "developing" for the third marking period (id. at pp. 26-29).

The student's report card also included grades for speaking and listening skills and language skills using the same rubric and a similar pattern showing improvement in most skills from "emerging" during the first marking period to "developing" during the third marking period (Parent Ex. G at pp. 29-31). As of the third marking period the student obtained a "proficient" grade in four skills areas; effectively participating in collaborative discussions, propelling conversations by proposing and responding to questions, demonstrating command of English grammar and usage, and determining the meaning of unknown or multi-meaning words (id.). All other speaking and listening skills and language skills were graded as "developing" for the third marking period (id.).

The report card included a bolded grade for "Standards for Mathematics" showing improvement from "emerging" during the first marking period, to "developing" during the second marking period, to "proficient" during the third marking period (Parent Ex. G at p. 31). However, review of the grades for the individual skills assessed shows that most skills were rated as "emerging" for the first and second marking period and as "developing" for the third marking period (id. at pp. 31-33). For the third marking period, the student was rated as "proficient" in

---

<sup>7</sup> A June 2023 counseling progress report provided checked responses for the frequency at which certain statements were true (Parent Ex. G at pp. 24-25). However, the accuracy of this report is unclear as it does not identify who completed it or how it was completed (id.).

performing arithmetic operations with complex numbers with all other skills assessed as "developing" (id.).

The supervisor testified that the program's curriculum was aligned with the New York State Common Core Curriculum but was modified to meet each student's individual needs, particularly for those with moderate delays in language, communication, and behavior (Parent Ex. I at ¶8). According to the supervisor, the program utilized applied behavior analysis methodology, employing research-based strategies, clear instructions, specific materials, and reinforcement plans for individual students (id.). The supervisor went on to indicate that specific goals and targets were set for each student, aligned with their IEP, when possible, to ensure meaningful progress and that the program used an electronic data collection program to maintain individual profiles for each student and consistently collect data (id. at ¶9).

The program supervisor testified that she ensured the student benefited from the program at Or Hatorah by working with his team to identify weaknesses in creating replacement techniques, preventative methods, and a plan for the student's success (Parent Ex. I at ¶11). In particular, the supervisor provided testimony regarding the student's BIP, showing it was created and implemented for the student, with collaboration from his parent, teachers, and providers, and his progress was monitored through data collection (id. at ¶12). As detailed above, the student exhibits significant behavioral challenges during the 2022-23 school year (see Parent Ex. G). Consistent with the documentary evidence, the supervisor testified that the student struggled with effective communication and engaged in maladaptive behaviors, identifying similar behaviors to those shown in the Or Hatorah FBA and BIP (compare Parent Ex. I at ¶¶13-14, with Parent Ex. G at pp. 2-6, 8-11).

The program supervisor opined that for the 2022-23 school year, the student's unique needs necessitated placement in a full-time, highly structured classroom with a low student to teacher ratio to minimize distractions (Parent Ex. I at ¶16). He further opined that the student required a BIP, social skills training, individualized attention, and frequent prompting, redirection, and repetition (id.). According to the supervisor, Or Hatorah provided the student with the supports he needed during the 2022-23 school year (id. at ¶17).

The supervisor provided an explanation as to why he believed the program at Or Hatorah met the student's needs (Parent Ex. I at ¶18-21). According to the supervisor, the student's educational program during the 2022-23 school year was designed to support him in his area of deficiency, the program included preferred learning activities to create a positive learning environment, the student was taught self-monitoring techniques to reduce problem behaviors and enhance performance across various domains, the student was provided with positive reinforcement (such as praise, money, attention, access to preferred activities or toys, and scheduled breaks), sensory toys, FCT, manding for a break, coping mechanisms, prompting, differential reinforcement of incompatible behavior, differential reinforcement of alternative behavior, scaffolding, use of graphic organizers, use of rewards, redirection, social stories, sensory breaks, and sensory activities (id. at ¶¶19, 20). According to the supervisor, these comprehensive supports enabled the student to make significant progress, reduce maladaptive behaviors, become less disruptive, and improve interactions with peers and teachers and the student showed improvement in academic skills, specifically in multiplication, division, fractions, and reading comprehension (id. at ¶21).

The IHO found that the hearing record did not sufficiently demonstrate how the nonpublic school addressed the student's specific needs, and that there was no evidence of how the curriculum was modified to address the student's specific delays (IHO Decision at p. 10). Initially, while the supervisor testified that the student's curriculum was individualized and that the school kept data on the student, the hearing record did not identify how the student's curriculum was individualized or modified to the student's specific needs or how the school either kept or tracked data for the student. It is unclear how the student's curriculum may or may not have differed from the general curriculum utilized by the school, which was included as a part of the school's contract (see Parent Exs. C at pp. 4-17; G at pp. 26-31).

The IHO further found that the student's progress reports merely listed areas of difficulty and interventions, and did not describe how they were utilized with the student or how he responded to them (IHO Decision at p. 10; see Parent Ex. G at pp. 19-25). However, as detailed above, the progress reports described the student's goals, his progress on the goals, his ongoing areas of need, and the tools, accommodations, and methodologies used by the school for the student (Parent Ex. G at pp. 19-25). Specifically, the progress reports identified effective strategies used for the student such as individualized attention, "teaching modeling", small group instruction, visual maps, modeling step by step instructions, prompting, graphic organizers, direct instruction, constant teacher prompting to engage, and verbal and visual cues to initiate tasks (id. at pp. 19-23).

Notably, as discussed above, the student's behavioral challenges were a significant area of need for the student and the nonpublic school conducted an FBA and developed a BIP for the student for use during the 2022-23 school year (Parent Ex. G at pp. 2-6, 8-11). The FBA and BIP described in detail the student's challenging behaviors, which were prevalent and pervasive, and thoroughly analyzed the data collected in order to address his behaviors (id.).

Overall, review of the progress reports, FBA, and BIP indicate that the nonpublic school provided instruction specially designed to meet the unique needs of the student, supported by such services as were necessary to ensure that the student would benefit from instruction.

### **C. Equitable Considerations:**

Regarding equitable considerations, the IHO found that a reduction of 8.6 percent for the portion of the school day that constituted religious instruction would have been appropriate because the parent was only seeking funding for the secular portion of the nonpublic religious school's school day (IHO Decision at p. 11). On appeal, the parent does not specifically appeal from the IHO's finding as to equitable factors, but requests funding for the cost of the student's tuition in the amount of \$115,000.<sup>8</sup> The district argues for upholding the reduction of the tuition based on the IHO's calculation.

---

<sup>8</sup> It is unclear where the parent obtained this dollar amount for the cost of the student's tuition as the contract indicates the student's tuition cost \$120,000 for the 2022-23 school year (Parent Ex. C), and the IHO indicated the reduction would have been \$10,320 resulting in public funding in the amount of \$109,680 (IHO Decision at p. 11 n. 3).

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

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

Here, there do not appear to be any equitable considerations weighing against granting the parent's request for relief. The parent testified, by affidavit, that on August 26, 2022, she sent a letter to the district indicating that she had not received an adequate placement for the student and that she intended to unilaterally place the student at Or Hatorah and to seek funding from the district for the 2022-23 school year (Parent Ex. J at ¶3; see Parent Ex. H). In her affidavit, the parent also indicated that a small portion of the student's instruction at Or Hatorah was religious in nature, and she was not seeking district funding for that portion of the tuition (Parent Ex. J at ¶¶8, 9).

Additionally, as determined by the IHO, the parent, in her affidavit indicated she was not seeking funding for the religious portion of the student's school day at Or Hatorah (Parent Ex. J at



¶¶8, 9). Accordingly, the IHO's proposed reduction will be upheld as consistent with the parent's request and the parent will be awarded district funding of the student's educational program at Or Hatorah for the 2022-23 school year in the amount of \$109,680.

## **VII. Conclusion**

As neither party appealed from the IHO's finding that the district denied the student a FAPE for the 2022-23 school year and having determined that the parent met her burden of showing that the services provided to the student by Or Hatorah during the 2022-23 were specially designed to meet the student's identified needs, and that equitable considerations weigh in favor of granting the parent's requested relief for funding of the student's tuition at Or Hatorah in the amount of \$109,680, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find they are without merit.

### **THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the IHO's decision, dated October 27, 2024, is modified by reversing that portion which found that the parent failed to meet her burden of proving that Or Hatorah was an appropriate placement for the student for the 2022-23 school year; and

**IT IS FURTHER ORDERED** that the district shall fund the cost of the student's tuition at Or Hatorah for the 2022-23 school year including in the amount of \$109,680.

**Dated:**           **Albany, New York**  
                      **March 18, 2025**

\_\_\_\_\_  
**JUSTYN P. BATES**  
**STATE REVIEW OFFICER**