The University of the State of New York

The State Education Department
State Review Officer
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No. 25-022

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

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

Liz Vladeck, General Counsel, attorneys for respondent, by Irene Dimoh, 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 reduced the award of reimbursement/direct funding of her daughter's tuition at the Hamaspik School (Hamaspik) for the 2022-23 school year. Respondent (the district) cross-appeals from that portion of the IHO's decision which found that the parent's unilateral placement of the student at Hamaspik was appropriate. The appeal must be sustained. The cross-appeal must be dismissed.

### II. Overview—Administrative Procedures

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

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

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

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

## III. Facts and Procedural History

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be recited here in detail.

Briefly, the student in this matter has received a diagnosis of Down syndrome and special education services from a young age (Tr. pp. 24-25; Parent Exs. F at p. 1; G at p. 1; H at p. 1; I at p. 1; L at p. 1; M at p. 1). After preschool, the student attended a district public school through the 2020-21 school year (Tr. pp. 25-26).

On April 15, 2021 a CSE convened and found the student eligible for special education services as a student with an intellectual disability (IHO Ex. II at pp. 1, 15).[1] The CSE developed an IEP with a projected implementation date of April 29, 2021 and recommended 10-month programming consisting of a 12:1+1 special class placement delivered in Yiddish with the exception of English language arts (ELA) instruction, and related services consisting of one 30-minute session per week of individual occupational therapy (OT) delivered in English, one 30-minute session per week of OT delivered in English in a group of two, one 30-minute session per week of individual physical therapy (PT) delivered in English, one 30-minute session per week of PT delivered in English in a group of two, and three 30-minute sessions per week of individual speech-language therapy delivered in Yiddish (id. at pp. 9-10, 11). The CSE also recommended daily, individual paraprofessional services to assist the student with toileting (id. at p. 11). The student began attending Hamaspik for the 2021-22 school year (Tr. p. 26).

In a letter dated August 19, 2022, the parent, through her attorney, informed the district that a CSE meeting had not been held to develop an IEP for the student for the 2022-23 school year, and the district had not notified the parent of the public school location to which it assigned the student to attend for the 2022-23 school year (Parent Ex. C). The parent expressed a willingness to consider "any appropriate program or placement that may be recommended" and notified the district that, in the interim, she would be placing the student at Hamaspik and seeking reimbursement or direct funding for the cost of the student's tuition (id.).[2] On September 7, 2022, the parent executed a "school contract" with Hamaspik for the 10-month 2022-23 school year (Parent Ex. N at p. 8). The parent paid a $250 deposit upon execution of the contract (Parent Exs. O; P at p. 2).

The student attended Hamaspik for the 2022-23 school year (see Parent Exs. F-J; L-M).

**A. Due Process Complaint Notice**

In a due process complaint notice dated June 28, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2022-23 school year by failing to convene a CSE to develop an appropriate program and placement recommendation (Parent Ex. A at p. 2). The parent also claimed that Hamaspik was an appropriate unilateral placement for the student (id.). As relief, the parent requested tuition funding, funding for appropriate related services, and funding for the costs and fees associated with the student's attendance at Hamaspik during the 2022-23 school year (id.).

In a due process response dated July 23, 2024, the district indicated that the CSE last convened on April 29, 2021, found the student eligible for special education as a student with an intellectual disability, and recommended a 12:1+1 special class placement in a specialized school

[1] The student's eligibility for special education as a student with an intellectual disability is not in dispute (see 34 CFR 300.8[c][6]; 8 NYCRR 200.1[zz][7]).

[2] Hamaspik has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

for ELA, math, science, and social studies instruction, with related services of OT, PT, and speech-language therapy (Parent Ex. B at p. 3).[3]

### B. Impartial Hearing Officer Decision

After a prehearing conference on September 3, 2024 (Tr. pp. 2-7), an impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 16, 2024 and concluded the same day (Tr. pp. 12-70). In a decision dated November 30, 2024, the IHO found that the district did not meet its burden to show that it offered the student a FAPE for the 2022-23 school year, that Hamaspik offered the student special education programming that was "tailored to her individual needs," and that equitable considerations supported the parent's requested relief in part (IHO Decision pp. 4-6). Specifically, the IHO summarized the facts and procedural history of the case, and then determined that because the district declined to present evidence or testimony that it offered the student a FAPE it did not meet its burden (id. at p. 4). The IHO held that the weight of the evidence offered by the parent demonstrated the student's educational needs were addressed by Hamaspik and that the instruction and support the student received was "reasonably calculated" to enable the student to receive educational benefit (id. at p. 5). Regarding equitable considerations, the IHO determined that an award of direct funding of the student's tuition should be reduced due to "religious programming" despite ruling that "nothing in the record" suggested that the parent did not cooperate with the district (id. at p. 6).

## IV. Appeal for State-Level Review

The parties' familiarity with the particular issues for review on appeal in the parent's request for review and the district's answer and cross-appeal is also presumed and, therefore, the allegations and arguments will not be recited here. The following issues presented on appeal must be resolved in order to render a decision in this case:

1. Whether the IHO erred in determining that Hamaspik was an appropriate unilateral placement to address the student's unique needs; and

2. Whether the IHO erred in reducing tuition funding based on the provision of religious instruction.

## 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]).

[3] The due process response is inconsistent with the April 2021 IEP which indicates the student's placement recommendation was a "Non-Specialized" school (compare Parent Ex. B at p. 3, with IHO Ex. II at p. 15).

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]). 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 v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "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

Initially, neither party has appealed from the IHO's determinations that the district failed to offer the student a FAPE for the 2022-23 school year, and that equitable considerations (other than as related to the proportion of religious instruction delivered at Hamaspik) weighed in favor of the parent. 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]).

### A. Unilateral Placement

In its cross-appeal the district asserts that the IHO erred in finding that the student's unilateral placement at Hamaspik was appropriate. Specifically, the district argues that "[a] significant percentage of non-academic courses lacked a focus on academics even though the [p]arent testified that lunch, circle time or structured play w[ere] all skill based," and that "there was no mention of grades, test scores, or grade level advancement of the [s]tudent" at Hamaspik. The district next asserts that, despite testimony that the student's schedule on Friday differed from the schedule on Monday through Thursday, a Friday schedule was not entered into evidence, and the hearing record also lacked evidence regarding the student's attendance other than testimony that it was "good."[4] Further, the district argues that the assistant teachers/paraprofessionals lacked

[4] At the hearing, in response to a question from the attorney for the district regarding the student's "pretty solid attendance" during the 2022-23 school year, the parent replied that unless she wasn't feeling well "here and there" the student was "all the time in school" (Tr. pp. 41-42). Additionally, the lead teacher testified that the student went to school "most days," there was nothing unusual about her attendance, and that she went "to school consistently" (Tr. pp. 51-52). Accordingly, I do not find merit to the district's contention that there was insufficient evidence regarding the student's attendance given the parent's testimony, which the district did not rebut.

"experience in special education and with students with Down[] [s]yndrome." Lastly, the district argues that the amount of time the student spent receiving religious instruction related to the appropriateness of Hamaspik, and the hearing record lacked information as to how the religious instruction addressed the student's individual needs.

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 v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998]). 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. The Student's Needs**

The student "present[ed] with many of the developmental and cognitive deficits associated" with a diagnosis of Down syndrome (IHO Ex. II at p. 2). Academically, the student, who was nine years old during the 2022-23 school year, identified most letters of the alphabet, decoded and encoded CVC words, identified some sight words, and wrote her first and last name and numbers 1-10 with prompting (Parent Ex. Q ¶¶ 15, 16; see IHO Ex. II at p. 1). In math, the student had mastered shapes, colors, and 1:1 correspondence up to 10, rote counted to 100, and identified numbers 0-10 and "more or less with visuals and numbers" (Parent Ex. Q ¶ 17). Regarding communication skills, the student spoke in three to four word phrases, exhibited "severe articulation errors and phonological processes" that reduced her speech intelligibility, and struggled to answer yes/no, multiple choice, and "wh" questions (Parent Ex. I at p. 1). The lead teacher testified that during the 2022-23 school year the student was easily distracted and often needed individual instructions when group instructions were provided due to her difficulty processing new information and understanding cause and effect (Parent Ex. Q ¶¶ 1, 11). The student additionally had difficulty remaining focused for extended periods of time and required multisensory learning and graphic organizers to learn a skill and complete a task (id.).

Regarding social skills, the lead teacher described the student as "socially motivated," although she struggled to interact appropriately due to poor perspective taking skills and rigid thinking patterns (Parent Ex. Q ¶ 12). According to the lead teacher, the student engaged in "problem behavior," which presented as non-compliance and "use of silly words" when presented with challenging activities and to gain attention from others (id. ¶ 13). Progress reports described that physically the student presented with "generalized muscle weakness" and exhibited delays in her gross motor skills and developmental milestones (Parent Ex. H at p. 1). Additionally, the student demonstrated delays in graphomotor and fine motor skills, executive functioning, visual perceptual skills, and her ability to complete activities of daily living (ADLs) (Parent Ex. G at p. 1).

**2. Hamaspik**

Descriptions of Hamaspik in the hearing record included that it "caters to children ages five to fourteen" who have received a diagnosis of Down syndrome, and that "part of the student population is bilingual, speaking English and Yiddish" (Parent Exs. D at p. 1; Q ¶ 8). Class ratios at Hamaspik are 8:1+2 with an 8:1+3 ratio for academic small group instruction and interventions used included applied behavior analysis (ABA), Floortime, multisensory learning, sensory and executive functioning training, social thinking training, and natural environment teaching (Parent Ex. D at p. 1). The school offers "a combination of group learning and small group instruction with a maximum of [three] students in small learning groups" during ELA, math, handwriting, thematic lessons such as science, social studies, and life skills, social thinking instruction, and activities of daily living (id. at p. 3). Related services at Hamaspik included "individualized" OT,

PT, and speech-language therapy, "blend-in group sessions," weekly skill based groups, as well as twice daily sensory motor movement therapy (id. at p. 4). To address student behavior, Hamaspik uses "principles of ABA, as well as behavior modification strategies to target specific goals" including class wide behavior systems and individualized behavior intervention plans as needed (id.).

According to the lead teacher, the student's classroom during the 2022-23 school year was composed of one teacher, three paraprofessionals, and six students (Tr. pp. 47-48). To address the student's academic needs, the lead teacher testified to using small group instruction; visual, auditory, and kinesthetic activities incorporated into all lessons; picture cues, flashcards, interactive games, and manipulatives to support her learning; songs and music to keep lessons engaging and help the student retain information; and a token chart to help her comply with tasks and transitions (Parent Ex. Q ¶ 14). Additionally, the lead teacher testified that the student received paraprofessional support in a group with one other student using Orton-Gillingham for reading, the "VAKT" approach and Handwriting Without Tears in a small group for writing, and My Math in a small group during math instruction (id. ¶¶ 15-17). To address the student's behavior needs, staff used positive reinforcement, engagement strategies, and consistency (id. ¶ 19).

During the 2022-23 school year, Hamaspik delivered two 30-minute sessions per week of individual PT to work on improving the student's gross motor skills, balance, strength, and motor planning skills; 1:1 OT, two sessions per day of group sensory motor intervention, and two sessions per week of "skill-based development" in the classroom to improve the student's graphomotor, executive functioning, visual/perceptual, oculomotor, selfcare/ADL, and fine motor skills; and three 30-minute sessions per week of individual speech-language therapy, one 30-minute session per week of group feeding/conversational intervention in the classroom, one 30-minute session per week of in-class skills-based instruction to address executive functioning and language skills, and four 15-minute sessions per week of group oral-motor intervention in the classroom (Parent Exs. G; H; I).

The student's Hamaspik schedule during the 2022-23 school year reflected time for structured play with teacher support; instruction in conversation and calendar skills; individualized reading group that incorporated phonemic awareness, phonics, vocabulary, fluency, and comprehension; oral motor skill instruction; thematic unit instruction focusing on topics such as science; group instruction focusing on sensory regulation, motor, and ADL skills; individualized math group; individualized handwriting group; and "[s]kills based group" (Tr. p. 56; Parent Ex. E). The district argues on appeal that the parent failed to explain how the portions of the school day related to religious instruction met the student's needs. However, review of the student's schedule shows that "Davening" focused on "[r]ead aloud (focusing on vocabulary/comprehension or shared reading (focus on fluency)" and that "Middos" related to "life skills" such as using manners and developing friendships; both reading and social skills were areas of need identified for the student (compare Tr. pp. 55-57, 61-62, and Parent Ex. E, with Parent Exs. F at p. 2; G at p. 3).[5] Additionally, the lead teacher testified that although during Davening religious texts were used, "teaching religion was not a primary purpose of that class" (Tr. pp. 55, 61-62).

[5] It appears that the instructional time entitled "Middos" was mistranscribed as "Nido's" in the transcript (compare Parent Ex. E, with Tr. pp. 56-57).

Next, the district appears to argue that "[a] great deal of the [student's] schedule [wa]s made up of what might be considered non-academic subjects," for example, snack, lunch, circle time, and structured play (see Tr. pp. 39-40; Parent Ex. E). The parent testified that while "academics" were important to the student, other areas such as play, life, and social skills were also important and addressed during those times (Tr. pp. 39-40). According to the parent, at lunch the student was taught skills such as using utensils and setting a table, and when playing staff used games that involved letters or numbers, skills she opined were "as important as . . . other academics" (id.). Additionally, while the title of some activities, such as morning circle, may not overtly appear to be academic in nature, the lead teacher testified that during that circle time students worked on calendar skills which "focused a lot on math skills" (Tr. p. 53). As described above, the student exhibited global developmental delays, not just academic needs, which Hamaspik addressed through the variety of instructional activities and related services it delivered and the nonpublic school was not required to spend a specific amount of time per day on academic instruction (see Parent Exs. E; G-I; Q ¶¶ 11-14).

Further, the district alleges that the evidence lacked mention of the student's grades, test scores, or grade level advancement.[6] Review of the evidence discussed above shows that Hamaspik identified and addressed the student's needs, and as noted here, described the progress the student made during the 2022-23 school year, albeit not in grade form or by referencing grade level advancement. The lead teacher testified that Hamaspik did not "really work with grade levels," rather, programming was "individualized according to . . . the student's level," which ensured that the student was moving on to the next skill when they needed to and continuing at an appropriate pace (Tr. pp. 60-61).[7] Student progress was measured through their "work binders" that included reading and math curriculum, which the student "followe[d] along" as staff "marked off which skills they ha[d] mastered" (Tr. pp. 58, 60). The binder also contained student worksheets and homework to show how the student progressed and mastered skills (Tr. p. 58). Additionally, student progress was measured using informal assessments and the issuance of mid-year and end-of-year progress reports (Parent Ex. Q ¶ 18).

To the extent the district's allegation could be construed to assert that the hearing record lacked evidence showing that the student made progress, it is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't

[6] Regarding the district's assertion on appeal that the parent failed to mention "test scores" it was not the parent's responsibility to evaluate the student and identify his needs (see A.D. v. Bd. of Educ. of City Sch. Dist. of City of New York, 690 F. Supp. 2d 193, 208 [S.D.N.Y. 2010] [finding that a unilateral placement was appropriate even where the private school reports were alleged by the district to be incomplete or inaccurate and finding that the fault for such inaccuracy or incomplete assessment of the student's needs lies with the district]).

[7] Specifically, the lead teacher testified that the student's curriculum "continue[d] on according to the sequence of the curriculum and according to the next skill" rather than indicating whether the student progressed from one grade to the next (Tr. pp. 59-60).

of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]). Regardless, according to the lead teacher, the student "did progress appropriately" and demonstrated progress in her ability to exhibit more flexible thinking patterns, "more easily identify big emotions," reduce impulsivity, and increase awareness of her actions (Tr. pp. 58, 60; Parent Ex. Q ¶ 19). Further, the lead teacher testified that "[i]n addition to her academic progress, [the student] became more social with her classmates during the 2022-23 school year and participated more frequently with the group by the end of the year" (Parent Ex. Q ¶ 19). Review of the mid-year educational and related service progress reports as compared to the end-of-year reports also reflects that the student made progress in many areas over the course of the 2022-23 school year (compare Parent Exs. F; G; I, with Parent Exs. J; L; M).

Additionally, contrary to the district's assertion that the support staff in the student's classroom lacked "experience in special education" and with students with Down syndrome, the lead teacher testified that each of the three paraprofessionals in the student's classroom during the 2022-23 school year "had previous experience working with children with special needs through working in summer camps for children with special needs," and that one of the paraprofessionals had worked at Hamaspik during the 2021-22 school year and in an after-school program for students with special needs (Parent Ex. Q ¶ 9). Additionally, the lead teacher testified that she provided supervision to the paraprofessionals while they worked in small groups with students (id.).[8]

Therefore, review of the information in the hearing record regarding the student's Hamaspik programming during the 2022-23 school year supports the IHO's finding that it was an appropriate unilateral placement.

**B. Equitable Considerations:**

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

[8] Further, the nonpublic school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14), and there is no requirement that assistant teachers or paraprofessionals at nonpublic schools have a certain amount or specific type of experience or training.

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"]).

Turning to the parties' arguments regarding whether the IHO erred in reducing the amount of tuition awarded for the student's attendance at Hamaspik for the portions of the school day the IHO determined were for religious studies, the parent argues that the IHO did not consider a recent Supreme Court case standing for the proposition that a nonsectarian requirement for funding violated the Free Exercise Clause of the First Amendment as well as the Equal Protection Clause of the Fourteenth Amendment. The parent also argues the IHO did not consider the secular benefit of the student's religious class. The district argues the religious studies class at Hamaspik was above and beyond what was required to offer the student a FAPE and that equitable considerations supported the IHO's determination to reduce tuition funding.

**1. Religious Instruction**

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).

More recently, in a case where Orthodox Jewish parents sued California school officials over a statutory requirement that nonpublic schools (NPS) must be "nonsectarian" to apply for certification to provide special education services to disabled students, claiming it violated free exercise and equal protection, the Ninth Circuit Court of Appeals explained that when the parent plaintiffs asked that a public benefit—state funding of nonpublic school placements for disabled students—not be restricted to those seeking placement in nonsectarian schools, they plausibly

alleged that California's nonsectarian NPS requirement burdened their free exercise of religion. This was because it conditioned public funding for their children's school on that school's nonreligious character and "presented a 'tendency to coerce' them 'into acting contrary to their religious beliefs'" (Loffman v. California Dep't of Educ., 119 F.4th 1147, 1169 [9th Cir. 2024]). In that case, the court held that the statute failed the neutrality test, the government was required to overcome strict scrutiny, and the government's alleged compelling interest in maintaining neutrality toward religion was insufficient to overcome such scrutiny (Loffman, 119 F.4th at 1170-71).

Although, the Supreme Court has not directly addressed the issue of tuition reimbursement for time spent in religious instruction at a unilateral placement, there are some principles that can be applied to this situation. The Supreme Court has directly held that the IDEA is a neutral program that distributes benefits to any child qualifying with a disability without regard to whether the school the child attends is sectarian or non-sectarian (Zobrest v. Calatina Foothills Sch. Dist., 509 U.S. 1, 10 [1993]). In the specific context of tuition reimbursement, some district courts in other states have found that full tuition reimbursement is appropriate under the Establishment Clause (Matthew J. v. Mass. Dep't of Educ., 989 F. Supp. 380 [D. Mass. 1998]; Christen G. v. Lower Merion Sch. Dist., 919 F. Supp. 793 [E.D. Pa. 1996], see Edison Twp. Bd. of Educ. v. F.S., 2017 WL 6627415, at *7 [D.N.J. Oct. 27, 2017] [noting that reimbursement of the funds was to the parents, not a religious school, and that "the sectarian nature of an appropriate school does not preclude reimbursement"], adopted at, 2017 WL 6626316 [D.N.J. Dec. 27, 2017]; R.S. v. Somerville Bd. of Educ., 2011 WL 32521, at *10 [D.N.J. Jan. 5, 2011] [finding that, if an appropriate unilateral placement is sectarian, "neither the IDEA nor the Establishment Clause is violated when the court orders reimbursement to the parents" but noting that a district placement might violate the Establishment Clause]; L.M. v. Evesham Twp. Bd. of Educ., 256 F. Supp. 2d 290, 303 [D.N.J. 2003] [noting that application of the endorsement test would not bar reimbursement of tuition for a unilateral placement in a sectarian school under the Establishment Clause];[9] see also Bd. of Educ. of Paxton-Buckley-Loda Unit Sch. Dist. No. 10 v. Jeff S., 184 F. Supp. 2d 790, 804 [C.D. Ill. 2002]; Doolittle v. Meridian Joint Sch. Dist. No. 2, 128 Idaho 805, 812-13 [1996]).

Among those district courts that have examined the issue with more analysis, it has been held that the tuition reimbursement for the full cost of a school year, "[did] not violate the second prong of Lemon" as it "[did] not in any way advance religion" and that "[t]he only matter advanced is the determination by Congress that a disabled child shall receive a free appropriate public education" which the district was obligated to provide yet "did not do so" (Christen G., 919 F. Supp. at818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).[10] Focusing on the indirect aid and individual choice factors discussed in prior Supreme Court cases, another district court granted

[9] 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).

[10] The second prong of the test set forth in Lemon v. Kurtzman, which has since been abandoned, was that the government action could not have a primary effect of advancing or inhibiting religion (403 U.S. 602, 612-13; see (Kennedy v Bremerton School Dist., 597 U.S. 507, 510 [2022] [holding that the Supreme Court "long ago abandoned Lemon and its endorsement test offshoot"]).

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 arrived in these circumstances because it failed to offer the student a FAPE for the 2022-23 school year. Based on this, the parent cannot be forced into choosing remedial relief that is nonsectarian only in nature, and the parent, under the IDEA, had the right to place the student at a school of her choosing and seek funding for it, provided that it was appropriate to meet the student's needs. In this instance, as noted above, the hearing record supports the IHO's determination that Hamaspik was an appropriate unilateral placement for the student for the 2022-23 school year.[11] Contrary to the IHO's determination, and as argued by the parent, 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, direct funding for the cost of the student's attendance at Hamaspik is not precluded by the Establishment Clause of the First Amendment, by any federal or State regulation, or by the State's Constitution. The IDEA has the secular purpose of ensuring that all children with disabilities are offered a FAPE. In its Burlington and Carter decisions, the Supreme Court provided the remedy of tuition reimbursement to the parents of children who were entitled to receive a FAPE but did not receive it. The remedy is available to all parents who otherwise meet the criteria set forth in those decisions, regardless of whether the expenses which they incur arise from placement of their children in other public schools or in private schools. Accordingly, the parent is entitled to reimbursement or direct funding for the full cost of the student's tuition.

**2. Excessive Services**

I now turn to the district's argument to uphold a portion of the IHO's decision on the basis that the religious studies class 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., 758 F.3d at 461 [noting that whether the amount of the private school tuition

[11] Rather than weighing the amount of time the student spent receiving religious instruction, or instruction not tied to special education or an academic curriculum, as an equitable consideration, the proportionate amount of time the student spent receiving such instruction during the school day may, in some cases, weigh 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], aff'd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]). However, here, as described above, Hamaspik provided an appropriate program for the student and the purported religious instruction (described as Davening) did not compromise a majority of the school day and, according to the IHO, the "[s]tudent was offered various strategies to help her access her academic skills" and the "weight of the evidence establish[ed] that the [s]tudent's individual special education needs were addressed" (Tr. pp. 61-62; IHO Decision at p. 5; see Parent Ex. E).

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 held that reduction in the student's tuition at Hamaspik for the 2022-23 school year was warranted, finding tangentially that a portion of the school day consisted of "religious instruction" (IHO Decision at p. 6). However, the IHO did not identify a method for segregating the costs for that portion 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 davening 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.

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, was actually used to pay for the portions of the school day devoted to religious instruction. Even if the proportion of the student's schedule devoted to "religious instruction" 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 "religious instruction" beyond the religious aspect. Rather, "the situation does not permit a fair approximation of the value of the services received" compared to the program overall and, therefore, equity supports full reimbursement (Gustafson, 2002 WL 313798, at *7).

## VII. Conclusion

Based on the foregoing, the hearing record supports the IHO's determination that Hamaspik was an appropriate unilateral placement that provided specially designed instruction to address the student's unique needs. Additionally, having reviewed the evidence in the hearing record, there is no basis for a finding that the federal regulation or the Establishment Clause bars the district from funding the religious portion of the student's education program at Hamaspik and there is no evidence in the hearing record to support the IHO's finding that the time the student spent in "religious instruction" was segregable form the student's overall educational program such that a specific direction could be made for reducing the costs of the student's tuition at Hamaspik for the 2022-23 school year.

**THE APPEAL IS SUSTAINED.**

**THE CROSS-APPEAL IS DISMISSED.**

**IT IS ORDERED** that the IHO's decision, dated November 30, 2024, is modified by reversing that portion which found that funding for tuition should be reduced due to the provision of religious instruction; and

**IT IS FURTHER ORDERED** that district shall fund the total cost of the student's tuition at Hamaspik for the 2022-23 school year including reimbursement to the parent for any out-of-pocket expenses incurred related to the student's attendance and tuition at Hamaspik upon proof of provision of said services.

**Dated:** **Albany, New York**
**May 12, 2025**

**CAROL H. HAUGE**
**STATE REVIEW OFFICER**