



The University of the State of New York

The State Education Department

State Review Officer

www.sro.nysed.gov

No. 25-119

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

Appearances:

The Law Offices of Martin Marks, attorneys for petitioners, by Martin Marks, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Brian J. Reimels, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioners (the parents) appeal from those portions of an impartial hearing officer (IHO) decision which denied their requested relief for the 2023-24 school year and reduced their requested relief for the 2024-25 school year. Respondent (the district) cross-appeals from those portions of the IHO's decision that found the parents met their burden of demonstrating the appropriateness of their unilateral placement and that equitable considerations weigh in favor of the parents. The appeal must be sustained in part. 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 proceeding is presumed, and the facts and procedural history of this case will not be recited in detail. The hearing record is sparse regarding the student's educational history prior to the 2023-24 school year.

Briefly, a CSE convened on February 7, 2023 and determined the student was eligible for special education as a student with a speech or language impairment for the 2023-24 school year

(Dist. Ex. 1 at pp. 1, 24).¹ Based on the student's needs, the CSE recommended that he attend a 12:1+1 special class for English language arts (ELA), math, and social studies (*id.* at pp. 18-19).² The CSE also recommended that the student receive two 30-minute sessions per week of individual occupational therapy (OT), two 30-minute sessions per week of individual physical therapy (PT), and three 30-minute sessions per week of individual speech-language therapy (*id.* at p. 19). The IEP developed by the February 2023 CSE had a projected implementation date of September 7, 2023 (*id.* at pp. 1, 18-19).

On August 20, 2023, the student's mother electronically signed an enrollment contract with the Yesod Program at Mill Basin Yeshiva Academy (Yesod) for the student's attendance at the school from September 7, 2023 through June 19, 2024 at a cost of \$110,000 (Parent Ex. R). For the 2023-24 school year, the student attended a Yesod second grade class of seven students, where in the morning he received instruction from a teacher who held State certification in special education (Parent Ex. X ¶¶ 5, 6, 8). The student also received specialized reading instruction and related services of speech-language therapy, OT, and counseling (*id.* ¶¶ 12,40). In the afternoon, the student received instruction in Hebrew, as well as religious instruction, from a second teacher (*id.* ¶ 10).

A CSE convened on January 29, 2024 and found the student eligible for special education as a student with a speech or language impairment for the 2024-25 school year (Dist. Ex. 2 at pp. 1, 27).³ The CSE recommended that the student receive integrated co-teaching services for ELA, math, social studies, and sciences (*id.* at p. 20). The CSE also recommended that the student receive one 30-minute session per week of counseling services in a group of three, two 30-minute sessions per week of individual OT, two 30-minute sessions per week of individual PT, and three 30-minute sessions of individual speech-language therapy (*id.* at pp. 20-21). The student's January 2024 IEP had a projected implementation date of September 4, 2024 (*id.* at pp. 1, 20-21).

By letter dated February 1, 2024, the district provided the parents with a prior written notice of the January 2024 CSE's recommendations for the student for the 2024-25 school year, as well as a school location letter notifying the parents of the student's assigned school site (Dist. Ex. 3).

In a letter to the district, dated August 21, 2024, the parents expressed their disagreement with the student's January 2024 IEP, as well as their intent to unilaterally place the student at Yesod for the 2024-25 school year, and to seek public funding for their unilateral placement if their concerns were not addressed (Parent Ex. B).⁴

¹ The student's eligibility for special education as a student a speech or language impairment is not in dispute (*see* 34 CFR 300.8[c][11]; 8 NYCRR 200.1[zz][11]).

² The recommendation that the student be placed in a 12:1+1 special class for social studies for five periods per week is listed twice in the student's February 2023 IEP (Dist. Ex. 1 at p. 19).

³ The January 2024 IEP indicated that although the student was attending a private school at the time, the parents were requesting an IEP for a public school placement (Dist. Ex. 2 at p.1).

⁴ The parents' August 21, 2024 ten-day notice appears twice in the hearing record, as both Parent Exhibits B and

On September 3, 2024, the student's mother electronically signed an enrollment contract with Yesod for the student's attendance for the 2024-25 school year at a cost of \$110,000 (Parent Ex. S).

A. Due Process Complaint Notice

In a due process complaint notice, dated September 5, 2024, the parents alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 and 2024-25 school years on various procedural and substantive grounds (Parent Ex. A at 1).

Regarding the 2023-24 school year, the parents alleged, among other arguments, that the district failed to evaluate the student in all areas of suspected disability, failed to consider all evaluative materials, and failed to include the parents in the evaluation process (Parent Ex. A at p. 2). The parents argued that without proper evaluative data, the CSE could not create an appropriate IEP for the student (id.). The parents also asserted that the recommended classroom size was too large and did not provide the student with the support he required (id. at p. 3). The parents also alleged that the district failed to provide them with a prior written notice and a written offer of placement letter for the 2023-24 school year (id.).

Regarding the 2024-25 school year, the parents again alleged that the district failed to evaluate the student in all areas of suspected disability, failed to consider all evaluative materials, and failed to include the parents in the evaluation process (Parent Ex. A at p. 4). The parents argued that although the district conducted a psychoeducational evaluation of the student in January 2024, such evaluation was insufficient as it did not evaluate all of the student's needs and the district failed to provide the parents with a copy of the January 2024 psychoeducational evaluation prior to the January 2024 CSE meeting (id.). The parents argued that the CSE failed to evaluate the student's speech-language and fine and gross motor needs (id.). The parents also asserted, among other arguments, that the CSE's recommendation that the student be placed in an integrated co-teaching classroom was inappropriate because the placement would not be supportive enough for the student (id.). The parents argued that while they received a school location letter and prior written notice from the district for the 2024-25 school year, the recommended public school placement was not appropriate or sufficient to meet the student's needs (id. at p. 5).

As relief, the parents requested direct funding and reimbursement for their unilateral placement of the student at Yesod for the 2023-24 and 2024-25 school years (Parent Ex. A at p. 5).

B. Impartial Hearing Officer Decision

An impartial hearing convened before an IHO with the Office of Administrative Trials and Hearings (OATH) on November 19, 2024 (Tr. pp. 10-37). In a decision dated January 13, 2025,

D (see Parent Exs. B; D). However, at the impartial hearing when describing the evidence the parents intended to admit into the hearing record, the parents' attorney identified Parent Exhibit B as a ten-day notice with email confirmation dated August 23, 2023 and identified Parent Exhibit D as a ten-day notice with email confirmation dated August 21, 2024 (Tr. p. 21).

the IHO found that the district denied the student a FAPE for the 2023-24 and 2024-25 school years (IHO Decision at p. 6). With regard to the district's recommendation that the student receive ICT services, the IHO found that although the CSE noted the student was making progress, he was doing so in a 7:1+1 special class during the 2023-24 school year and in an 8:1+1 special class during the 2024-25 school year, with the added assistance of a reading specialist (id.).⁵ The IHO noted that the evidence demonstrated that the student was behind one grade level in his core academic subjects and was struggling more with reading; the IHO also noted that the CSE failed to recommend any additional reading supports or provide its rationale for not doing so (id.). Thus, the IHO found that the district failed to prove that the CSEs recommended an appropriate program for the student for the 2023-24 and 2024-25 school years (id.). The IHO further found that the district failed to timely offer the student a school location to implement his IEP for the 2024-25 school year (id. at p. 7).

The IHO concluded, without analysis, that the parents met their burden to prove the appropriateness of the unilateral placement, finding that the parents provided sufficient evidence that Yesod addressed the student's individual needs for both the 2023-24 and 2024-25 school years (IHO Decision at p. 8). Regarding equitable considerations, the IHO denied the parents' requested award for reimbursement for the 2023-24 school year because they failed to submit a written ten-day notice, and rather "merely provided an unsigned, unsworn statement regarding the issuing of the notice" (id. at p. 9). Regarding the 2024-25 school year, the IHO found no equitable bars to reimbursement, but determined the evidence in the hearing record supported a one-third reduction in the tuition award to account for "reimbursement/direct funding for academic instruction provided to the [s]tudent" (id.). The IHO found that only two-thirds of the student's school day at Yesod was dedicated to academic instruction and the remaining third of the student's day was spent on religious education (id. at p. 5).

The IHO ordered the district to directly fund/reimburse the parents for the student's tuition at Yesod for the 2024-25 school year in an amount not to exceed \$73,333.33 (IHO Decision at p. 10).

IV. Appeal for State-Level Review

The parents appeal from the portion of the IHO decision that found they did not submit a written ten-day notice to the district for the 2023-24 school year. The parents note that there are two ten-day notices that should have been submitted into evidence, one for the 2023-24 school year, Parent Exhibit B, and one for the 2024-25 school year, Parent Exhibit D. The parents' attorney admits that the 2023-24 ten-day notice was inadvertently omitted from the parents' disclosure and that the 2024-25 ten-day notice was included in the hearing record twice, once as Parent Exhibit B and once as Parent Exhibit D. The parents submit the purported 2023-24 ten-day notice as additional evidence for this appeal. The parents argue that the IHO erred in failing to complete the hearing record, once this error was detected. The parents also appeal that portion of

⁵ The IHO mistakenly indicated that the parent disagreed with the CSE's recommendation for ICT services for the 2023-24 school year when the CSE actually recommended that the student attend a 12:1+1 special class for the 2023-24 school year (compare IHO Decision at p. 6, with Dist. Ex. 1 at pp 18-19).

the IHO decision that found equitable considerations warranted a one-third reduction in the tuition award for the 2024-25 school year, based on religious considerations.

In its answer and cross-appeal, the district argues that the IHO erred in finding that the parents met their burden of demonstrating the appropriateness of Yesod. The district asserts that Yesod did not provide the student with PT for either the 2023-24 or 2024-25 school year, despite evidence that the student "sorely needed this service". Regarding the appropriateness of Yesod, the district further asserts that the student's speech and counseling progress reports are essentially the same for both the 2023-24 and 2024-25 school years. In terms of academics, the district argues that while the Yesod progress report discussed the student's functioning at the time, as well as deficits that the school was attempting to address, there were no measurable goals in the record, nor was there evidence that the student's progress was being tracked on a daily, weekly, monthly, or quarterly basis. The district asserts this is especially concerning with regard to the 2023-24 school year, where the school year had long concluded and for which a report card or other form of measurable progress could have been easily obtained. Turning to the Hebrew language portion of the student's school day and portions of the school day devoted to prayer, the district argues that there is little evidence of the appropriateness of the instruction and no student-specific description of how it aligned with or addressed the student's reading or language deficits. Additionally, the district argues that the IHO's determination regarding equitable considerations should be affirmed. Regarding the proposed exhibit of the 2023-24 ten-day notice, the district argues that the proposed exhibit should not be admitted into evidence as it was available at the time of the hearing and was not included as a part of the hearing record due to an attorney error. The district also argues that equitable considerations support a reduction in any relief awarded because the student's schooling is religious in nature.

In an answer to the district's cross-appeal, the parents argue that the IHO's finding that the parents met their burden to prove the appropriateness of Yesod should be upheld because the parents provided sufficient evidence that Yesod addressed the student's individual needs. Regarding the one-third reduction in the tuition award, the parents argue that the IHO and the district are conflating religious instruction with Hebrew instruction. For roughly one-third of the student's school day, instruction is delivered in Hebrew. The parents argue that the only time the student receives religious instruction is during "Religious Studies," accounting for one out of seven periods after 12:30 p.m. Monday through Thursday and one class on Friday.

V. Applicable Standards

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

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the

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

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

(20 U.S.C. § 1412[a][5][A]; 34 CFR 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).⁶

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

Initially, neither party has appealed from the IHO's determination that the district failed to offer the student a FAPE for both the 2023-24 and 2024-25 school years. Accordingly, this finding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

A. Preliminary Matters - Additional Evidence

Turning to the three proposed SRO exhibits attached to the parents' request for review, the parents have offered an exhibit list, a purported ten-day written notice letter dated April 23, 2023,

⁶ 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).

and an affidavit of the parents' attorney. The district objects to the consideration of all proposed exhibits as additional evidence.

Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068).

The factor specific to whether the additional evidence was available or could have been offered at the time of the impartial hearing serves to encourage full development of an adequate hearing record at the first tier to enable the IHO to make a correct and well supported determination and to prevent the party submitting the proposed additional evidence from withholding what the party either knew or should have known was relevant evidence during the impartial hearing and thereby shielding the additional evidence from cross-examination or later attempts to spring it on the opposing party, effectively distorting the State-level administrative review and transforming it into a trial de novo (see M.B. v. New York City Dep't of Educ., 2015 WL 6472824, at *2-*3 [S.D.N.Y. Oct. 27, 2015]; A.W. v. Bd. of Educ. of the Wallkill Cent. Sch. Dist., 2015 WL 1579186, at *2-*4 [N.D.N.Y. Apr. 9, 2015]).

Regarding the exhibit list, I note the proposed exhibit list is identical to the parents' exhibit list already present in the hearing record. Purely for the purpose of avoiding duplicative evidence in the record, this proposed exhibit is rejected (see Parent Exhibit List).

The parents' second proposed exhibit, the purported ten-day written notice letter, dated April 23, 2023, was available at the time of the impartial hearing. The parents argue in their request for review that the ten-day notice was served upon the district, however it was "inadvertently omitted" from the parents' disclosure (Req. for Rev. ¶ 13). Here, the parents concede that the April 23, 2023 ten-day written notice letter was available at the time of the impartial hearing and was omitted from their documentary evidence at the hearing in error. However, there is no evidence that the letter was sent to the district, and, as the letter was not presented during the impartial hearing, the district did not have the opportunity to argue that it was not received.

As to the parents' third proposed exhibit, an affidavit of the parents' attorney who represented them at the impartial hearing, I find this exhibit testimonial in nature. The district was not afforded an opportunity to cross examine this witness; thus, the proposed exhibit will not be admitted into the hearing record.

Based on the foregoing, I decline to exercise my discretion and will not consider any of the parents' proposed SRO exhibits as additional evidence.

B. Unilateral Placement – Appropriateness of Yesod

I turn now to the parties' dispute regarding whether Yesod was an appropriate unilateral placement for the student during the 2023-24 and 2024-25 school years.

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).

The IHO determined that the parents met their burden to show that Yesod delivered specially designed instruction to meet the unique needs of the student for both the 2023-24 and 2024-25 school years (IHO Decision at p. 8). The district argues that the parents did not meet their burden in proving that Yesod was an appropriate placement for the student due to a lack of related services as well as specific evidence regarding the religious portion of the student's school day.

In her testimony by affidavit, the principal at Yesod described the school as a "small, specialized classroom program which provides self-contained classes for students who are unable to make progress in a mainstream setting due to learning disabilities, behavioral difficulties, and social/emotional challenges" (Parent Ex. W ¶ 8). The principal explained that classroom instruction at the school is provided by special education teachers who collaborate with the school's regular education teachers and related services providers to "modify and enhance instruction for each student"(id.). The Yesod program description reflected the principal's testimony in stating that Yesod used a collaborative team approach of teachers and specialists who created an educational plan for each student's success and that the school had a speech-language pathologist, occupational therapist, counselor, and reading specialist who collaborated with the classroom teachers and cotaught key concepts and skills (Parent Exs. E at p. 1; W ¶ 9). The principal indicated that the program employs multisensory approaches and hands-on games and activities as well as direct social skills instruction to keep students engaged and learning (Parent Ex. W ¶ 9). According to the Yesod program description, the school curriculum focuses on two goals, the first being to align the Yesod curriculum with the mainstream curriculum to allow students to transition easily to a mainstream setting and, the second, to employ a reading and writing curriculum which drives the goals and objectives of other subject areas (Parent Ex. E at p. 2). The program description reflected that subject areas of math, social studies, science and Jewish studies were designed to support and enhance the school's reading and writing curriculum (id.). In addition, Yesod used Foundations as a preventative program to "help reduce reading and spelling failure" (id.). The program description noted that, in conjunction with Foundations, the reading specialists at Yesod used Preventing Academic Failure (PAF), "a program for teaching beginning reading using multisensory techniques supported by scientific research" (id.). According to the Yesod program description, learning centers in the Yesod classrooms provided students with opportunities to strengthen concepts and skills taught in class, independently, collaboratively and with differentiated materials provided by the teacher including leveled books, computers or iPads (id. at p. 3). Additionally, Yesod offered art, music, physical education, and technology "designed to reinforce" academics as well as "provide additional outlets for creativity, expression and movement" (id.).

1. 2023-24 School Year

As noted above, during the 2023-24 school year, the student was in second grade at Yesod and, according to the principal, the student struggled with executive functioning, specifically in organization, and presented with delays in reading, writing and math (Parent Ex. W ¶ 13). She indicated that during the 2023-24 school year, the student was one of seven students in a class with a teacher and an assistant teacher and, in addition, a reading specialist pushed into the classroom daily (*id.* ¶ 15). For the 2023-24 school year, the student received the following related services per week: three 30-minute sessions of speech-language therapy; two 30-minute sessions of OT, and one 30-minute session of counseling (*id.* ¶ 26).

According to his class schedule, the student's school day began at 8:15 a.m. and ended at approximately 4:00 p.m. Monday through Thursday, with dismissal at noon on Fridays (Parent Ex. F). The student's school day began with a "morning meeting" followed by a 15-minute period of prayer (*id.*). Thereafter, the student engaged in classroom instruction in the following courses, as well as received the following related services: reading, science, music, math, art, social studies, physical education, English language arts (ELA), technology, Hebrew, speech-language therapy, OT and counseling, (Parent Exs. F; G). The student's schedule also included a daily lunch period and twice weekly recess (Parent Ex. F). In her written testimony by affidavit, the student's second-grade classroom teacher indicated that she held a master's degree in special education and was New York State certified as a special education teacher (Parent Ex. X ¶5). She explained that she instructed the student's class each day until 12:30 p.m. and thereafter, another teacher "took over instruction" in the classroom, until 4:00 p.m. (*id.* ¶¶ 9, 10). The student's teacher indicated that she "worked closely" with the teacher who taught the class each afternoon, and that she was in the school building throughout the school day, but the teaching assistant was in the classroom from arrival to dismissal (*id.* ¶ 11). In addition to music and art, afternoon instruction included Hebrew reading centers, Hebrew writing and grammar, and religious studies (*id.* ¶ 10).

To address the student's reading needs, the Yesod staff reported that Yesod used multiple reading curriculums, including PAF and Reading A-Z and that the student, by practicing reading and retelling at the end of each page, improved his visualization and summarization abilities (Parent Ex. X ¶ 16). The student's teacher stated that she had received training in PAF and Reading A-Z prior to implementing these programs in the classroom (*id.* ¶ 20). Additionally, the teacher stated that Reading A-Z improved the student's "literacy skills both at school and home," as the student was able to work on improving his fluency and comprehension skills within his current reading level (Parent Ex. H at p. 3). The program "provided [the student] with opportunities to review targeted goals such as identifying main ideas, story elements, vocabulary, and auditory discrimination" (*id.* at p. 2). In addition to the reading programs described above, the teacher reported that she actively worked on strategies to improve the student's visualization and summarization abilities by practicing reading and retelling at the end of each page (*id.*). She also noted that she worked on reinforcing the student's knowledge of blends and added suffixes through repetitive practice to aid in reading longer, multisyllabic words (*id.*).

A June 2024 Yesod teacher progress report indicated that at the end of June 2024, the student was at a first grade reading level and had progressed from a level H to a level M as measured by the Fountas and Pinnell benchmark assessment (Parent Ex. H at pp. 1-2). In terms

of reading comprehension, the teacher stated that the student had improved his ability to answer basic 'wh' questions but continued to exhibit difficulty in summarizing and retelling texts both independently and in group settings (id.).

The Yesod June 2024 progress report indicated that to address the student's writing needs, he was provided with a "notable" amount of 1:1 instruction, instruction using PAF, and wide-ruled, multi-lined paper which helped him better space and form his letters properly (Parent Ex. X ¶ 29). The progress report indicated the student benefited from the use of classroom visuals to remind him to capitalize and use proper punctuation and graphic organizers to help him gather and express his thoughts (Parent Ex. H at p. 3). The teacher reported that the student's writing skills had improved by the end of the school year as demonstrated by his improved handwriting, ability to apply some of the skills he had been taught, and his ability to use punctuation (Parent Ex. X ¶ 30).

In mathematics, the June 2024 Yesod progress report indicated that the student benefited from participation in smaller groups, "personalized prompts," step-by-step breakdown of word problems, and "involvement in activities that nurture[d] his self-confidence" (Parent Ex. H at p. 1). According to the progress report, the introduction of new concepts posed a challenge for the student, "necessitating additional reinforcement to ensure a comprehensive understanding due to occasional difficulties in concentration and silly behaviors" (id.). The classroom teacher reported that to address the student's math needs, instruction was provided using a multisensory approach that included the use of manipulatives and visuals (Parent Ex. X ¶ 23). The teacher noted that the student was a visual learner and she found it "helpful to provide him with as many visual aids as possible," such as a number line/ruler taped to his desk; manipulatives, such as base 10 blocks; and drawing and writing out problems with clear columns for the ones, 10s, and 100s (id.). The June 2024 teacher progress report reflected that the student made "notable progress" in mathematics as he was then proficient in counting money, telling time using counting patterns, distinguishing and categorizing two- and three-dimensional shapes based on their properties, and interpreting bar graphs (Parent Ex. H at p. 1). The teacher indicated that the use of visual aids, participation in small group environments, and engagement with the "IXL math program" had "proven highly advantageous" for the student's math skills development (id.).

According to a June 2024 Yesod speech-language progress report, to "enhance [the student's] language and cognitive skills," and also his ability to organize information in a logical manner, the speech-language therapist used picture description and sequencing to facilitate longer utterances and encourage full sentence responses (Parent Ex. I at p. 1). The speech-language therapist reported that this strategy helped to improve the student's expressive language skills and also enhanced his ability to organize information in a logical manner (id.). To address the student's expressive and receptive vocabulary needs, the speech-language therapist used "picture cards and pictures of opposites" (id.). The student also participated in "sequencing activities," listened to short stories, discussed the stories, and answered questions about them during therapy sessions to increase his auditory comprehension skills, improve organizational skills, and improve his narrative abilities (id. at pp. 1-2). The speech-language therapist reported that during the 2023-24 school year, the student showed a great deal of progress in decoding and comprehension but also indicated that the student was often tired during sessions and had difficulty paying attention and focusing (id. at p. 1). The therapist noted that despite some progress in decoding and vocabulary, the student often interrupted sessions with "unrelated statements or demands for new activities"

and his tendency to rush through reading tasks affected his comprehension skills and ability to retain information (id. at p. 2). As such, the speech-language therapist noted minimal progress in attending and comprehension and recommended carrying over the 2023-24 goals for the 2024-25 school year (id.).

Turning to OT, a June 2024 OT progress report stated that the student demonstrated improved but inconsistent ability to remain on task; was "learning to write more efficiently;" had learned to sit properly at his desk, with proper positioning of himself and paper; and was working on using "the proper tripod writing grasp with improved letter formation, size, spacing and line targeting" (Parent Ex. J at p. 2). The therapist stated that the student made gradual progress during OT sessions "in class and in the therapy room," but that the student's "focus and motivation continue[d] to inhibit learning new skills and [his ability] to implement them in class" (id.). The therapist encouraged periodic movement breaks for the student to improve his focus and reset himself while completing classroom activities (id.). Overall, in OT, the therapist indicated that the student had displayed improved skills but required more practice and review to achieve mastery and further, while the student used many strategies in OT sessions, he had not generalized these skills to the classroom (id.).

Lastly, the student's Yesod counselor reported that the student participated well in sessions and had made progress in his social skills with peers and also with prompting, some progress in focus and following directions (Parent Ex. K at p. 1).

Based on the above, under the totality of the circumstances, the parents met their burden to prove that Yesod delivered specially designed instruction based on evidence in the hearing record that reflected the student's unique needs and described the instructional strategies and supports his teachers and related services providers used to address those unique needs during the 2023-24 school year. In addition, while the district argues that the student's progress was not adequately measured and tracked for either school year, the progress reports showed that the student made progress in the Yesod program during the 2023-24 school year and, as discussed below, continued to make progress during the 2024-25 school year.⁷

2. 2024-25 School Year

The student continued to attend Yesod in a third-grade classroom as one of eight students during the 2024-25 school year (Parent Ex. W ¶ 16). The student's third-grade class was staffed

⁷ In any event, it is well settled that progress is not a dispositive factor in determining whether a unilateral placement is appropriate, although it is relevant factor to be considered (see 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]); see also Frank G., 459 F.3d at 364; Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]) Frank G., 459 F.3d at 364)

by a teacher who held a master's degree in special education, along with a teaching assistant and a reading specialist who pushed into the classroom for one hour a day Monday through Thursday (Parent Ex. Y at pp. 1, 2). The Yesod principal indicated in his written testimony by affidavit that the student received the related services of speech-language therapy, OT, and counseling at the same frequency and duration as the previous school year (id. ¶ 26). The hearing record contained the student's third grade 2024-25 daily schedule which was similar to the student's second grade schedule for the 2023-24 school year (compare Parent Ex. L, with Parent Ex. F).

The student's third grade teacher described him as a "thoughtful and kind boy," with "positive energy" who showed kindness to those around him (Parent Ex. Y ¶ 7). The teacher indicated that the student had difficulty paying attention, maintaining focus and initiating tasks, which "significantly impact[ed] his ability to function effectively in the classroom setting" (id.). The teacher noted that the student struggled with executive functioning often requiring repetition of "simple directions multiple times," or needing "individual direction with prompting to support" him (id.). According to the teacher, the student often needed step by step guidance and "while he love[d] participating in the class, he often [did not] raise his hand" (id.). In addition, the student often forgot classroom rules and routines (id.). The teacher indicated that the student required the support of prompting, guidance, and redirection and noted the student continued to struggle with the "daily class routine of entering class, taking what is needed out of his bag and getting set up for the day" (id.). Additionally, the teacher reported that the student had poor body awareness as he bumped into other students unintentionally, which "often creat[ed] conflict with other students in the class"(id.).

In reading, the teacher reported that at the beginning of the school year, the student was at a Fountas and Pinnell instructional level M which corresponded to an end of second grade level (Parent Ex. Y ¶ 13). The teacher reported that the student often needed reminders to "sit still and concentrate," and had difficulty maintaining his attention in independent reading tasks (Parent Ex. N at p. 2). In November 2024, the teacher indicated that the student was progressing in recognizing syllable types, but he continued to demonstrate difficulties with "independent reading, particularly with multisyllabic and irregularly spelled words appropriate for his grade level" (id.). Also in November 2024, the teacher stated that the student's reading comprehension was "significantly below grade level," which impacted his ability to comprehend "critical thinking concepts and [also] extract key lessons from texts" (id.). The student continued to have difficulty following the sequence of events, summarize main ideas, and make inferences (id.). To address the student's reading needs, the teacher reported that Yesod provided explicit instruction, modeling, prompts, and targeted feedback aimed at enhancing his comprehension skills in addition to "personalized reading support sessions with a reading specialist" and the implementation of PAF and Reading A-Z (Parent Ex. Y ¶ 14).

In terms of writing, the teacher indicated that at the beginning of the school year, the student's writing skills were below grade level and he struggled with following instructions, maintaining grammatical coherence, and organizing his writing (Parent Ex. Y ¶ 17). He opined that the student's difficulties with attention and executive functioning "significantly" impacted his writing abilities, requiring the support of prompting, guidance, and redirection (id.). Further, the teacher reported that the student struggled with "fundamental grammar concepts, including subjects, predicates, tenses, and punctuation" (id.). To assist the student with his writing needs,

the teacher used graphic organizers, PAF paper "which helped him remember to write neatly within the lines," and one-to-one guidance (Parent Ex. N at p. 2-3).

In math, the teacher indicated that at the beginning of the school year, the student's math skills "focus[ed] primarily on basic addition and subtraction within 20" (Parent Ex. N at p. 1). In a November 2024 progress report, the teacher indicated that the student was challenged when working with addition and subtraction up to 100 (id.). As previously noted during the 2023-24 school year, the teacher reported the student continued to exhibit a "hurried approach" which often resulted in inaccuracies, "especially in word problems, where he ha[d] difficulty identifying key terms and determining whether to add or subtract (id.). Multistep problems were reported to be "particularly challenging" for him, and the student required support from tables, charts, and manipulative blocks to reinforce foundational multiplication concepts (id.). The teacher indicated that the student's lack of focus was evident when he encountered more complex problems, as he frequently needed redirection and guidance, particularly when solving word problems independently (id.). To address the student's needs in math, word problems were read aloud and tasks were broken down into smaller steps to assist him in sequencing (id.). In addition, Yesod used the "IXL program," which allowed teachers to monitor his progress and provide targeted practice aligned with classroom goals (id.).

Turning to OT, an October 2024 OT progress report indicated that the student presented with sensory-related behaviors, and during OT sessions the student was given therapeutic sensory activities to "better regulate his sensory needs" and thereby resist "inappropriate sensory urges while in class" (Parent Ex. P at p. 1). Although the student continued to be distractible, the occupational therapist reported that he demonstrated improved focus when his environment was structured, and distractions caused by classmates or objects in his desk had reduced in frequency and duration (id.). The therapist reported that the student's difficulty with body awareness and sensory processing had "slightly improved" but continued to be an issue which made it "difficult for him to keep up with the class" (id.). According to the progress report, the student wrote "more efficiently," and was able to sit properly at his desk, with proper positioning of himself and paper, but only if prompted (id. at p. 2). The October 2024 progress report reflected that the student continued to practice and review using the proper tripod writing grasp with improved letter formation, size, spacing and line targeting, improve his ability to copy information when writing, using strategies and techniques to improve speed and efficiency while optimizing legibility (id.). The progress report indicated the student needed to improve his motor planning, body awareness, problem solving, sensory modulation, and graphomotor skills (id. at p. 1).

In terms of communication, a November 2024 speech-language progress report describing the student's performance was nearly identical to the student's June 2024 speech-language progress report (compare Parent Ex. O with Parent Ex. I). According to the November 2024 progress report, the speech-language therapist continued to work with the student on goals for improved expressive and receptive language skills, decoding, and reading comprehension (Parent Ex. O at p. 2).

The student's counseling progress report, written in November 2024, was also nearly identical to the student's June 2024 counseling progress report (compare Parent Ex. Q with Parent Ex. K). The counselor noted "slow and steady progress" and recommended goals that targeted the

student's social relationships, ability to maintain attention, and ability to verbalize the difference between the truth and his imagination (Parent Ex. Q at p. 2).

Based on the foregoing, the hearing record contains sufficient information, taking into account the totality of the circumstances, to show that the Yesod program provided the student with specially designed instruction to meet his unique educational needs in the areas of reading, writing, social/emotional development, communication and OT during the 2024-25 school year.

To the extent the district argues that Yesod was not an appropriate unilateral placement as it did not provide the student with PT for either the 2023-24 or 2024-25 school years, and the student's counseling and speech language progress reports were essentially identical for the two school years in question, such arguments are unavailing to overcome the above finding of appropriateness. As a general matter, 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). Here, while the student was not receiving PT at Yesod, the June 2024 OT progress report included a goal that targeted the student's body awareness (see Parent Ex. J). Both OT reports indicated that the student had adequate gross motor skills when focused but also noted the student needed to further improve gross motor skills (Parent Exs. J at p. 1; P at p. 1). Additionally, while the district asserts that the counseling and speech-language reports are essentially the same for both school years, it is noted that the June 2024 progress reports were issued at the end of the 2023-24 school year and the November 2024 progress reports were issued approximately in the first 10 weeks of the 2024-25 school year. It is reasonable that there may not have been substantial changes in counseling but also, as previously noted, specifically in communication, the speech-language therapist had noted slow progress and a carryover of goals from the 2023-24 school year to the next (Parent Ex. I at p. 2).

Similarly, the district's arguments based on the inclusion of religious instruction and Hebrew in Yesod's curriculum must also fail. The student's class schedules and progress reports in the hearing record sufficiently describe, as discussed above, his unique special education needs and the specially designed instruction he received from teachers and related service providers to address those needs, and that the majority of the student's school day was comprised of such instruction and related services. As a result, I find that the parents met their burden to demonstrate that Yesod was an appropriate unilateral placement for the student for both the 2023-24 and 2024-25 school years.

C. Equitable Considerations

The final criterion for a reimbursement award is that the parents' claim must be supported by equitable considerations. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied

when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442, 461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was 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"]).

1. Ten-Day Notice

The Second Circuit recently emphasized that "[t]he ten-day notice requirement gives school districts an opportunity to discuss with parents their objections to the IEP and to offer changes to the IEP designed to address those objections—all before the parents enroll their child in a private school and file a due process complaint" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d, 152, 171 [2d Cir. 2021]; see 20 U.S.C. § 1412[a][10][C][iii][I]; 34 CFR 300.148[d][1]; Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004] [noting that the statutory provision "serve 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"])). During the ten-day notice period, a district "may seek to correct the IEP" after it has been given notice of the parents' objections and "may defend against a claim for tuition reimbursement by pointing out that parents did not cooperate in the revision of the IEP, or that the corrected IEP, if accepted by the parents, would have provided the child with a FAPE" (Bd. of Educ. of Yorktown Cent. School Dist., 990 F.3d at 171).

Overall, while the hearing record does not reflect that the parents provided the district with a ten-day notice for the 2023-24 school year, a complete denial of relief for the 2023-24 school year based solely on this one factor is unjustified in this instance. Taking the hearing record in its entirety, and noting the equitable nature of the inquiry, it appears that attorney error may well have led to the parents' 2023-24 ten-day notice not being included in the hearing record. The district does not argue that it never received a ten-day notice for the 2023-24 school year from the parents but rather argues that a ten-day notice for the 2023-24 school year is not included in the hearing record (Answer and Cross-appeal ¶ 21). Thus, while I find that a complete denial of relief for the 2023-24 school year is unjustified in this instance, a reduction in funding for the 2023-24 school year is warranted. Due to the lack of a ten-day notice for the 2023-24 school year in the hearing record, I find that a 25 percent reduction in funding for the 2023-24 school year is warranted.

2. Religious Instruction

Turning to the IHO's reduction in funding for the 2024-25 school year, the IHO found that only the portions of the school day that provide academic instruction to the student should be funded by the district (IHO Decision at p. 9). Here, the IHO found that approximately two-thirds of the student's school day was dedicated to academic instruction, while the remaining third of the

student's school day was dedicated to religious instruction (*id.* at p. 5).⁸ Thus, the IHO ordered the district to provide funding for two-thirds of the student's tuition at Yesod for the 2024-25 school year.

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 (Carson, 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

⁸ At this juncture, I note that, in some instances, 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 could be weighed as a factor regarding the appropriateness of the unilateral placement (see e.g., Doe v. E. Lyme Bd. of Educ., 2012 WL 4344304, at *19 [D Conn Aug. 14, 2012] [finding a unilateral placement inappropriate because the school did not provide special education supports and the student spent a substantial amount of time receiving religious education], adopted as mod at, 2012 WL 4344301 [D Conn Sept. 21, 2012], aff'd in part, vacated in part, remanded sub nom. 790 F.3d 440 [2d Cir 2015]. Here, however, I note that the IHO found, for purposes of her equitable considerations analysis, that the student had received specially designed instruction for 2/3 of the school day (IHO Decision at p. 9).

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. At 818, citing Lemon v. Kurtzman, 403 U.S. 602 [1971]).¹⁰ Focusing on the indirect aid and individual choice factors discussed in the Supreme Court cases, another district court granted full tuition reimbursement to parents for four school years under the IDEA, determining that the Establishment Clause would not be violated by full reimbursement because the placement was "necessary as a last resort" due to the district's denial of a FAPE, "the aid would go to pay for the student's education in a placement the court f[ound] was otherwise appropriate under the IDEA,"

⁹ In L.M. v. Evesham Township Board of Education, 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"]).

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]).

The district also asserts that the New York State Constitution prohibits district payment for the portion of the school day attributed to religious instruction in that it states that: "[n]either the state nor any subdivision thereof, shall use its property or credit or any public money, or authorize or permit either to be used, directly or indirectly, in aid or maintenance, other than for examination or inspection, of any school or institution of learning wholly or in part under the control or direction of any religious denomination, or in which any denominational tenet or doctrine is taught, but the legislature may provide for the transportation of children to and from any school or institution of learning" (N.Y. Const. art. XI, § 3). Notwithstanding this language, the State Constitution also provides that: "nothing in this constitution contained shall prevent the legislature from providing for the . . . education and support of" individuals with disabilities "as it may deem proper" (N.Y. Const. art. VII, § 8[2]; see Application of the Bd. of Educ., Appeal No. 03-062; Application of the Bd. of Educ., Appeal No. 96-036).

In this matter, neither party appealed that the district failed to offer the student a FAPE for either the 2023-24 or 2024-25 school year. The parents, under the IDEA, had the right to place the student at a school of their choosing and seek funding for it, provided that it was appropriate to meet the student's needs. In this instance, as noted above, the hearing record supports the IHO's determination that Yesod was an appropriate unilateral placement for the student for both the 2023-24 and 2024-25 school years. Thus, reimbursement and direct funding for the cost of the student's attendance at Yesod 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, there should be no reduction to the parents' reimbursement or direct funding for the 2023-24 or 2024-25 school year on the basis of religious instruction.

VII. Conclusion

The evidence in the hearing record supports the IHO's finding that Yesod was an appropriate placement for the student for both the 2023-24 and 2024-25 school years. However, equitable considerations warrant a 25 percent reduction to the parents' award for the 2023-24 school year due to a lack of a ten-day notice in the hearing record for that school year.

I have considered the parties' remaining contentions and find them unnecessary to address given the decision above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO's decision dated January 13, 2025 is modified by reversing the portion which denied the parents' relief for the 2023-24 school year;

IT IS FURTHER ORDERED that the district shall reimburse the parents 75 percent of the tuition paid to Yesod for the 2023-24 school year;

IT IS FURTHER ORDERED that the IHO decision dated January 13, 2025 is modified by reversing the portion which reduced the parents' relief on the basis of religious instruction;

IT IS FURTHER ORDERED that the district shall reimburse and directly fund the student's tuition costs at Yesod for the 2024-25 school year.

Dated: **Albany, New York**
 October 15, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER