The University of the State of New York

The State Education Department
State Review Officer
www.sro.nysed.gov

No. 24-145

Application of the NEW YORK CITY DEPARTMENT OF EDUCATION for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability

Appearances:
Liz Vladeck, General Counsel, attorneys for petitioner, by Thomas W. MacLeod, Esq.

Gulkowitz Berger, LLP, attorneys for respondent, by Shaya M. Berger, 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 district) appeals from the decision of an impartial hearing officer (IHO) which found that it failed to offer appropriate equitable services to respondent's (the parent's) son and ordered it to reimburse the parent for the costs of the student's special education teacher support services (SETSS) provided by Think Pink, LLC during the 2023-24 school year. The appeal must be sustained.

II. Overview—Administrative Procedures

When a student who resides in New York is eligible for special education services and attends a nonpublic school, Article 73 of the New York State Education Law allows for the creation of an individualized education services program (IESP) under the State's so-called "dual enrollment" statute (see Educ. Law § 3602-c). The task of creating an IESP is assigned to the same committee that designs educational programing for students with disabilities under the IDEA (20 U.S.C. §§ 1400-1482), namely 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, State law provides that

"[r]eview of the recommendation of the committee on special education may be obtained by the parent or person in parental relation of the pupil pursuant to the provisions of [Education Law § 4404]," which effectuates the due process provisions called for by the IDEA (Educ. Law § 3602-c[2][b][1]). 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

In this matter, the evidence reflects that on March 9, 2022, a CSE convened and, having found that the student remained eligible for special education as a student with a speech or

language impairment, developed an IESP (March 2022 IESP) that included a recommendation for five periods per week of SETSS in a group to address the student's identified needs (see Parent Ex. F at pp. 1-2, 4).[1] In addition, the March 2022 IESP included three annual goals targeting the student's needs in reading, mathematics, and writing (id. at pp. 3-4).[2]

By due process complaint notice dated August 26, 2023 (August 2023 due process complaint notice), the parent alleged that the district failed to offer the student a free appropriate public education (FAPE) for the 2023-24 school year (see Parent Ex. A at p. 1). According to the parent, the student's October 2018 IESP represented the student's last-agreed upon program, which included a recommendation for five sessions per week of SETSS and "certain related services" (id.).[3] The parent "dispute[d] any subsequent program the [district] developed that removed and/or reduced services on the IESP, and also dispute[d] any act the [district] may have taken to deactivate or declassify the student from being eligible to receive services" (id.). The parent asserted that the student continued to require the "same special education services and the same related services each week as set forth on the IESP" (id.).

Next, the parent indicated that she could not locate providers at the district's "standard rates," and the district had not provided any for the student for the 2023-24 school year (Parent Ex. A at p. 1). The parent further indicated that she had located providers to deliver "all required services" to the student for the 2023-24 school year, but at "rates higher than standard [district] rate[s]" (id.).

As relief, the parent sought an order directing the district to continue the student's special education and related services under pendency, to fund five sessions per week of special education teacher services at an enhanced rate for the 2023-24 school year, and to issue related services authorizations (RSAs) for the parent to obtain the student's related services through parent-selected providers or to directly fund the costs of the student's related services delivered by parent-selected providers at the providers' rates "even if higher than the standard [district] rate" (Parent Ex. A at p. 2).

The parent executed an "Agreement for Services" with Think Pink, LLC—effective September 1, 2023—to deliver five hours per week of SETSS to the student for the 2023-24 school year (Parent Ex. D).[4] The agreement did not identify a date when the parent executed the agreement; however, it reflected that the agency charged $175.00 per hour for SETSS (id.). Evidence in the hearing record further reflected that, for the 2023-24 school year, the agency began

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

[2] According to the "Evaluation Results" within the March 2022 IESP, the student was administered the "Wechsler Preschool and Primary Scale of Intelligence" on "August 20, 2014," when she was three years old (Parent Ex. F at p. 1). At the time the student's March 2022 IESP was developed, she was 10 years old (id.).

[3] Neither party entered the student's October 2018 IESP into the hearing record as evidence (see generally Tr. pp. 1-27; Parent Exs. A-B; D-H; Dist. Ex. 1).

[4] Think Pink, LLC 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).

delivering SETSS to the student on September 1, 2023 and would continue to deliver the same frequency and duration of SETSS to the student for the entire 2023-24 school year (see Parent Ex. E ¶¶ 4-5). Based on the evidence in the hearing record, SETSS were being provided to the student "based on the [s]tudent's needs as set forth in the [s]tudent's most recent [IESP] dated [October 25, 2018]" as well as "any updated information the individual provider obtain[ed] from working with the [s]tudent" (id. ¶ 6).

On September 19, 2023, a district representative executed a pendency implementation form, which indicated that the student's October 2018 IESP formed the basis for pendency services and that the pendency services consisted of five periods per week of SETSS in a group and one 30-minute session per week of individual occupational therapy (OT) (see Pendency Imp. Form).

In a response to the parent's due process complaint notice, dated November 8, 2023, the district indicated, in part, that an individualized education program (IEP) "team met and held a review" for the student on March 9, 2022 (Parent Ex. B at pp. 1, 3). In addition, the district indicated in its response that the "team recommended the following educational program" for the student: SETSS (id. at p. 2).

On November 28, 2023, the parties proceeded to an impartial hearing before an IHO with the Office of Administrative Trials and Hearings (OATH) (see Tr. p. 1). When the IHO reviewed the issues in the parent's August 2023 due process complaint notice, the district representative indicated that an IESP had been developed subsequent to the October 2018 IESP referenced in the due process complaint notice, albeit with the same program recommendations; the district representative further indicated that the subsequent IESP was dated March 9, 2022 (see Tr. pp. 3-4). The IHO asked the parent's advocate whether he intended to file an amended due process complaint notice in light of this information, and after consulting with an attorney in his office, the parent's advocate confirmed that he would do so (see Tr. pp. 4-6).

Thereafter, in an amended due process complaint notice dated December 8, 2023, the parent realleged that the district failed to offer the student a FAPE for the 2023-24 school year and reasserted all of the same claims and information as set forth in the August 2023 due process complaint notice, except that the parent now asserted that the student's March 2022 IESP represented the student's last-agreed upon program, which included the same recommendation for five sessions per week of SETSS and "certain related services" (compare Parent Ex. H at p. 1, with Parent Ex. A at p. 1). In addition, the parent sought the same relief in the amended due process complaint notice as requested in the August 2023 due process complaint notice (compare Parent Ex. H at p. 2, with Parent Ex. A at p. 2).

On February 23, 2024, the parties resumed and completed the impartial hearing in this matter after two total days of proceedings (see Tr. pp. 8-27). At that time, the parent's advocate confirmed that the only relief sought was for the student to receive the "services in the IESP through the independent agency" hired by the parent, which consisted of five sessions per week of SETSS (Tr. pp. 11-12; see Parent Ex. F at pp. 1, 4-5). Both parties entered documentary evidence into the hearing record, presented opening and closing statements, and neither party presented any

witnesses for direct or cross-examination (see Tr. pp. 12-25).[5] As part of its closing statement, the district representative stated that, in order for the parent to secure public funding for the unilaterally-obtained SETSS, the parent must sustain her burden of proof under the "Burlington/Carter analysis" (Tr. pp. 22-23).

In a decision dated March 15, 2024, the IHO initially noted that "[e]xcept for circumstances not applicable here, the burden of proof [wa]s on the school district during an impartial hearing" (IHO Decision at pp. 4, 7). The IHO then briefly described FAPE and "Dual Enrollment" and turned to the findings of fact and decision, wherein the IHO found that it was undisputed that the student was entitled to receive five sessions per week of SETSS in a group pursuant to the March 2022 IESP (id. at pp. 4-5). In support of this finding, the IHO noted that the district had not implemented any services for the student during the 2023-24 school year, and the district had not submitted any evidence to "prove that the services were implemented" during the 2023-24 school year (id. at p. 5). The IHO also found that the parent had located a SETSS provider, at an "enhanced rate," to deliver the services to the student (id.). Additionally, the IHO concluded that the evidence in the hearing record demonstrated that the SETSS provider was "appropriate" and possessed the relevant State license to provide such services to the student (id.).

With regard to the SETSS provider's enhanced hourly rate, the IHO found that the district's evidence was "not compelling" (IHO Decision at p. 5). According to the IHO, while the district offered the "Independent Rate Study" as evidence, the district did not present any witness to "explain the information contained therein or to answer questions regarding its content" (id.). Consequently, the IHO determined that the evidence did not support the district's contention that the SETSS provider's rate should be capped at $125.00 per hour (id. at pp. 5-6).

Next, the IHO concluded that the hearing record lacked evidence to find that the parent failed to cooperate with the district or otherwise impeded the district's obligation to provide the student a FAPE on an equitable basis (see IHO Decision at p. 6). As a result, the IHO found that the district failed to sustain its burden to establish that it provided the student a FAPE on an equitable basis for the 10-month 2023-24 school year (id.).

As relief, the IHO ordered the district to directly fund the student's SETSS (five periods per week in a group) for the 10-month, 2023-24 school year at a rate not to exceed $175.00 per hour (see IHO Decision at p. 6). More specifically, the IHO ordered the district to directly pay the "licensed or certified provider of [the p]arent's choosing outlined above, within thirty-five (35) days of the [district's] receipt of a valid contract between [the p]arent and the chosen provider, proof of proper New York State Certification, an affidavit attesting that the services billed for were provided, and after submission of invoices for services rendered" (id. at pp. 6-7).

[5] The parent submitted an "Affidavit Regarding Services," affirmed by the parent's attorney on February 1, 2024 (Parent Ex. E at pp. 1-2). The district declined the opportunity to cross-examine the affiant, who was identified in the affidavit as the "CEO of Think Pink LLC," the agency allegedly delivering SETSS to the student (see Tr. p. 22; Parent Ex. E ¶ 1).

IV. Appeal for State-Level Review

The district appeals, arguing that the IHO erred by finding in a summary and conclusory fashion that the parent's unilaterally-obtained SETSS was appropriate to meet the student's needs. More specifically, the district contends that the parent failed to establish that the unilaterally-obtained SETSS provided the student with specially designed instruction and whether those services enabled the student to make progress. For example, the district asserts that the hearing record lacked evidence describing the specific elements of instruction that a SETSS provider purportedly delivered to the student. The district also asserts that the agency's affidavit did not describe the student's needs or any methods, strategies, or techniques used by the SETSS provider to address the student's needs. In addition, the district argues that the hearing record lacked evidence, such as progress reports, assessments, or session notes, which could describe the services delivered to the student and whether those services benefitted the student.

Next, the district argues that equitable considerations did not support the parent's requested relief. The district contends that the parent failed to provide the district with a 10-day notice of unilateral placement, which, in this case, should act as a complete bar to relief.

In an answer, the parent responds to the district's allegations and generally argues to uphold the IHO's decision in its entirety. In seeking to uphold the IHO's decision, the parent primarily argues that, as an equitable services matter, the district entirely bore the burden of proof and persuasion. Additionally, while acknowledging that a Burlington/Carter analysis has typically been used in these cases but without acknowledging that it is the correct legal standard to apply, the parent contends that the IHO's decision should be upheld. The parent also contends that the district's argument that the parent failed to file a 10-day notice of unilateral placement is misplaced. As a final point, the parent asserts that since this case is solely about funding, which has been required pursuant to pendency, the district's appeal is moot.

V. Applicable Standards

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a], [b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (see 34 CFR 300.137[a]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, such students are not individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 CFR 300.134, 300.137[a], [c], 300.138[b]).

However, under State law, parents of a student with a disability who have privately enrolled their child in a nonpublic school may seek to obtain educational "services" for their child by filing a request for such services in the public school district of location where the nonpublic school is located on or before the first day of June preceding the school year for which the request for services is made (Educ. Law § 3602-c[2]).[6] "Boards of education of all school districts of the state

[6] State law provides that "services" includes "education for students with disabilities," which means "special

shall furnish services to students who are residents of this state and who attend nonpublic schools located in such school districts, upon the written request of the parent" (Educ. Law § 3602-c[2][a]). In such circumstances, the district of location's CSE must review the request for services and "develop an [IESP] for the student based on the student's individual needs in the same manner and with the same contents as an [IEP]" (Educ. Law § 3602-c[2][b][1]). The CSE must "assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district" (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

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. v. New York City Dep't of Educ., 694 F.3d 167, 184-85 [2d Cir. 2012]).

VI. Discussion

A. Legal Standard

In this matter, the student has been parentally placed in a nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's parental placement in the nonpublic school. Instead, the parent alleged that the district failed to implement the student's mandated public special education services under the State's dual enrollment statute for the 2023-24 school year and, as a self-help remedy, the parent unilaterally obtained private SETSS from Think Pink, LLC for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA.

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educational programs designed to serve persons who meet the definition of children with disabilities set forth in [Education Law § 4401(1)]" (Educ. Law § 3602-c[1][a], [d]).

[7] State guidance explains that providing services on an "equitable basis" means that "special education services are provided to parentally placed nonpublic school students with disabilities in the same manner as compared to other students with disabilities attending public or nonpublic schools located within the school district" ("Chapter 378 of the Laws of 2007–Guidance on Parentally Placed Nonpublic Elementary and Secondary School Students with Disabilities Pursuant to the Individuals with Disabilities Education Act (IDEA) 2004 and New York State (NYS) Education Law Section 3602-c," Attachment 1 at p. 11, VESID Mem. [Sept. 2007], available at http://www.p12.nysed.gov/specialed/publications/policy/nonpublic907.pdf). The guidance document further provides that "parentally placed nonpublic students must be provided services based on need and the same range of services provided by the district of location to its public school students must be made available to nonpublic students, taking into account the student's placement in the nonpublic school program" (id.).

Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the private services. "Parents who are dissatisfied with their child's education can unilaterally change their child's placement . . . and can, for example, pay for private services, including private schooling. They do so, however, at their own financial risk. They can obtain retroactive reimbursement from the school district after the [IESP] dispute is resolved, if they satisfy a three-part test that has come to be known as the Burlington-Carter test" (Ventura de Paulino v. New York City Dep't of Educ., 959 F.3d 519, 526 [2d Cir. 2020] [internal quotations and citations omitted]; see Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 14 [1993] [finding that the "[p]arents' failure to select a program known to be approved by the State in favor of an unapproved option is not itself a bar to reimbursement"]).

The parent's request for district funding of privately-obtained services must be assessed under this framework. Thus, 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 (Carter, 510 U.S. 7; 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. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[8] 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).

Here, the district asserts that, although the IHO did not explicitly cite to Burlington/Carter, the IHO properly addressed whether the unilaterally-obtained SETSS was appropriate for the student, but the IHO erred in her determination. In reviewing the decision, it is not entirely clear what, if any, legal standard the IHO relied on to reach her determination that the SETSS Think Pink, LLC delivered were appropriate to meet the student's needs (see generally IHO Decision). The parent contends that the district had the burden of proof and persuasion in this matter arising under Education Law § 3602-c and that even if Burlington/Carter applied, the IHO decision should be upheld in its entirety.

In addressing the parties' arguments regarding the appropriate legal standard, while I acknowledge that the Burlington/Carter framework is being utilized here for matters related to an IESP arising under State Education Law § 3602-c rather than an IEP under the IDEA, there is no caselaw from the courts as to what other, more analogous framework might be appropriate when a parent privately obtains special education services without consent that a school district failed to provide pursuant to an IESP and then retroactively seeks to recover the costs of such services from the school district. I also note that IHOs have not approached the question with consistency. While the IHO in this matter did not explicitly agree or disagree with the use of the Burlington/Carter

[8] State law provides that the parent has the obligation to establish that a unilateral placement is appropriate, which in this case is the special education that the parent obtained from Think Pink, LLC (Educ. Law § 4404[1][c]).

standard, the alternative approaches adopted by some IHOs has been found to be insufficient to address the factual circumstances in these cases, as explained more below.[9]

In some cases, IHOs have indicated these matters were distinguishable from the Burlington/Carter scenario because of the type of violation by the district (i.e., a failure to provide services that the parties agreed to versus a disagreement over the adequacy of an IEP) and because the type of privately-obtained relief was different (i.e., services versus private school tuition (see IHO Decision at pp. 4-5). This position is generally supported by the parent in the instant matter (see Answer ¶¶ 4-9).

As for the underlying violation, the fact that the Burlington and Carter cases were IEP disputes, that is, disputes over the adequacy of the programming design, is of little consequence. It just so happens that parties more often disagree about which type of programming is appropriate for a student with a disability, and the courts have explained that the sufficiency of the program offered by the district must be determined on the basis of the IEP itself (R.E., 694 F.3d at 186-88). The Second Circuit has also explained that "[s]peculation that the school district will not adequately adhere to the IEP is not an appropriate basis for unilateral placement" (R.E., 694 F.3d at 195; see E.H. v. New York City Dep't of Educ., 611 Fed. App'x 728, 731 [2d Cir. May 8, 2015]; R.B. v. New York City Dep't of Educ., 603 Fed. App'x 36, 40 [2d Cir. Mar. 19, 2015] ["declining to entertain the parents' speculation that the 'bricks-and-mortar' institution to which their son was assigned would have been unable to implement his IEP"], quoting T.Y. v. New York City Dep't of Educ., 584 F.3d 412, 419 [2d Cir. 2009]; R.B. v. New York City Dep't of Educ., 589 Fed. App'x 572, 576 [2d Cir. Oct. 29, 2014]).

However, a district's delivery of a placement and/or services must be made in conformance with the CSE's educational placement recommendation, and the district is not permitted to deviate from the provisions set forth in the IEP (M.O. v. New York City Dep't of Educ., 793 F.3d 236, 244 [2d Cir. 2015]; R.E., 694 F.3d at 191-92; T.Y., 584 F.3d at 419-20; see C.F. v. New York City Dep't of Educ., 746 F.3d 68, 79 [2d Cir. 2014]). Thus, a deficient IEP is not the only mechanism for concluding that a school district has failed to provide appropriate programming to a student and thereby also failed to provide a FAPE. Such a finding may also be premised upon a standard described by the courts as a "material deviation" or a "material failure" to deliver the services called for by the public programming (see L.J.B. v. N. Rockland Cent. Sch. Dist., 660 F. Supp. 3d 235, 263 [S.D.N.Y. 2023]; Y.F. v. New York City Dep't of Educ., 2015 WL 4622500, at *6 [S.D.N.Y. July 31, 2015], aff'd, 659 Fed. App'x 3 [2d Cir. Aug. 24, 2016]; see A.P. v. Woodstock Bd. of Educ., 370 Fed. App'x 202, 205 [2d Cir. Mar. 23, 2010] [deviation from IEP was not material failure]; R.C. v. Byram Hills Sch. Dist., 906 F. Supp. 2d 256, 273 [S.D.N.Y. 2012]; A.L. v. New York City Dep't of Educ., 812 F. Supp. 2d 492, 503 [S.D.N.Y. 2011] ["[E]ven where a district fails to adhere strictly to an IEP, courts must consider whether the deviations constitute a material failure to implement the IEP and therefore deny the student a FAPE"]). The courts do not employ a different framework in reimbursement cases because the parents raise a "material failure" to implement argument rather than a program design argument, and instead they employ the

[9] However, by pointing to the burden of proof in the decision and noting that it did not apply to the circumstances of this case, the IHO appears to have adopted the position that so long as the services unilaterally obtained by the parent matched the services recommended in the IESP, then the unilaterally-obtained services must be appropriate, as argued by the parent in her answer (see Answer ¶¶ 4-9).

Burlington/Carter approach (R.C., 906 F. Supp. 2d at 273; A.L., 812 F. Supp. 2d at 501; A.P. v. Woodstock Bd. of Educ., 572 F. Supp. 2d 221, 232 [D. Conn. 2008], aff'd, 370 Fed. App'x 202).

As for supportive services versus school tuition, some IHOs have noted language in the State burden of proof statute referencing "tuition reimbursement" and the parent's burden to prove only the appropriateness of the "unilateral parental placement" (Educ. Law § 4404[1][c] [emphasis added]; IHO Decision at p. 4).[10] In noting the Commissioner of Education's discretion to determine allowable tuition rates for nonpublic schools with which the district may contract for the purpose of educating students with disabilities, Education Law § 4401(5) defines tuition as "the per pupil cost of all instructional services" (Educ. Law § 4401[5]; Org. to Assure Servs. for Exceptional Students, Inc. v. Ambach, 82 A.D.2d 993, 994, modified on other grounds, 56 N.Y.2d 518 [1982]). State guidance pertaining to a school district's authority to contract for the provision of core instructional services defines "core instructional services" as "those instructional programs which are part of the regular curriculum of the school district and to which students are entitled as part of a free public education" including "both general and special education programs and related services which school districts are required by law to provide as part of a program of public education and for which a certification area exists and to which tenure rights apply pursuant to Education Law and/or Commissioner's regulations" ("Q and A related to Contracts for Instruction" Office of Special Educ. Mem. [June 2010], available at https://www.p12.nysed.gov/resources/contractsforinstruction/qa.html). Although the term SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6), to the extent it comprises a special education service delivered by a certified special education teacher, it falls within the scope of this definition of instructional services and, therefore, of tuition, at least as defined in the Education Law.

Moreover, in fashioning appropriate relief, courts have generally interpreted the IDEA as allowing reimbursement for the cost not only of private school tuition, but also of "related services" (see Burlington, 471 U.S. at 369; Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 31 [1st Cir. 2006]; M.M. v. Sch. Bd. of Miami-Dade Cnty., Fla., 437 F.3d 1085, 1100 [11th Cir. 2006] [collecting authority]; see also Ventura de Paulino, 959 F.3d at 526 ["Parents who are dissatisfied with their child's education . . . can, for example, 'pay for private services, including private schooling'"] [emphasis added], quoting T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 152 [2d Cir. 2014]). In the present matter, the services at issue are SETSS, which are not included in the State continuum of services but are generally defined as a hybrid of resource room services and/or consultant teacher services, which are included in the State's definition of "special education," as are related services (Educ. Law § 4401[1]-[2]). Under these broad definitions, SROs have disagreed with an IHO's interpretation that funding for a unilateral parental placement means only the costs of a student's tuition at a private school and, as a result, the IHO's findings thereto that a parent had no obligation to demonstrate that she obtained appropriate services from a private agency was found to be error.

[10] In the pendency context, the Second Circuit has stated that educational placement means "the general type of educational program in which the child is placed," not the bricks and mortar school location (Concerned Parents & Citizens for the Continuing Educ. at Malcolm X Pub. Sch. 79 v. New York City Bd. of Educ., 629 F.2d 751, 753, 756 [2d Cir. 1980]).

Additionally, some IHOs have quoted the Supreme Court's decision in Burlington for the proposition that "[t]he Act was intended to give . . . children [with disabilities] both an appropriate education and a free one; [and therefore,] it should not be interpreted to defeat one or the other of those objectives" (Application of the Dep't of Educ., Appeal No. 24-139). However, when doing so, the IHO takes the statement out of context because the Supreme Court made this statement when holding that a parent did not waive the right to tuition reimbursement by moving the student to a unilateral placement during the pendency of the proceedings (Burlington, 471 U.S. at 372). The Court did not find that placing a burden on the parent to prove the appropriateness of a unilateral placement defeated the objectives of the statute; to the contrary, the Court determined that if it was determined "that a private placement desired by the parents was proper under the Act," the IDEA authorizes relief in the form of tuition reimbursement (id. at 369). The Court went on to eventually hold that "[a]bsent some reason to believe that Congress intended otherwise, . . . the burden of persuasion lies where it usually falls, upon the party seeking relief" (Schaffer v. Weast, 546 U.S. 49, 57–58 [2005]). Accordingly, a state law placing the burden of production and persuasion on parents who seek reimbursement or public funding of private services that they acquired from private companies without the consent of school district officials does not offend the objectives in the IDEA.

These matters arising from Education Law § 3602-c, in which the district had already agreed to pay for private services, were originally presented by the parties as disputes over the rate to be paid to private providers devoid of any context or arguments over the appropriate legal standard. One decision addressing such a matter noted that the cases had "all of the hallmarks of what is approaching complete systemic dysfunction regarding the provision of special education services and the procedural safeguards that were supposed to protect the student" and that the "dysfunction ha[d] twisted itself into a murky dispute that the parents should not even be involved in, but for their efforts to locate services that the district was responsible to plan and provide for" (Application of a Student with a Disability, Appeal No. 20-087). These disputes, as raised by the parties, originally tended to gloss over the district's underlying implementation failures, improper attempts to contract out for the delivery of instruction and, further, the district's attempts to delegate its implementation duties to parents, and, instead, presented as "rate dispute[s]" year after year (id.). Given that the district was not authorized to contract for the provision of independent special education teachers, the idea that a "public rate for independent SETSS instruction" could be sanctioned in a policy of the district was itself flawed and, therefore, relief sought for private providers to deliver services in an IESP at an "enhanced rate" was similarly a fiction (see id.).

The Burlington/Carter framework was adopted in these matters to provide context, standards, and oversight over the remedies being sought. For example, although the school district could not contract with a teacher who was qualified as a special education teacher but who was not certified in the State of New York, a parent could do so and seek reimbursement from the district (Application of a Student with a Disability, Appeal No. 20-087). Further, in the earlier incarnations of these cases, the parents had not taken any financial risk that is required in a Burlington/Carter framework. Without any requirement for parents to take the financial risk for such services, the financial risk was borne entirely by unregulated private schools and companies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district; this has practical effects because the private schools and companies are incentivized to inflate costs for services for which parents do not have any financial liability and parents may begin seeking the best private placements possible with little consideration given to

costs or what the child needs for an appropriate placement (or services) as opposed to "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]). Further, proof of an actual financial risk being taken by parents tends to support a view that the costs of the contracted for program were reasonable, at least absent contrary evidence in the hearing record.

While acknowledging the distinctions identified by some IHOs, the most defining factor that has arisen in these matters for determining the appropriate category of relief and the standards attendant thereto is whether the parent engaged in self-help and obtained relief contemporaneous with the violation (i.e., the Burlington/Carter scenario) or whether the relief is prospective in nature with the purpose to remedy a past harm (i.e., compensatory education). In the former, the parent has already gone out and made decisions unilaterally without input from the district and, therefore, must bear a burden of proof regarding those services. For prospective compensatory education ordered to remedy past harms, relief may be crafted to be delivered in the future with protections to avoid abuse and to ensure appropriate delivery of services. While some courts have fashioned compensatory education to include reimbursement or direct payment for educational expenses incurred in the past, the cases are in jurisdictions that place the burden of proof on all issues at the hearing on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015]; Indep. Sch. Dist. No. 283 v. E.M.D.H., 2022 WL 1607292, at *3 [D. Minn. 2022]). In contrast, under State law in this jurisdiction, the burden of proof has been placed 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 Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

Based on the foregoing, and assuming without deciding if the IHO in this case relied on the Burlington/Carter analysis, the next inquiry focuses on whether the IHO properly determined that the SETSS delivered by Think Pink, LLC, was appropriate to meet the student's needs and whether the parent was entitled to the relief sought.

B. Unilaterally-Obtained SETSS

Turning to a review of the appropriateness of the unilaterally-obtained services, the federal standard for adjudicating these types of disputes is instructive.

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). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. at 13-14). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ. of the City Sch. Dist. of Yonkers, 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement'" (Gagliardo, 489 F.3d at 112, quoting Frank G. v. Bd. of Educ. of Hyde Park, 459 F.3d 356, 364 [2d Cir. 2006]; see Rowley, 458 U.S. at 207). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether a unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether the placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115; Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] ["evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]). A private placement is appropriate if it provides instruction specially designed to meet the unique needs of a student (20 U.S.C. § 1401[29]; Educ. Law § 4401[1]; 34 CFR 300.39[a][1]; 8 NYCRR 200.1[ww]; Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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).

In this case, although the student's needs are not in dispute, a description thereof provides context to determine whether the parent's unilaterally-obtained SETSS were appropriate to address those needs. Here, the March 2022 IESP reflects that the student continued to "struggle with reading and math," and teachers had commented that the student was "not at grade level in both critical areas" (Parent Ex. F at p. 1). According to the IESP, the student read "very slowly" and her teachers had informed the parent that this was "an issue" (id.). The March 2022 IESP reported the parent's concern that "math [wa]s a particularly difficult subject for [the student] though

reading and writing skills also remain[ed] delayed" (id.). The student's "working memory" was reported as a strength for the student, who could consistently "recall picture locations" (id.). Socially, the March 2022 CSE indicated in the IESP that the student continued to exhibit "some anxiety, which c[ould] factor into her classroom performance"; however, it was also noted that, according to the parent, the student's anxiety was "not impacting on her learning in the classroom as it had it the past" (id. at pp. 1-2). The IESP reflected no concerns with respect to the student's physical development (id. at p. 2).

Turning to the annual goals in the March 2022 IESP, in the area of reading, the annual goal targeted the student's ability to "answer literal and inferential questions in detail, concerning the story's plot, main ideas, setting and characters" after reading a "short story on or near grade level" (Parent Ex. F at p. 3). In the area of mathematics, the annual goal targeted her ability to solve problems involving "fractions, mixed numbers, and decimal points" by using the "rules and concepts taught in class" (id.). In writing, the student's annual goal targeted her ability to "generate a composition of at least two connecting paragraphs on a topic of interest, with a minimum of spelling and grammatical errors" (id. at p. 4).

To address the student's identified needs, the March 2022 CSE recommended that the student receive five periods per week of SETSS in a group (see Parent Ex. F at p. 4).

As noted above, to qualify for reimbursement under the IDEA, parents must demonstrate that the unilateral placement provided instruction specially designed to meet the student's unique needs, supported by services necessary to permit the student to benefit from instruction (Gagliardo, 489 F.3d at 112; see Frank G., 459 F.3d at 364-65). Regulations define specially designed instruction, in part, as "adapting, as appropriate to the needs of an eligible student under this Part, the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability" (8 NYCRR 200.1[vv]; see 34 CFR 300.39[b][3]).

Here, as the district argues, the hearing record is devoid of evidence to show that the SETSS allegedly delivered by Think Pink, LLC, to the student constituted specially designed instruction sufficient to meet the student's identified needs. For example, consistent with the district's arguments, the hearing record is devoid of any progress reports or session notes describing the SETSS delivered to the student by the agency, which could shed light on the specific strategies used with the student and how the SETSS provided were tailored to the student and met her unique needs. Additionally, the evidence in the hearing record does not indicate where the SETSS were delivered to the student or whether the SETSS provider was working for or with Think Pink, LLC, the agency for which the parent is seeking funding (see generally Tr. pp. 1-27; Parent Exs. A-B; D-H; Dist. Ex. 1). Moreover, neither the SETSS provider nor the parent testified at the impartial hearing to describe the services or how, if at all, the SETSS provider worked on the student's annual goals related to her needs in reading, mathematics, and writing (see generally Tr. pp. 1-27; Parent Exs. A-B; D-H; Dist. Ex. 1).

In light of the foregoing, the IHO's finding that the parent's unilaterally-obtained SETSS was appropriate to meet the student's needs is not supported by the evidence in the hearing record. As a result, the IHO's determination must be reversed.

VII. Conclusion

Having found that, contrary to the IHO's determination, the parent failed to sustain her burden to demonstrate that the unilaterally-obtained SETSS were appropriate to meet the student's special education needs, the necessary inquiry is at an end and there is no need to reach the issue of whether equitable considerations weighed in favor of the parent's requested relief.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the IHO's decision, dated March 15, 2024, is modified by reversing that portion which ordered the district to pay for the parent's unilaterally-obtained SETSS for the student for the 2023-24 school year.

Dated: **Albany, New York**
June 10, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER