The University of the State of New York

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

No. 24-338

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

Appearances:
Gulkowitz Berger LLP, attorneys for petitioner, by Shaya Berger, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Ezra Zonana, Esq.

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which denied her request that respondent (the district) fund the costs of her son's private services delivered by Think Pink, LLC (Think Pink) for the 2023-24 school year. The appeal must be sustained in part.

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

On March 10, 2017, a CSE convened, determined the student was eligible for special education as a student with a learning disability, and developed an IESP (Parent Ex. B).[1] The CSE

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

recommended that the student receive 10 periods per week of group special education teacher support services (SETSS) in Yiddish, two 30-minute sessions per week of individual occupational therapy (OT) in English, and two 30-minute sessions per week of individual counseling services in Yiddish (id. at pp. 1, 12). The CSE convened on November 24, 2021 and developed an IESP that continued to mandate 10 periods of group SETSS per week in Yiddish, two 30-minute sessions per week of individual OT in English, and two 30-minute sessions per week of individual counseling services in Yiddish (compare Parent Ex. B at p. 12, with Dist. Ex. 2 at pp. 1, 7).

On September 1, 2023, the parent and an occupational therapist signed an agreement that Think Pink would provide one hour per week of services to the student for the 2023-24 school year, and that the parent was responsible for the "fees" the provider charged for those services (Parent Ex. C; see Parent Ex. H at pp. 1, 3).[2] During the 2023-24 school year, the student attended a nonpublic school and Think Pink delivered 10 hours per week of SETSS and one hour per week of OT to the student (see Parent Exs. A at p. 1; D ¶¶ 1, 4; F).[3]

A. Due Process Complaint Notice

In a due process complaint notice dated April 15, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year by failing to provide the student with the SETSS and related services pursuant to his March 2017 IESP (Parent Ex. A at p. 1). The parent asserted that she was unable to locate providers at the district rate, but was able to secure providers who were willing to deliver services at enhanced rates and therefore the parent was seeking an award of funding for the SETSS and related services at enhanced rates (id. at p. 2). The parent also sought an order requiring the district to "continue the student's special education and related services under the student's automatic pendency entitlement" (id.).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on May 24, 2024 (Tr. pp. 1-27). Following the hearing, the IHO called the parties back for a status conference to discuss an anomaly the IHO detected in one of the documents (see Tr. pp. 28-92). In a decision dated June 28, 2024, in his discussion regarding whether the district offered the student a FAPE, the IHO found that the parent did not present a 10-day notice, which he described as being "designed to articulate a disagreement with a program," in order to give the district "time to cure a deficient" IESP (IHO Decision at p. 6). The IHO next stated that the district could not have "cured" any dissatisfaction, as there was "no IESP to implement"; however, although the district waived its June 1 defense by failing to timely raise it, the "[p]arent still must give the district an inkling of a purported issue" (id.). According to the IHO, if the parent did not state her concerns at any time, even after June 1, "it would be unreasonable to expect [the district] to be required to provide equitable services in the same manner as a FAPE" (id.). Therefore, the IHO found that the district "was not required to provide services to [the s]tudent irrespective of its

[2] 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).

[3] According to the district's invoices, the frequency of the student's SETSS sessions was "11" (Parent Ex. F).

waiver of the June 1 defense" and that the district "prevail[ed] on [p]rong 1" of the Burlington/Carter analysis (id.).

Next, the IHO determined that he could not "rely on the authenticity and veracity of the documents presented at hearing or on the witness," and therefore, the parent failed to meet her burden to show that the unilaterally-obtained services were appropriate (IHO Decision at p. 7).

Regarding equitable considerations, the IHO found that he could not "expect [the district] to provide services if [the p]arent never asked [the district] to do so" and had inquired into "whether [the p]arent informed [the district] of [her] intention to seek equitable services" (IHO Decision at p. 8).[4] The IHO noted that the Think Pink CEO (CEO) testified that she had discussed with the parent the parent's submission of the June 1 letter "sometime in June 2023" but that the IHO "had doubts regarding the veracity of the testimony based on [the CEO's] demeanor and reluctance to provide definite answers" (id. at p. 9). The IHO therefore gave the parent's attorney "the opportunity to present [p]arent's testimony to corroborate [the CEO's] recollection" but the parent's attorney did not call the parent to testify (id.). As such, the IHO determined that "even if [the d]istrict failed to meet its burden on [p]rong 1, and even if the [p]arent met her burden under [p]rong II, I find that [the p]arent is not entitled to reimbursement for the special education services she purportedly unilaterally procured and did not provide [the district] with notice that [the s]tudent required equitable services at any point during the school year" (id. at p. 8).

Further, the IHO also found that there was a discrepancy in the agreement for services between Think Pink and the parent (id.). Specifically, the IHO determined that the "the words 'half hour' were clearly superimposed on the original document, revealing that the rate was actually '150 per hour'" instead of $150 per half hour (IHO Decision at p. 10; see Parent Ex. C). The IHO's decision then described that, upon discovering the anomaly in parent exhibit C, the IHO invited the parties back for a status conference to give the parent's attorney the opportunity to clarify the exhibit (IHO Decision at pp. 10-11; see Tr. pp. 28-92).[5] According to the IHO, he gave the parent's attorney additional time to contact the parent so that the parent could explain the hourly rate that existed in the agreement for services that she signed, but that the parent's attorney failed to provide any additional testimony or evidence to the IHO following the June 6, 2024 status conference (IHO Decision at p. 11). The IHO held that the parent's failure to clarify this issue precluded the parent from being reimbursed as an equitable matter and dismissed the parent's case with prejudice (id. at pp. 11-12).

[4] The IHO issued a scheduling order dated April 15, 2024 directing, among other things, that "any known or knowable affirmative defense must be articulated with specificity in writing by email no later than 10 business days before the hearing date" (April 15, 2024 Order at pp. 5, 7). As the district failed to notify the parent of its intention to raise the June 1 affirmative defense 10 business days before the hearing date, the IHO deemed the district to have waived it as an affirmative defense (Tr. pp. 7, 25).

[5] The IHO requested that the parties inspect parent exhibit C in Adobe, and stated that the document was altered (Tr. p. 33). The IHO stated that "the reason why [the IHO] kn[e]w [wa]s because you could remove the word 'half-hour" from there and then there's a whiteout under there" and that "the word that's under both of those layers is the word "hour" (id.). The IHO noted that "there may be a reasonable explanation, but [the IHO] just wanted . . . to give [the p]arent an opportunity to explain it" (Tr. p. 34). The IHO expressed concern that the modified parent exhibit C was "not the document that the parent had in front of her or him when this document was signed" (Tr. p. 35).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in dismissing her claim with prejudice and arguing that the IHO's dismissal was based on a failure to properly apply the facts and a misapplication of the law. Specifically, the parent argues that the burden of proof and persuasion lies entirely with the district in equitable services cases pursuant to Education Law §3602-c; however, even if applying a Burlington/Carter standard, the parent argues that she is still entitled to relief. Next, the parent asserts that there was no basis for the IHO's finding that the district was not required to offer the student a FAPE, as he was "indisputably" a student with a disability entitled to services under his IESP, which the district conceded it did not provide during the 2023-24 school year. The parent argues that she demonstrated the unilaterally-obtained services were appropriate, and the providers from Think Pink were appropriately credentialed and licensed.

The parent alleges that the IHO's bases for denying relief fell under equitable considerations; the lack of a 10-day notice and the Think Pink-adjusted agreement for services. As to the first claim, the parent asserts that the district failed to raise the issue of the lack of a 10-day notice, it was improper for the IHO "to make arguments on behalf of [the district]," that requirement is not applicable to a "services" case, there was nothing in law requiring notice when a school district failed to offer a placement, and the district failed to provide notice of this requirement to the parent. Regarding Think Pink's adjustment of the agreement for services, the parent argues that there was no evidence of any wrongdoing in the hearing record, and that to the extent there was any inequitable conduct related to the contract, such conduct was attributable to Think Pink, not the parent, and this agreement was not the type of contract that was required to be in writing. The parent also asserts that she is entitled to funding for SETSS, OT and counseling services through pendency.

In an answer, the district responds to the parent's allegations and generally argues to uphold the IHO's decision in its entirety.[6]

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

[6] Although the district's September 2, 2024 Answer is titled "Verified Answer and Cross-Appeal" it does not contain a cross-appeal (see Answer).

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]).[7] "Boards of education of all school districts of the state 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.).[8] 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. FAPE

As an initial matter, to the extent the IHO's decision can be read to find that the district did not deny a FAPE or equitable services to the student, the parent correctly asserts in the request for review that such determination was in error. While acknowledging that the district had waived its June 1 defense by failing to raise it in a timely fashion, the IHO went on to deny all relief to the parent on the basis of her failure to submit a 10-day notice to the district. Accordingly, the IHO improperly treated the absence of a 10-day notice, an equitable consideration that may be used to

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

[8] 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 (Questions and Answers), VESID Mem. [Sept. 2007], available at https://www.nysed.gov/special-education/guidance-parentally-placed-nonpublic-elementary-and-secondary-school-students). 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.). The guidance has recently been reorganized on the State's web site and the paginated pdf versions of the documents previously available do not currently appear there, having been updated with web based versions.

reduce or deny relief once a parent has demonstrated that the unilaterally-obtained services he or she seeks funding or reimbursement for were appropriate under a Burlington-Carter analysis[9] (see Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]), as an affirmative defense that was functionally indistinguishable in effect from the June 1 defense he had foreclosed the district form asserting, namely that the district was not obligated to provide the student with special education services under 3602-c.

However, such commingling of the three prongs that make up the Burlington-Carter standard constitutes an erroneous application of the standard. As the Second Circuit Court of Appeals has recently held, it is error for an IHO to apply the Burlington-Carter test by conducting reimbursement calculations within the IHO's analysis of the appropriateness of the unilateral placement (A.P. v. New York City Dep't of Educ., 2024 WL 763386 at *2 [2d Cir. Feb. 26, 2024] [holding that the IHO should have determined only whether the unilateral placement was appropriate or not rather than holding that the parent was entitled to recover 3/8ths of the tuition costs because three hours of instruction were provided in an eight hour day]). The Court further reasoned that "once parents pass the first two prongs of the Burlington-Carter test, the Supreme Court's language in Forest Grove, stating that the court retains discretion to 'reduce the amount of a reimbursement award if the equities so warrant,' suggests a presumption of a full reimbursement award" (A.P., 2024 WL 763386 at *2 [S.D.N.Y. 2024] quoting Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 246-47 [2009]). Given the separate legal standards and burdens of proof that apply to each prong, it follows that an equitable consideration, such as whether the parent provided the district with a 10-day notice, similarly should not be injected into a discussion of the first prong of Burlington-Carter pursuant to which the district bears the burden of demonstrating that it provided a FAPE to the student.

Based on the evidence in the hearing record, the district last developed an IESP for the student in November 2021 and there is no evidence that a CSE has held an annual review or developed either an IEP or an IESP in the interim. The district did present any evidence at the impartial hearing that it provided the student with either a FAPE or equitable services for the 2023-

[9] "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 "Parents' 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 they obtained for a student 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]). 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).

24 school year.[10] Accordingly, to the extent that the IHO found that the absence of a 10-day notice obviated the district's obligation to provide a FAPE to the student and, as a result, the district "prevail[ed] on [p]rong 1" of the Burlington-Carter test (IHO Decision at p.), that portion of the IHO's decision was in error and must be reversed.

B. Unilateral Placement

The parent argues also that the IHO incorrectly determined that she failed to demonstrate that the unilaterally-obtained services provided to the student by Think Pink were appropriate. 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; 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

[10] Relatedly, although this is a dual enrollment case, it bears noting that the failure of a parent to request dual enrollment services does not, by itself, eliminate the district's obligation to evaluate the student and develop appropriate public school programming; the district and the CSE may not simply treat the student as if he or she had been declassified when he or she was not. Mere inaction by the parent does not establish that the parent made clear an intention to keep the student enrolled in the nonpublic school despite needing special education services such that the district would not be required to make a FAPE available in the public school ("Questions and Answers on Serving Children with Disabilities Placed by Their Parents in Private Schools" 80 IDELR 197 [OSERS 2022]; see also "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. 12, VESID Mem. [Sept. 2007], available at https://www.nysed.gov/sites/default/files/special-education/memo/chapter-378-laws-2007-guidance-on-nonpublic-placements-memo-september-2007.pdf).

F.3d 372, 386 [2d Cir. 2014]; C.L. v. Scarsdale Union Free Sch. Dist., 744 F.3d 826, 836 [2d Cir. 2014]; Gagliardo, 489 F.3d at 114-15; Frank G., 459 F.3d at 365).

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

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

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

1. The Student's Needs

Although not in dispute, a brief description of the student's special education needs is necessary to address the issues raised on appeal.[11]

According to the November 2021 IESP, the student obtained cognitive scores in 2017 that were primarily in the extremely low or very low ranges (Dist. Ex. 2 at p. 1). Further, the November 2021 IESP indicated that regarding the "WIAT-III-[d]ue to severe academic delays[,] formal scoring [was] unavailable" and the student continued to work on "his rudimentary academic skills" (id.).[12] In addition, regarding social/emotional development, the November 2021 IESP indicated the student demonstrated "difficulty with transition[s]," required a "structured routine," and while he "follow[ed] classroom instructions and teacher direction," the student "lack[ed] patience" (id. at p. 2). The November 2021 IESP reflected that the parent was "still searching" for a counselor to address the student's social skills (id.).

[11] The hearing record contains two IESPs, dated March 2017 and November 2021 (Parent Ex. B; Dist. Ex. 2). While the 2017 IESP included some additional detail in the academic achievement section of the present levels of performance, the two IESPs are quite similar (compare Parent Ex. B, with Dist. Ex. 2).

[12] According to the March 2017 IESP, the student's academic skills consisted of "emerging" reading skills including that he read six words; that he was able to write his last name but not his first, along with two other simple words; and that he made errors with single digit addition and subtraction and confused the operations (Parent Ex. B at p. 2). The March 2017 IESP also indicated the student was able to tell time and identify the value of coins (id.).

The November 2021 IESP indicated that physically, the student demonstrated "poor coordination and balance" (Dist. Ex. 2 at p. 2). In addition, the November 2021 IESP included information from a January 2017 OT progress report that indicated the student "present[ed] with cognitive, expressive language[,] and pre-writing/handwriting deficits" (id.). The November 2021 IESP described that the student "require[d] moderate verbal redirection" during transitions and "ha[d] difficulty expressing his emotions appropriately" (id.). According to the November 2021 IESP, the student demonstrated "risk[-]taking" and "impulsive" behaviors, "ha[d] difficulty sitting still" and "with self-regulation," as well as a "low frustration tolerance with occasional outbursts while [he] perform[ed] moderately challenging tasks" (id.). Further, the November 2021 IESP indicated the student demonstrated difficulty with short- and long-term memory skills, and was "unable to retain, recall auditory and visual information for immediate and future use" (id.).

The November 2021 CSE recommended supports and strategies to address the student's management needs that included praise, encouragement, repetition, refocusing prompts, "visual and auditory cues," scaffolding, modeling, and "graphic organizers to aid him with reading and writing tasks" (Dist. Ex. 2 at p. 3). Further, the November 2021 IESP indicated the student demonstrated "reduced memory skills" as well as "significant difficulties understanding abstract concepts [and] making logical connections" (id.).

Annual goals included within the November 2021 IESP addressed the student's ability to identify and blend sounds and syllables of words, read targeted letter patterns, read "priority" first grade sight words, answer "wh-" questions about a story, understand currency, and solve math problems with supports that identified the "mathematical concepts in the problem" (Dist. Ex. 2 at pp. 3-5).[13] The November 2021 IESP also included OT annual goals to address the student's ability to complete a three-step activity, demonstrate "awareness of positions and movement of body parts," and increase his fine motor control (id. at p. 5). Counseling and social/emotional annual goals included in the November 2021 IESP addressed the student's ability to deal with frustration, develop coping mechanisms, "demonstrate improved behavior in a group activity," appropriately "gain positive attention," and "follow[] school rules" (id. at p. 6). The November 2021 IESP also recommended extended time, revised test directions, and a separate location as testing accommodations (id. at p. 8).

2. Unilaterally-Obtained Services From Think Pink

The CEO testified via affidavit that Think Pink provided the student with 10 60-minute sessions per week of SETSS during the 2023-24 school year, and further indicated those services "began on" September 1, 2023 (Parent Ex. D ¶ 4).[14] The April 2024 SETSS progress report confirmed the student received "ten hours of SETSS [] to address his IESP goals," and the included attendance records indicated the first session of SETSS was on September 5, 2023 (Tr. p. 10; Parent Exs. G; F at p. 1).

[13] Many of the annual goals included in the November 2021 IESP were also included in the March 2017 IESP (compare Parent Ex. B at pp. 4-11, with Dist. Ex. 2 at pp. 3-6).

[14] Specifically, the CEO's affidavit indicated that services began "Sept 1, 23__" (Parent Ex. D ¶ 4).

The student's SETSS provider prepared a SETSS progress report dated April 15, 2024 (Parent Exs. G; I at p. 1). According to the April 2024 SETSS progress report, the student was bilingual, "ha[d] a diagnosis of autism spectrum disorder," and struggled with cognitive and social/emotional skills (Parent Ex. G at p. 1). The April 2024 SETSS progress report indicated that the student "require[d] 1:1 instruction to master academic skills," had "difficulty with [his] attention span," and "require[d] frequent breaks between sessions" (id.). According to the April 2024 SETSS progress report, the student required prompts to participate in group discussions and activities, follow multistep instructions, adhere to a schedule, and complete a task in a timely manner (id.). Additionally, the April 2024 SETSS progress report also indicated the student had difficulty "using proper pacing, tone[,] and proximity when talking to others" (id.).

The April 2024 SETSS progress report reflected that the student was "working on decoding and fluency" (Parent Ex. G). The April 2024 SETSS progress report also indicated the student "work[ed] on two vowel sounds and silent letters," had difficulty reading a paragraph, and "scored level H on the reading record" (id.). As for reading comprehension, the April 2024 SETSS progress report indicated the student was working on answering questions based on texts read aloud, inferencing, and paraphrasing (id.). The student reportedly "struggle[d]" to identify the "parts of a story" and to "defin[e] grade[-]level vocabulary words," and he "require[d] prompts to answer lesson[-]related questions" (id.).

According to the April 2024 SETSS progress report, the student struggled to compare written passages, and "us[e] adjectives, pronouns[,] and adverbs," and was working on his ability to "writ[e] a full sentence using correct punctuation and capitalization" (Parent Ex. G). The April 2024 SETSS progress report indicated that the student worked on math concepts such as "finding the greatest common factors and least common denominators in two digits" as well as "solving word problems" (id.). The SETSS provider indicated the student "require[d] frequent breaks," "an individualized curriculum," and "prompts" (Parent Ex. G).

In terms of progress, the April 2024 SETSS progress report indicated the student's grades had improved and he demonstrated more confidence (Parent Ex. G). Further, the April 2024 SETSS progress report included that the student was "respectful" and tried his best "to do well" (id.). The April 2024 SETSS progress report reflected that the student had "mastered reading many sight words," writing the alphabet and numbers, and demonstrated an ability to spell "many sight words such as his name, address[,] and street signs" (id.). Additionally, the April 2024 SETSS progress report also indicated the student had "mastered [] the concept of estimation, percentage[,] and decimals" as well as "multiplying and dividing multi[-]digit numbers" (id.).

Regarding OT services, the hearing record contained an OT evaluation report dated March 4, 2024 that indicated the student demonstrated "profound impulsivity" as well as "deficits in [his] functional performance" (Parent Ex. H at p. 1). The March 2024 OT evaluation described that the student had "significantly high muscle tone, poor bilateral coordination," as well as "impaired balance" and "body awareness" (id.). The March 2024 OT evaluation indicated the student demonstrated "[p]oor visual-motor tracking," "poor postural control," and "poor distal control/strength" (id. at p. 2). In addition, the March 2024 OT evaluation described the student's difficulty with his "alignment, orientation, sizing, and spacing" of the English alphabet (id.).

The March 2024 OT evaluation included that the student demonstrated "an under-registered sensory processing system" that "impair[ed] his ability to engage with" tasks (Parent

Ex. H at p. 1). The occupational therapist indicated in his March 2024 OT evaluation that the student "ha[d] difficulty following directions" and "remaining on task," though he performed better when he was provided with "preferred activities" coupled with "maximal verbal and tactile cueing" (id. at pp. 1, 3). Based on the results, the occupational therapist recommended that the student receive OT services (id. at p. 3).

The CEO testified that the student "ha[d] autism and ADHD" with "a lot of challenges" including "behavior[]" and "aggression" given his "severe delays in many areas" (Tr. p. 16). In her affidavit, the CEO testified that the student's providers based their services on the student's "most recent" IESP from March 2017 (Parent Ex. D ¶ 6). During cross-examination, the CEO confirmed the March 2017 IESP was the most recent, despite acknowledging that it was seven years old, and testified that the student's providers used the March 2017 IESP to create their special education programming (Tr. pp. 13, 15-16). Specifically, the CEO testified that short-term goals were created from the March 2017 IESP goals for the providers to work on with the student (Tr. pp. 14-15, 19-20). The CEO further testified that the student was graduating during the 2023-24 school year and that they "really worked hard" to ensure the student was "ready to go out" and "get a job so that he [was] functional in the community" (Tr. pp. 15-16).

The CEO further testified that an assessment identified as the "ABLES" was used to develop the student's short-term goals and that the assessment was "use[d] annually every year" and that they "conduct[ed] it on a monthly basis" (Tr. pp. 19-20). According to the CEO, the assessment provided information on the "skills . . . require[d]" for the student "to function both in the school and the community" (Tr. p. 20). The CEO testified that the assessment provided "different activities and . . . different worksheets for the [student] to complete" (Tr. p. 21). Additionally, the CEO stated that the provider collected "data on everything" done with the student "to make sure that the [student] [] ma[de] progress" (id.). Despite this testimony, the hearing record does not contain results of administrations of the ABLES to the student, the short-term goals the SETSS provider developed, or any of the data the CEO testified the SETSS provider gathered (see Parent Exs. A-I). The hearing record does not otherwise reflect the specially designed instruction the SETSS provider used with the student to address his special education needs (id.).

The CEO testified that the student's SETSS provider was "trained" and that he knew "how to address the academic goals" as well as the student's behavior (Tr. p. 17). A review of the hearing record indicated the SETSS provider was issued an early childhood education, birth to grade 2 "Internship Certificate" as well as a students with disabilities, birth to grade 2 "Internship Certificate" (Parent Ex. I at p. 1). According to information in the hearing record, the occupational therapist who conducted the March 2024 OT evaluation held a license in occupational therapy (id. at p. 3).

In the request for review, the parent argues that she demonstrated the unilaterally-obtained services obtained were appropriate because the providers were appropriately credentialed or licensed, and the submitted progress reports demonstrated how the providers addressed the specific needs of the student. While the SETSS provider held a special education internship certificate, it was for students ages birth to grade two, and the student in this matter turned 21 years old during the school year at issue (Tr. pp. 15-16; Parent Ex. I at p. 1; Dist. Ex. 2 at p. 1). The CEO did not describe the specially designed instruction provided to meet the student's needs beyond testifying that the SETSS provider was "trained" and "he really clicked well with the job" and "the student" (Tr. p. 17). Further, although the occupational therapist was licensed, the evidence submitted

during the hearing only indicated that he conducted an OT evaluation in March 2024, at which time he recommended the student receive services (Parent Exs. H; I at p. 3). There is no other information in the hearing record about any of the OT services the student may have received during the school year from Think Pink (see Parent Exs. A-I).

Further, the CEO described the student as having "severe delays," a characterization which was supported by the descriptions of the student's needs in the IESPs, the April 2024 SETSS progress report, and the March 2024 OT evaluation (Tr. p. 16; Parent Exs. B at pp. 1-3; G; H; Dist. Ex. 2 at pp. 1-3). However, the evidence indicated only that the student received some ongoing assessment to develop short-term goals and monitor progress, as well as prompts, breaks, worksheets, and an "individualized curriculum" (Tr. pp. 19-21; Parent Ex. G). The April 2024 SETSS progress report did not include a description of these short-term goals or the individualized curriculum, nor did it identify any specific strategies or specially designed instruction beyond the provision of breaks and prompts that would address the student's needs. In addition, as stated previously, the only available information regarding OT services was a summary of needs within an OT evaluation (Parent Ex. H). Further, in the due process complaint notice the parent asserts that "the student requires the same special education services and the same related services each week as set forth on the IESP," yet the hearing record does not include any indication that the parent either obtained or attempted to obtain counseling services as recommended in the student's March 2017 and November 2021 IESPs (Tr. pp. 1-92; Parent Exs. A-I).

Therefore, under the totality of the circumstances, the parent did not present sufficient evidence that the services delivered by Think Pink constituted specially designed instruction that addressed the student's unique special education needs. Therefore, the determination of the IHO finding that the parent failed to demonstrate at the impartial hearing that the special education and related services she obtained were appropriate for the student will not be disturbed.

VII. Conclusion

Having determined that the IHO correctly found that the parent failed to sustain her burden to demonstrate the appropriateness of the unilaterally-obtained services for which she sought funding, the necessary inquiry is at an end.

I have considered the parties' remaining contentions and find that it is unnecessary to address them in light of my determination above.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the decision is hereby modified to reverse the portion thereof which found the district did not deny the student a FAPE.

Dated: **Albany, New York**
October 3, 2024

CAROL H. HAUGE
STATE REVIEW OFFICER