The University of the State of New York

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

No. 24-489

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:
Liz Vladeck, General Counsel, attorneys for respondent, by Toni L. Mincieli, 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 EDopt, LLC (EDopt) for the 2023-24 school year. The district cross-appeals asserting that the IHO lacked subject matter jurisdiction to hear this matter. The appeal must be dismissed. The cross-appeal must be dismissed.

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

As the evidence in the hearing record regarding the student's educational history is sparse, a review of it is limited. Briefly, a CSE convened on May 11, 2020, finding the student eligible to receive special education services as a student with a learning disability, developed an IESP for the student with a projected implementation date of May 25, 2020, and a projected annual review

date of May 11, 2021 (see Parent Ex. B).[1] The May 2020 CSE recommended that the student receive five periods per week of direct group special education teacher support services (SETSS) (Parent Ex. B at p. 3).[2] The May 2020 IESP noted that the student was "[p]arentally [p]laced in a [n]on[p]ublic [s]chool" (id. at p. 5).

The hearing record does not include any information as to the student's educational program between the development of the May 2020 IESP and the 2023-24 school year.

In connection with the 2023-24 school year, on May 16, 2023, the parent advised the district that she intended to place the student in a nonpublic school at her expense for the 2023-24 school year (Parent Ex. E at p. 1). The parent further stated that she was requesting that the district "provide the educational services that my child is entitled to as a result of having an IEP/IESP" (id.).

On July 20, 2023, the parent electronically signed an "Enrollment Agreement for the 2023-2024 School Year" with EDopt for the delivery of "certain services listed in the attached Schedule A," which, as relevant to this appeal, included special education services ($195.00 per hour, individually; $145.00 per hour, group) for the 2023-24 school year from September 2023 through June 2024 (Parent Ex. C at pp. 1-3).[3]

Additionally, the hearing record includes a letter, dated August 22, 2023, with the salutation "Dear Chairperson," from Prime Advocacy, LLC (Prime Advocacy), which indicated it was authorized to communicate on the parent's behalf and advised the "Chairperson" that the district had failed to assign the student any providers to deliver the student's mandated services for the 2023-24 school year (Parent Ex. D). According to the letter, the parent requested that the district "fulfill the mandate" or she would be "compelled to unilaterally obtain the mandated services through a private agency at an enhanced market rate" (id.).

The hearing record indicates that during the 2023-24 school year, the student received individual and group SETSS provided by EDopt (Parent Exs. G; H; I).

A. Due Process Complaint Notice

By due process complaint notice, dated July 12, 2024, the parent, through an advocate with Prime Advocacy, alleged that the district failed to develop and implement a program for the student for the 2023-24 school year, thereby denying the student a free appropriate public education (FAPE) "and/or [e]quitable [s]ervices" (Parent Ex. A at pp. 1-2). In addition, the parent asserted that the district failed to develop an updated program of services for the student for the 2024-25

[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]).

[2] SETSS is not defined in the State continuum of special education services (see 8 NYCRR 200.6). As has been laid out in prior administrative proceedings, the term is not used anywhere other than within this school district and a static and reliable definition of "SETSS" does not exist within the district.

[3] EDopt is a limited liability company that has not been approved by the Commissioner of Education as a company or agency with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7).

school year and, thus, denied the student a FAPE for the 2024-25 school year (id. at p. 2). Related to the 2023-24 school year, according to the parent, the district impermissibly shifted its responsibilities to the parent "to find providers" to deliver services to the student (id. at p. 2). The parent asserted she was unable to find providers willing to accept the district's standard rates but found providers willing to provide the student with his mandated services for the 2023-24 school year at enhanced rates (id.). Among other relief, the parent sought pendency, an order directing the district to fund the costs of the student's program consisting of five hours per week of SETSS at enhanced rates, and an award of compensatory educational services for any mandated services not provided by the district (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened before the Office of Administrative Trials and Hearings (OATH) on September 4, 2024 (Tr. pp. 1-14). In a decision dated September 19, 2024, the IHO found that the district failed to meet its burden that it offered the student services on an equitable basis for the 2023-24 school year; that the parent failed to meet her burden that the agency provided the student with specially designed instruction sufficient to meet the student's needs; and if the parent met her burden, equitable considerations would only partially support the parent's requested relief (IHO Decision at pp. 2, 4-6).

In connection with the appropriateness of the unilaterally obtain services, the IHO discussed the undated progress report and stated it was "extremely generic" and offered no specific information pertaining to the student (IHO Decision at p. 6). The IHO found little information in the progress report pertaining to the student's level of performance at the beginning of the school year (id.). The IHO found that without a baseline of the student's level of performance from the beginning of the school year, it was impossible to measure progress during the 2023-24 school year (id. at p. 7). Additionally, the IHO found that there was little evidence in the hearing record about the program for the student, if assessments were conducted, or as to goals for the student to achieve (id. at p. 6). Next, the IHO referenced the session notes which he found only began at the end of October 2023, were unclear as to what was worked on during each of the student's sessions, some goals were carried over from 2020, and some notes had no relation to SETSS (id.). After noting the above concerns and that it was impossible to determine if the program recommended over three years ago was still appropriate to meet the student's needs, the IHO found that the parent failed to meet her burden and, therefore, was not entitled to her requested relief (id. at p. 7).

For "completeness" of the hearing record, the IHO went on to discuss equitable considerations (IHO Decision at pp. 7-8). The IHO found that although the parent submitted a document entitled 10-day notice, there was no evidence that it was sent to the CSE nor that the parent was seeking funding for the services (id.). Therefore, the IHO determined that if funding was awarded a reduction of 20 percent would be warranted (id. at p. 8). In addition, the IHO found that the contract for services was missing terms, was overly vague, and failed to identify what services the agency was providing to the student or what the parent was obligated to pay for (id.). Lastly, the IHO found that the parent's claims for the 2024-25 school year were related to a failure to implement and that as the school year had not yet started those claims were "not ripe for adjudication" (id. at pp. 8-9). Ultimately, the IHO dismissed all of the parent's claims with prejudice (id. at p. 9). However, the IHO ordered the district to conduct a reevaluation of the student (id. at p. 9).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in finding that she did not meet her burden that the unilaterally obtained services were appropriate and that the IHO incorrectly found that the contract for services was invalid.[4]

The parent argues that the IHO's analysis of the progress report was incorrect as it detailed how the program addressed the student's deficits and described the student's goals and how the student made progress. The parent asserts that the progress report, session notes, and time sheets demonstrated that the SETSS delivered by EDopt during the 2023-24 school year were appropriate and that the student made progress.

In connection with the contract for services, the parent argues that the contract evidenced the parent's financial obligation to pay for the services, and that the contract specified the rate charged and set forth the frequency and duration of services by reference to the student's last agreed upon IESP. As relief, the parent requests that the IHO award the parent the rate of $195 for individual SETSS and $145 for group SETSS.

In an answer and cross-appeal, the district generally denies the material allegations contained in the request for review. The district contends that the request for review was not timely filed with the Office of State Review.[5] Next, the district asserts that the parent failed to prove that the unilaterally obtained services were appropriate for the student. The district also asserts that equitable considerations do not favor any award for relief. In a cross-appeal, the district argues that neither the IHO nor an SRO have subject matter jurisdiction over this matter. The district seeks an affirmance of the IHO's decision.

In a reply to the district's answer and answer to the cross-appeal, the parent asserts that there is subject matter jurisdiction over this matter and seeks an award for SETSS at an enhanced rate.

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[4] A notice of request for review was not filed by the parent as required by State regulations (see 8 NYCRR 279.3; 279.4[e]).

[5] State regulation provides that the "petitioner shall file the notice of intention to seek review, notice of request for review, request for review, and proof of service with the Office of State Review of the State Education Department within two days after service of the request for review is complete" (8 NYCRR 279.4[e]). The parent timely served the request for review on the district on October 28, 2024 but did not file her appeal with the OSR until October 31, 2024. Based on the foregoing, I decline to exercise my discretion to dismiss the parent's appeal as the district suffered no prejudice. There was minimal disruption of the State Review procedures in this case and the staff of the OSR were not required to expend scarce resources locating the problems with the parent's filing. Additionally, the request for review is not "signed by an attorney, or by a party if the party is not represented by an attorney" as required by State regulation (8 NYCRR 279.8[a][4]). Although this matter is not being dismissed for failure to comply with the practice regulations, the advocate for the parent is warned that any future failure to comply with the practice regulations may result in rejection of the pleading (8 NYCRR 279.8[a]). Advocate for the parent is advised to review the practice regulations thoroughly and to be diligent in filing any future pleadings.

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 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

[6] 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]).

[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 (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.

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. Preliminary Matter

1. Subject Matter Jurisdiction

At the outset it is necessary to address the issue of subject matter jurisdiction raised by the district for the first time in its cross-appeal. Subject matter jurisdiction refers to "the courts' statutory or constitutional power to adjudicate the case" (Steel Co. v. Citizens for a Better Environment, 523 U.S. 83, 89 [1998]). Although the district did not raise the argument at the IHO hearing, it is permitted to raise subject matter jurisdiction at any time in proceedings, including on appeal (see U.S. v. Cotton, 535 U.S. 625, 630 [2002]). Indeed, a lack of jurisdiction "can never be forfeited or waived" (Cotton, 535 U.S. at 630).

The district argues that that there is no federal right to file a due process complaint notice regarding services recommended in an IESP and that "Education Law § 4404 does not confer IHOs with jurisdiction to consider enhanced rate claims from parents seeking implementation of equitable services" (Answer & Cr.-Appeal at ¶ 15). Thus, according to the district, IHOs and SROs lack subject matter jurisdiction with respect to pure IESP implementation claims.

Recently in a number of decisions, the undersigned and other SROs have rejected the district's position that IHOs and SROs lack subject matter jurisdiction to address claims related to implementation of equitable services under State law (see, e.g., Application of a Student with a Disability, Appeal No. 24-584; Application of a Student with a Disability, Appeal No. 24-572; Application of a Student with a Disability, Appeal No. 24-558; Application of a Student with a Disability, Appeal No. 24-547; Application of a Student with a Disability, Appeal No. 24-528; Application of a Student with a Disability, Appeal No. 24-512; Application of a Student with a Disability, Appeal No. 24-507; Application of a Student with a Disability, Appeal No. 24-501; Application of a Student with a Disability, Appeal No. 24-498; Application of a Student with a Disability, Appeal No. 24-464; Application of a Student with a Disability, Appeal No. 24-461; Application of a Student with a Disability, Appeal No. 24-460; Application of a Student with a Disability, Appeal No. 24-441; Application of a Student with a Disability, Appeal No. 24-436; Application of the Dep't of Educ., Appeal No. 24-435; Application of a Student with a Disability, Appeal No. 24-392; Application of a Student with a Disability, Appeal No. 24-391; Application of a Student with a Disability, Appeal No. 24-390; Application of a Student with a Disability, Appeal No. 24-388; Application of a Student with a Disability, Appeal No. 24-386).

Under federal law, all districts are required by the IDEA to participate in a consultation process with nonpublic schools located within the district and develop a services plan for the provision of special education and related services to students who are enrolled privately by their

parents in nonpublic schools within the district equal to a proportionate amount of the district's federal funds made available under part B of the IDEA (20 U.S.C. § 1412[a][10][A]; 34 CFR 300.132[b], 300.134, 300.138[b]). However, the services plan provisions under federal law clarify that "[n]o parentally-placed private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school" (34 CFR 300.137 [a]). Additionally, the due process procedures, other than child-find, are not applicable for complaints related to a services plan developed pursuant to federal law.

Accordingly, the district's argument under federal law is correct; however, the student did not merely have a services plan developed pursuant to federal law alone and the parent did not argue that the district failed in the federal consultation process or in the development of a services plan pursuant to federal regulations.

Separate from the services plan envisioned under the IDEA, the Education Law in New York has afforded parents of resident students with disabilities with a State law option that requires a district of location to review a parental request for dual enrollment 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]).[8]

Education Law § 3602-c, concerning students who attend nonpublic schools, provides that "[r]eview of the recommendation of the committee on special education may be obtained by the parent, guardian or persons legally having custody of the pupil pursuant to the provisions of section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][b][1]). It further provides that "[d]ue process complaints relating to compliance of the school district of location with child find requirements, including evaluation requirements, may be brought by the parent or person in parental relation of the student pursuant to section forty-four hundred four of this chapter" (Educ. Law § 3602-c[2][c]).

However, the district asserts that neither Education Law § 3602-c nor Education Law § 4404 confers IHOs with jurisdiction to consider enhanced rates claims from parents seeking implementation of equitable services and that the State Education Department (SED) sought to clarify the jurisdiction of IESP implementation claims by adopting, by emergency rulemaking, an amendment of 8 NYCRR 200.5 (Answer & Cr.-Appeal at ¶¶ 16-17).

Education Law § 4404, concerning appeal procedures for students with disabilities, consistent with the IDEA, provides that a due process complaint may be presented with respect to "any matter relating to the identification, evaluation or educational placement of the student or the provision of a free appropriate public education to the student" (Educ. Law §4404[1][a]; see 20 U.S.C. § 1415[b][6]). State Review Officers have in the past, taking into account the legislative history of Education Law § 3602-c, concluded that the legislature did not intend to eliminate a parent's ability to challenge the district's implementation of equitable services under Education Law § 3602-c through the due process procedures set forth in Education Law § 4404 (see

[8] This provision is separate and distinct from the State's adoption of statutory language effectuating the federal requirement that the district of location "expend a proportionate amount of its federal funds made available under part B of the individuals with disabilities education act for the provision of services to students with disabilities attending such nonpublic schools" (Educ. Law § 3602-c[2-a]).

Application of a Student with a Disability, Appeal No. 23-121; Application of the Dep't of Educ., Appeal No. 23-069; Application of a Student with a Disability, Appeal No. 23-068). [9] In addition, the New York Court of Appeals has explained that students authorized to receive services pursuant to Education Law § 3602-c are considered part-time public school students under State Law (Bd. of Educ. of Monroe-Woodbury Cent. Sch. Dist. v. Wieder, 72 N.Y.2d 174, 184 [1988]), which further supports the conclusion that part-time public school students are entitled to the same legal protections found in the due process procedures set forth in Education Law § 4404.

However, the number of due process cases involving the dual enrollment statute statewide, which were minuscule in number until only a handful of years ago, have now increased to tens of thousands of due process proceedings per year within certain regions of this school district in the last several years. Public agencies are attempting to grapple with how to address this colossal change in circumstances, which is a matter of great significance in terms of State policy. Policy makers have recently attempted to address the issue.

In May 2024, the State Education Department proposed amendments to 8 NYCRR 200.5 "to clarify that parents of students who are parentally placed in nonpublic schools do not have the right under Education Law § 3602-c to file a due process complaint regarding the implementation of services recommended on an IESP" (see "Proposed Amendment of Section 200.5 of the Regulations of the Commissioner of Education Relating to Special Education Due Process Hearings," SED Mem. [May 2024], available at https://www.regents.nysed.gov/sites/regents/files/524p12d2revised.pdf). Ultimately, however, the proposed regulation was not adopted. Instead, in July 2024, the Board of Regents adopted, by emergency rulemaking, an amendment of 8 NYCRR 200.5, which provides that a parent may not file a due process complaint notice in a dispute "over whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services" (8 NYCRR 200.5[i][1]). The amendment to the regulation does not apply to the present circumstance for two reasons. First, the amendment to the regulation applies only to due process complaint notices filed on or after July 16, 2024 (id.).[10] Second, since its adoption, the amendment has been enjoined and suspended in an Order to Show Cause signed October 4, 2024 by the Honorable Kimberly A. O'Connor, J.S.C., in the matter of Agudath Israel of America v. New York State Board of Regents, (No. 909589-24 [Sup. Ct., Albany County, Oct. 4, 2024). Specifically, the Order provides that:

> pending the hearing and determination of Petitioners' application for a preliminary injunction, the Revised Regulation is hereby stayed and suspended, and Respondents, their agents, servants, employees, officers, attorneys, and all other persons in active

[9] The district did not seek judicial review of these decisions.

[10] A statutory or regulatory amendment is generally presumed to have prospective application unless there is clear language indicating retroactive intent (see Ratha v. Rubicon Res., LLC, 111 F.4th 946, 963- [9th Cir. 2024]). The presence of a future effective date typically suggests that the amendment is intended to apply prospectively, not retroactively (People v. Galindo, 38 N.Y.3d 199, 203 [2022]). The due process complaint in this matter was filed with the district on July 12, 2024 (Parent Ex. A), prior to the July 16, 2024 date set forth in the emergency regulation. Since then, the emergency regulation has lapsed.

> concert or participation with them, are temporarily enjoined and restrained from taking any steps to (a) implement the Revised Regulation, or (b) enforce it as against any person or entity

(Order to Show Cause, O'Connor, J.S.C., Agudath Israel of America, No. 909589).

According to the district, however, the aforesaid rule making activities support its position that parents never had a right under State law to bring a due process complaint regarding implementation of an IESP or to seek relief in the form of enhanced rate services. Consistent with the district's position, State guidance issued in August 2024 noted that:

> parents have never had the right to file a due process complaint to request an enhanced rate for equitable services or dispute whether a rate charged by a licensed provider is consistent with the program in a student's IESP or aligned with the current market rate for such services. Therefore, such claims should be dismissed on jurisdictional grounds, whether they were filed before or after the date of the regulatory amendment.

("Special Education Due Process Hearings - Rate Disputes," Office of Special Educ. [Aug. 2024]).[11]

However, acknowledging that the question has received new attention from State policymakers as well as at least one court at this juncture and appears to be an evolving situation, given the implementation date set forth in the text of the amendment to the regulation and the issuance of the temporary restraining order suspending application of the regulatory amendment, the amendments to the regulation may not be deemed to apply to the present matter regardless of the guidance document.

B. Unilaterally Obtained Services

Prior to reaching the merits of the parties' dispute, the district has not appealed from the IHO's finding that it did not meet its burden that it offered the student a FAPE for the 2023-24 school year or from the IHO's order to reevaluate the student and the parent has not appealed from the IHO's dismissal of her claims related to the 2024-25 school year; accordingly, those findings have become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

I will next address the parent's argument that the IHO erred by finding the private SETSS provided by EDopt during the 2023-24 school year were not appropriate.

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 parental placement.

[11] For reasons that are not apparent, the guidance document is no longer available on the State's website, so I have added a copy to the administrative hearing record on appeal in this matter.

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, she unilaterally obtained private services from EDopt 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 that 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. 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 "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]).[12] 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).

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

[12] 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 EDopt (Educ. Law § 4404[1][c]).

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

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

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

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

1. Student Needs

While the student's needs are not in dispute, a brief discussion thereof provides context for the issue to resolved on appeal, namely, whether the unilaterally obtained SETSS were appropriate to meet the student's needs.

The May 2020 IESP is the only IEP/IESP included in the hearing record and the parent represented that the SETSS provided during the 2023-24 school year were provided in accordance with the May 2020 IESP as the student's last agreed-upon IESP, which included a recommendation for five periods per week of SETSS (Tr. p. 10; see Tr. pp. 1-14; Parent Exs. A at p. 1; B at pp. 1-

5).[13] The IESP indicated that the student's present levels of performance were based on information obtained from a SETSS teacher report (Parent Ex. B at pp. 1-2). According to the IESP, the student could read on his own and his reading fluency was good but he had trouble identifying the problem and the main idea in a story (Parent Ex. B at p. 1). The IESP identified math as the student's "main struggle," and noted the student had difficulty retaining information he had learned as well as working with integers, fractions, and equations, but that his basic math computation was on grade level (id.). The May 2020 IESP stated that the teacher estimated the student to be on a sixth-grade level in reading and math (id.). According to the IESP, the student was "a little behind" his peers in writing and language arts (id.). The IESP noted additional student needs related to identifying literary techniques and grade level vocabulary, solving multi-step equations and word problems, and organizing class work (id.). As recorded in the IESP, no concerns were stated, via the teacher report, in the areas of social and physical development (id. at pp. 1-2). The May 2020 IESP included four annual goals targeting the student's ability to understand word problems, learn rules for adding/subtracting/multiplying/dividing negative numbers, learn new grade level vocabulary, and identify the main idea, characters, problem, and solution in grade level short stories (id. at pp. 2-3).

Moving forward to the school year at issue in this case, the student's needs, as identified by the student's SETSS provider, reflect increased needs in reading and writing as well as social development.

For the 2023-24 school year, the student attended an eleventh-grade class in a nonpublic school (Parent Ex. G at p. 1). According to the SETSS progress report, the student was classified "due to significant deficits in academic and cognitive development" and he struggled with focus, motivation, and attention (id.). The report indicated that the student received four hour per week of individual SETSS and one hour per week of group SETSS pushed into his anatomy and history classes (id.).

The 2023-24 SETSS progress report stated that the student's relative strength in reading was his comprehension when texts were read aloud to him and that he demonstrated a basic understanding of the material and could summarize texts and answer "wh" questions (Parent Ex. G at p. 1).[14] The progress report stated that the student's reading skills were significantly below grade level and that he struggled with decoding particularly with unfamiliar, multi-syllabic words, and often resorted to guessing rather than using word attack strategies (id.). According to the progress report, the student's fluency was hindered by mispronunciations and a choppy reading pace, and it was challenging for the student to sustain attention during reading activities all of which negatively impacted his overall comprehension (id. at pp. 1-2). The progress report stated that the student's reading skills were equivalent to that of a seventh grader (id. at p. 1).

In terms of writing, the SETSS progress report indicated that the student's skills were below grade level and characterized by significant delays in the student's ability to express his thoughts

[13] At the time of the CSE meeting, the student was in seventh grade (Parent Ex. B at p. 1).

[14] Without further explanation in the hearing record, it is not clear from the report if the student did have a relative strength in reading comprehension or if whoever drafted the report noted reading comprehension in error and was in fact referring to listening comprehension.

in written form, that his writing often lacked coherence, that he struggled to expand on his ideas often writing only the minimum required to complete assignments, and that his essays were typically incomplete and missing proper spelling, punctuation, and syntax (Parent Ex. G at p. 2). The progress report noted that the student had a basic understanding of paragraph structure but that he required substantial guidance to create a five-paragraph essay (id.).

Regarding math, the SETSS progress report stated that the student demonstrated some understanding of basic algebraic concepts but struggled with following classroom math instruction, often finding the pace too fast and the material too complex (Parent Ex. G at p. 3). According to the report, the student required significant support to complete math assignments and frequently misunderstood key concepts and had difficulty applying math concepts to real world problems particularly in translating word problems into algebraic equations (id.).[15]

With respect to social development the progress report stated the student's social maturity was still developing and that he often found himself in trouble due to impulsive behavior and a lack of focus during class and that he tended to blame external factors for his academic challenges (Parent Ex. G at p. 4). The progress report also stated the student had no significant physical issues that impacted his academic performance (id.).

2. SETSS From EDopt

During the 2023-24 school year, the student received special education services through EDopt (Parent Exs. F at p. 1; G at p. 1; see Parent Exs. C; H; I). However, as noted by the IHO, the provider agency provided a program which was recommended in 2020 (over three years earlier) (see IHO Decision at pp. 6-7). Following this point, it is worth noting that, as discussed above, the description of the student from the May 2020 IESP to the undated 2023-24 SETSS progress report prepared by EDopt shows that the student's academic functioning was falling further behind grade level. For example, while the student had previously been described as "a little behind his peers in writing and language arts" with an estimate that the student was functioning at a sixth-grade level in both reading and math when the student was in the seventh grade (Parent Ex. B at p. 1), the SETSS progress report indicated the student had "significant" academic deficits, that his "overall reading abilities remain[ed] significantly below grade level," and reported the student had "a current reading level equivalent to that of a 7th grader" (Parent Ex. G at pp. 1-2).[16] Additionally, while the May 2020 IESP did not identify any concerns regarding the student's attention or any behavioral issues, the undated 2023-24 SETSS progress report indicated that the student struggled

[15] The report indicated the student had difficulty with sustaining focus and that his tendency to avoid asking for help often resulted in incomplete or incorrect math assignments (Parent Ex. G at p. 3). However, it is unclear who provided this information as the SETSS provider provided the student with 1:1 instruction in math and indicated that, in that setting, the student "receive[d] the attention and support needed to understand the material" (id.).

[16] Although the SETSS progress report indicated in the written summary that the student's reading level was equivalent to a student at the seventh-grade level, the report also noted that the student has a reading grade equivalent at the 11th grade and a math grade equivalent at the 11th grade (Parent Ex, G at p. 1). However, the hearing record does not clarify this discrepancy.

with focus, motivation, and attention, that the student "often f[ound] himself in trouble due to impulsive behavior and a lack of focus during class" (Parent Exs. B; G at pp. 1, 4).

Turning back to the IHO's decision, the IHO noted that the sessions notes did not identify what goals had been established for the student to work toward, further noting some goals were from 2020 and some of the sessions notes had no relation to the provision of SETSS (see IHO Decision at pp. 6-7).

Review of the undated 2023-24 SETSS progress report shows that it included annual goals targeting improving the student's reading comprehension by identifying key details and summarizing grade level text, writing a five-paragraph essay, solving multi-step math problems, including word problems, and demonstrating increased participation in class discussions and taking responsibility for academic progress (Parent Ex. G at pp. 4-5). Review of the sessions notes shows that the SETSS provider indicated that these goals were worked on during the 2023-24 school year (compare Parent Ex. G at pp. 4-5, with Parent Ex. H). The SETSS session notes included many weeks of entries with the student working on activities involving personal finance, calculating interest, US history and ELA test preparation, watching audio/visual clips on anatomy and US history, using an "online, matching" activity in learning anatomy, naming the theme of short stories, "playing to his strength" as an auditory learner, and studying with classmates instead of "just socializing" (see Parent Ex. H at pp. 1-10). Also, a number of the session notes involved activities which were aligned with goals identified in the 2020 IESP such as identifying the main idea and grade level vocabulary, which were not identified as needs in the then-current 2023-24 school year's progress report (compare Parent Ex. B at p. 1, with Parent Ex. H at pp. 1, 4-6).

Of particular concern is that the undated 2023-24 SETSS progress report did not include any goals addressing the student's identified needs in decoding and fluency (Parent Ex. G at pp. 1, 4-5). In addition, although the progress report stated that the provider modeled decoding strategies, focused on guided reading sessions where the student was encouraged to decode words aloud, and helped the student to pause at punctuation marks and read sentences fluently, the accompanying 2023-24 SETSS session notes included only two entries which noted decoding, for the weeks of December 11 to December 17, 2023 and May 13 to May 19, 2024 and no entries regarding fluency (compare Parent Ex. G at p. 2, with Parent Ex. H).

Further, and upon closer inspection, these two entries show that the lesson only tangentially targeted decoding. For the week of December 11, 2023, the session note indicated the student was using an online, matching, colored visual aid to help him with learning the parts of the skull in his anatomy class (Parent Ex. H at p. 2). For the week beginning May 13, 2024 the note stated the student was engaged in an activity of learning how to identify key words and phrases in the NYS English language arts (ELA) Regents questions and that "Best Described" and "Most Likely" were "phrases that help the student realize that although one or more answers may be close to the correct answer, … the student is supposed to think deeply to identify the 'best' answer" (id. at p. 8). According to the session notes, these activities were matched with a goal for "Decoding" where the student would know and apply grade level phonics and word analysis and would use combined knowledge of all letter-sound correspondence, syllabication patterns, and morphology to read unfamiliar multi-syllabic words in and out of context (id. at pp. 2, 8). However, it is not clear how the student was expected to apply grade level phonics when he was described in the progress report as reading at a seventh-grade level while in an eleventh-grade class at the student's nonpublic

school, with his comprehension skills higher than his decoding skills (Parent Ex. G at p. 1). Additionally, it is unclear how the SETSS provider was working with the student on reading grade level texts, as indicated in both the 2023-24 SETSS progress report and the sessions notes, while the student was simultaneously described as being four grade levels behind in reading (see Parent Exs. G at pp. 1-2, 4; H).

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 . . ., the content, methodology, or delivery of instruction to address the unique needs that result from the student's disability; and to ensure access of the student to the general curriculum, so that he or she can meet the educational standards that apply to all students" (8 NYCRR 200.1 [vv]; see 34 CFR 300.39 [b][3]). Accordingly, it is expected that in order to meet her burden, the parent should provide some information regarding the curriculum provided to the student at the nonpublic school and how the student was functioning in the nonpublic school. However, the hearing record is void of information from the nonpublic school program the student attended during the 2023-24 school, which the additional SETSS services should have been designed to complement (see Tr. pp. 1-14; Parent Exs. A-I; K-L).

While the evidence in the hearing record shows that the SETSS provider delivered some specially designed instruction, the SETSS progress report and session notes demonstrate that the provider mostly worked with the student on a mix of generic academic skills which did not align with the student's identified areas of need or to a specific curriculum, particularly with respect to teaching the student decoding skills and improving the student's reading fluency, and with describing how the student was expected to read at grade level. To begin, the 2023-24 SETSS progress report states generally that the SETSS sessions were utilized to address the student's deficits through activities and strategies that were designed to remediate the student's deficits and support him in making progress toward age-appropriate goals and objectives (Parent Ex. G at p. 1). This vague and general statement provides no information about the instruction provided to the student.

The parent cites to the progress report and argues that it illustrates how a program was developed to address the student's deficits and that the student was making progress.[17] While not dispositive on the issue of appropriateness, a review of the student's 2023-24 school year progress

[17] It is well settled that a finding of progress is not required for a determination that a student's unilateral placement is adequate (Scarsdale Union Free Sch. Dist. v. R.C., 2013 WL 563377, at *9-*10 [S.D.N.Y. Feb. 4, 2013] [noting that evidence of academic progress is not dispositive in determining whether a unilateral placement is appropriate]; see M.B. v. Minisink Valley Cent. Sch. Dist., 523 Fed. App'x 76, 78 [2d Cir. Mar. 29, 2013]; D.D-S. v. Southold Union Free Sch. Dist., 506 Fed. App'x 80, 81 [2d Cir. Dec. 26, 2012]; L.K. v. Ne. Sch. Dist., 932 F. Supp. 2d 467, 486-87 [S.D.N.Y. 2013]; C.L. v. Scarsdale Union Free Sch. Dist., 913 F. Supp. 2d 26, 34, 39 [S.D.N.Y. 2012]; G.R. v. New York City Dep't of Educ., 2009 WL 2432369, at *3 [S.D.N.Y. Aug. 7, 2009]; Omidian v. Bd. of Educ. of New Hartford Cent. Sch. Dist., 2009 WL 904077, at *22-*23 [N.D.N.Y. Mar. 31, 2009]; see also Frank G., 459 F.3d at 364). However, while not dispositive, a finding of progress is, nevertheless, a relevant factor to be considered in determining whether a unilateral placement is appropriate (Gagliardo, 489 F.3d at 115, citing Berger, 348 F.3d at 522 and Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 26-27 [1st Cir. 2002]).

report reveals that progress was noted in the areas of sustained attention during reading, decoding skills, constructing "more coherent" essays, using transitional phrases, using a graphing calculator, and understanding basic algebraic concepts (Parent Ex. G at pp. 1-3). While this progress aligns with some of the student's areas of need identified in the progress report, the noted progress aligns with only one of the student's four identified goals and no mention was made of the student's progress toward his goals targeting reading comprehension, solving multi-step math problems, or demonstrating increased participation in class discussions and taking responsibility for his academic progress (id. at pp. 1-5). Additionally, review of the session notes indicates that the student was not making progress in reading comprehension, as, although unexplained, the ratings provided with the description of what goals the SETSS provider was working on with the student appears to be more sporadic than showing improvement in any skill area (see Parent Ex. H). Finally, the final entry on the session notes indicates that the student requested that short stories be read aloud to him and the SETSS provider had been providing the student with audio versions of texts or reading aloud to him in order to increase engagement and understanding (Parent Ex. H at p. 10). This appears to be a switch from focusing on teaching reading skills to accommodating the student's deficits and without someone to explain why the switch was made appears to show that the student was having some difficulty with the instruction that was being provided.

As a final point, the undated 2023-24 SETSS progress report stated that the student was receiving five hours of SETSS per week with four hours of 1:1 individual SETSS and one hour of group push-in support in the student's anatomy and history classes (Parent Ex. G at p. 1). However, the evidence in the hearing record indicates that the student did not receive SETSS services at that level (Parent Ex. H at pp. 4-8; I at pp. 2, 5, 7). The evidence shows the student did not receive services during portions of the school year (Parent Ex. H at pp. 4-8; I at pp. 2, 5, 7). In addition, the EDopt time sheets show that during the weeks the student did receive services, during the 2023-24 school year, the student was receiving SETSS on average less than the mandate and closer to about 3 1/2 sessions per week (see Parent Ex. I at pp. 1-10). Adding up the total number of hours, the student received approximately 123.5 hours of SETSS during the 2023-24 school year, which if divided by the five hours of SETSS the 2023-24 progress report indicated the student was receiving, would amount to a total of approximately 25 weeks of school for the 2023-24 school year.

Overall, the totality of the evidence does not support a finding that the parent met her burden of showing that the unilaterally obtained services were designed to meet the student's needs. In particular, it must be noted that the parent continued a special education program consisting of five periods per week of SETSS for the student during the 2023-24 school year. Essentially, the parent continued a program that was recommended for the student in the May 2020 IESP, when the student was described one grade level behind in reading and math. However, as of the 2023-24 school year, the SETSS progress report described the student as having "significant" academic and cognitive deficits and as being four grade levels behind in reading (Parent Ex. G at p. 1). Considering this description of the student, continuing the same five periods per week of SETSS for the 2023-24 school year was not appropriate to meet the student's needs.

Accordingly, the hearing record does not support finding that the SETSS delivered by EDopt to the student constituted specially designed instruction sufficient to meet the student's identified needs. The only witness who testified on behalf of the parent was the financial administrator of EDopt who was unable to identify anything about the services provided to the

student including assessments, instruction, or progress (see Parent Ex. F). Although the session notes and progress report provided some information, as described above, they did not adequately describe the specially designed instruction used during SETSS to address the student's identified needs. Without such evidence, I find that the parent did not sustain her burden to demonstrate how the unilaterally obtained SETSS provided specially designed instruction to meet the student's unique needs (see L.K. v. Northeast Sch. Dist., 932 F. Supp. 2d 467, 491 [S.D.N.Y. 2013] [in reviewing the appropriateness of a unilateral placement, courts prefer objective evidence over anecdotal evidence]).

Based upon the foregoing, I find that the IHO correctly determined that the hearing record did not include sufficient evidence to find that the SETSS procured for the student was appropriate and therefore, correctly denied the parent's request for direct funding of her unilaterally obtained SETSS for the 2023-24 school year.

VII. Conclusion

Having determined that the evidence in the hearing record supports the IHO's conclusion that the SETSS delivered by EDopt to the student during the 2023-24 school year were not appropriate, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 29, 2025

STEVEN KROLAK
STATE REVIEW OFFICER