The University of the State of New York

The State Education Department
State Review Officer
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No. 23-225

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

Appearances:
Liz Vladeck, General Counsel, attorneys for respondent, by Thomas W. MacLeod, 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 the decision of an impartial hearing officer (IHO) which denied in part her request for reimbursement for the cost of special education services she unilaterally obtained from Benchmark Student Services LLC (Benchmark) for her daughter during the 2022-23 school year. Respondent (the district) cross-appeals from the IHO's determination that the district waived an affirmative defense. The appeal must be sustained in part. The cross-appeal must be dismissed. For reasons set forth below, the matter is remanded for further administrative proceedings.

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 Individuals with Disabilities Education Act (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, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 8 NYCRR 200.5[h]-[*l*]).

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

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

III. Facts and Procedural History

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

Briefly, the CSE convened on May 27, 2021, to develop an IESP for the student for the 2021-22 school year with an implementation date of June 17, 2021 (see Dist. Ex. 2). The May

2021 CSE recommended that the student receive three periods per week of direct, group special education teacher support services (SETSS), three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling services (Dist. Ex. 2 at pp. 7-8).

On September 14, 2022, the parent sent a letter to the district in which the parent stated the last IESP created for the student was a May 2017 IESP and that since such date, the district has not implemented "the recommended SETSS, Related Services and paraprofessional Services" (Parent Ex. C).[1] The parent further stated that if the district did not provide the student's "mandated services," she would continue to obtain such services through an agency with whom she contracted (id.).

On September 15, 2022, the parent signed a contract with Benchmark in which the parent agreed to pay Benchmark for the SETSS instruction it provided to student during the 2022-23 school year at "enhanced market rates" (Parent Ex. D).[2] Under the agreement "if the [p]arent cho[se] not to seek funding from the [district,] the parent [was] responsible for the cost of the services at the rate charged by Benchmark" and the parent would be billed on a monthly basis (id. at p. 2). The agreement further provided that "[i]f the [p]arent chooses to litigate the cost of these services against the [district,] Benchmark may agree to delay invoicing until the case is litigated and finalized. However, the [p]arent remains responsible for the full payment amount that is not funded by the [district]" (id.). According to a Benchmark administrator, Benchmark began providing instruction to the student on or about September 12, 2022 (see Parent Ex. H ¶ 3).

According to the parent, she initially filed a due process complaint notice relating to the 2022-23 school year on September 16, 2022 but then subsequently withdrew it without prejudice on January 19, 2023 (Parent Ex. A at p. 2). Following the withdrawal of the parent's September 2022 due process complaint notice, the CSE convened on February 6, 2023 and created an IESP for the student with an implementation date of February 23, 2023 (Dist. Ex. 3 at p. 1). The February 2023 CSE continued to recommend three periods per week of direct, group SETSS, three 30-minute sessions per week of individual speech-language therapy and one 30-minute session per week of individual counseling services (compare Dist. Ex. 3 at pp. 8-9, with Dist. Ex. 2 at pp. 7-8).

A. Due Process Complaint Notice

In a second due process complaint notice dated May 24, 2023, the parent, through a lay advocate, alleged the district did not develop an IESP for the 2022-23 school year nor did it implement pendency (stay-put) services for the student during the period of time between September 16, 2022 and January 19, 2023 (see Parent Ex. A). The parent further alleged that the district failed to reevaluate the student (id.). The parent also sought an order from the IHO to fund the student's "current educational placement" in accordance with the student's IESP dated May 6,

[1] According to the May 2017 IESP, no paraprofessional services were recommended for the student (see generally Parent Ex. B).

[2] Benchmark 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).

2017.[3] As relief, the parent sought: a finding that the district failed to provide the student with a free appropriate public education (FAPE) for the 2022-23 school year; an order directing the district to implement the student's recommended instruction from Benchmark and related services at enhanced market rates; and an order directing the district to provide a bank of compensatory education services for the services that the district did not provided during the 2022-23 school year (Parent Ex. A at p. 2).

B. Impartial Hearing Officer Decision

The parties convened for a prehearing conference on June 16, 2023 before the Office of Administrative Trials and Hearings (OATH), and the IHO assigned to hear the matter issued a prehearing conference summary and order which indicated the issues to be addressed as: "Compensatory Education/Services; IESP Hourly Rate or Implementation of Services; Payment: Services; RSA; [and] SETSS for the 2022-2023 school year(s)" (Pre-Hr'g Conf. Summ. & Order ¶ 3). The prehearing conference summary and order also indicated that the parent was no longer requesting a pendency placement (id. ¶ 1).

The parties reconvened for an impartial hearing on July 26, 2023, which concluded on the same day (Tr. pp. 1-35). During its opening statement, the district's counsel stated that the parent has an affirmative obligation to request services from the district each year no later than June 1 of each year and further alleged that there was no evidence that showed that the parent requested services for the 2022-23 school year prior to June 1, 2022 (Tr. pp. 10-11). During its closing statement, the district's counsel asserted once more that the June 1 deadline was not met (Tr. p. 30).

During the parent's opening statement, the parent's attorney clarified that the parent was seeking direct funding by the district for the unilaterally obtained instruction she obtained for the student during the 2022-23 school year by Benchmark at the enhanced rate of $175 per hour and a "bank of compensatory hours" of related services consisting of 20 hours of counseling services and 60 hours of speech-language therapy (Tr. pp. 12-13).

In a decision dated September 8, 2023, the IHO stated that "I found the Parent's testimony to be relevant but do not credit her testimony due to inconsistencies with regards to creation of key documents, attendance at CSE meetings, timeline of requests, service implementation and contractual signature. I found the Agency witness credible as to the rates and contractual obligations" (IHO Decision at p. 5).[4] The IHO determined that the district met its burden of proof that it offered the student a FAPE for a portion of the 2022-23 school year from September 12, 2022 to February 23, 2023, but that it did not meet its burden that it offered the student a FAPE

[3] I note that the May 2017 CSE recommended the same services as were later listed in the May 2021 IESP and the February 2023 IESP; three periods per week of direct, group SETSS, three 30-minute sessions per week of individual speech-language therapy, and one 30-minute session per week of individual counseling services (compare Parent Ex. B at pp. 5-6, with Dist. Ex. 2 at pp. 7-8, and Dist. Ex. 3 at pp. 8-9).

[4] The IHO affixed two dates to the signature page of the decision, September 7, 2023 and September 8, 2023 (IHO Decision at pp. 1, 11). As discussed in more detail below, I find that the decision was signed on September 8, 2023 (id. at p. 11).

from February 23, 2023 to June 27, 2023 (see IHO Decision). The IHO also determined that Benchmark was an appropriate unilateral service provider and that equitable considerations weighed in favor of the parent for reimbursement of the unilaterally obtained services from February 23, 2023 to June 27, 2023 (id.).

The IHO noted that it was uncontested that the student attended a nonpublic school during the 2022-23 school year and indicated that the parent did not challenge the content of the three IESPs (May 2017 IESP, May 2021 IESP, and February 2023 IESP) at issue, but rather alleged that the district failed to deliver the services it recommended in each of the IESPs respectively (IHO Decision at p. 2). The IHO then addressed the legal framework relevant to this matter, more specifically, the State's dual enrollment statute and the June 1 deadline (IHO Decision at pp. 6-8). The IHO stated that it was uncontested that the student was entitled to services recommended in the February 2023 IESP; that the district did not provide proof that services recommended were provided to the student beginning February 23, 2023; and that the district challenged the delivery and appropriateness of the services provided by Benchmark but did not dispute the enhanced rate charged by Benchmark (id. at p. 7). The IHO determined that the district waived its June 1 affirmative defense for numerous reasons including the failure to adhere to the IHO's prehearing order to identify defenses in a timely manner and because the district nevertheless proceeded to provide the student with partial services under the IESP for the 2022-23 school year (IHO Decision at pp. 7-8).

However, the IHO also determined that the parent did not act in good faith with respect to requesting services from the district and contracting with Benchmark prior to the February 2023 IESP (id. at p. 7). As for the parent's requested relief, the IHO determined that from February 23, 2023 through June 27, 2023, the student was entitled to direct, group SETTS three times per week, individual speech-language therapy three times per week for 30-minutes, and individual counseling services once per week for 30-minutes (IHO Decision at p. 10). The IHO ordered the district to reimburse the parents for the cost of the student's unilaterally obtained services provided by Benchmark from February 23, 2023 through June 27, 2023 upon proof of payment and for the district to fund and provide the student with a bank of compensatory services consisting of 17 half-hours of speech-language therapy and 51 half-hours of counseling to be provided by a provider of the parent's choosing (IHO Decision at p. 11).[5]

IV. Appeal for State-Level Review

The parent, through the lay advocate, appeals from the decision of the IHO. The parties' familiarity with the particular issues for review on appeal in the parent's request for review is also presumed and, therefore, the allegations and arguments will not be recited here in detail. The crux of the parent's appeal is whether the IHO erred in finding that the district offered the student a FAPE from September 12, 2023, and February 23, 2023, and whether the IHO erred in failing to

[5] The IHO signed a "corrected" decision in this matter on September 9, 2023, which modified the ordered compensatory education relief to 51 half-hours of speech-language therapy and 17 half-hours of counseling. Once again, in the corrected version, the IHO affixed two different decision dates on the signature page, September 8, 2023, and September 9, 2023. According to the electronic signature, the corrected version was signed by the IHO on September 9, 2023.

order the district to directly fund the unliterally obtained instruction from Benchmark in contrast to reimbursing the parent.

In its answer with cross-appeal, the district argues that the parent's appeal should be dismissed on the basis that the parent failed to timely initiate the appeal. The district further responds to the parent's material allegations and argues that the IHO's decision should be upheld in its entirety, except that portion in which the IHO determined that the district waived its June 1 deadline. The district alleges that the IHO incorrectly found that the district waived the June 1 deadline as a defense and further requests that the IHO's finding on that point be reversed and the parent's request be denied in its entirety. Should the district not prevail with its arguments regarding the June 1 notice defense, the district argues in the alternative that the IHO should have applied a Burlington/Carter analysis to the parent's request for Benchmark's services, that reimbursement instead of direct funding of Benchmark was appropriate, and that equitable considerations supported the IHO's decision to deny funding "for the start of the [school year] at [i]ssue."

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

[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]).

nonpublic schools located within the school district (id.).[7] Thus, under State law an eligible New York State resident student may be voluntarily enrolled by a parent in a nonpublic school, but at the same time the student is also enrolled in the public school district, that is dually enrolled, for the purpose of receiving special education programming under Education Law § 3602-c, dual enrollment services for which a public school district may be held accountable through an impartial hearing.

The burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see R.E., 694 F.3d at 184-85).

VI. Discussion

A. Preliminary Matter—Initiation of the Appeal

As a threshold matter, it must be determined whether the parent's appeal should be dismissed for untimeliness.

An appeal from an IHO's decision to an SRO must be initiated by timely personal service of a verified request for review and other supporting documents upon a respondent (8 NYCRR 279.4[a]). A request for review must be personally served within 40 days after the date of the IHO's decision to be reviewed (id.). If the last day for service of any pleading or paper falls on a Saturday or Sunday, service may be made on the following Monday; if the last day for such service falls on a legal holiday, service may be made on the following business day (8 NYCRR 279.11[b]). State regulation provides an SRO with the authority to dismiss sua sponte an untimely request for review (8 NYCRR 279.13; see e.g., Application of the Board of Educ., Appeal No. 17-100 [dismissing a district's appeal for failure to timely effectuate personal service on the parent]; Application of a Student with a Disability, Appeal No. 16-014 [dismissing a parent's appeal for failure to effectuate service in a timely manner]; Mt. Vernon City Sch. Dist. v. R.N., 2019 WL 169380 [Sup. Ct. Westchester Cnty. Jan. 9, 2019] [upholding the dismissal of an SRO appeal as untimely, as calculation of the 40-day time period runs from the date of an IHO decision, not from date of receipt via email or regular mail], aff'd 188 A.D.3d 889 [2d Dep't 2020]). However, an SRO may, in his or her sole discretion, excuse a failure to timely seek review within the 40-day timeline for good cause shown (8 NYCRR 279.13). The reasons for the failure must be set forth in the request for review (id.). "Good cause for late filing would be something like postal service error, or, in other words, an event that the filing party had no control over" (Grenon v. Taconic

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

Hills Cent. Sch. Dist., 2006 WL 3751450, at *5 [N.D.N.Y. Dec. 19, 2006]; see T.W. v. Spencerport Cent. Sch. Dist., 891 F. Supp. 2d 438, 441 [W.D.N.Y. 2012]).

The district argues that the parent's request for review fails to comply with the practice requirements of Part 279 because the parents failed to timely serve the request for review within 40 days after the date of the IHO's decision. The district alleges that the IHO improperly issued a corrected decision on September 8, 2023, and therefore such date cannot be used for calculating the date on which the parent should have initiated this appeal.[8] The district argues that IHO's final decision date for purposes of calculating the date on which the parent needed to initiate this appeal was September 7, 2023, and thus the parent needed to personally serve the district with her request for review by October 17, 2023. According to the district and the parent's affidavit of service, the parent served the district on October 18, 2023 (see Answer with Cross-appeal ¶ 13; Parent Aff. of Service).

The parent argues that the IHO made an obvious error in her compensatory education calculation for which the IHO issued a corrected decision, but that both the initial decision and the corrected decision have the same date of September 8, 2023. The parent alleges that she believed the initial decision was issued on September 8, 2023, as indicated on the decision cover sheet, and thus she served her request for review appropriately upon the district 40-days after the date of the decision, on October 18, 2023. The parent also argues that the IHO also signed the first decision on September 8, 2023 at 10:40:16 a.m. as indicated by the IHO's electronic signature at the end of her decision. The parent alleges that the electronic timestamp clearly shows the date and time when the IHO affixed her signature to the decision and that the IHO decision, without explanation, includes the date of September 7, 2023 next to her signature.

Based on the following, it appears that although the IHO has indicated multiple dates within her initial findings of fact and decision, she signed the decision on September 8, 2023, the date indicated on the cover page of the final decision.[9] As such, the parent is correct that September 8,

[8] As indicated above, the corrected IHO decision was dated September 8, 2023 but was electronically signed on September 9, 2023.

[9] Although the IHO issued the corrected findings of fact and decision dated September 8, 2023, however well intentioned, it made material alteration to the amounts of relief ordered against the district after the proceeding concluded, which is impermissible. An IHO's jurisdiction is limited by statute and regulations and there is no authority for an IHO to reopen an impartial hearing, reconsider a prior decision, or retain jurisdiction to resolve future disputes between the parties (see Application of a Student with a Disability, Appeal No. 21-133; Application of the Dep't of Educ., Appeal No, 17-009; Application of the Dep't of Educ., Appeal No. 16-065; Application of a Student with a Disability, Appeal No. 16-035; Application of the Dep't of Educ., Appeal No. 15-073; Application of a Student with a Disability, Appeal No. 15-026; Application of the Dep't of Educ., Appeal No. 12-096; Application of a Student with a Disability, Appeal No. 11-046; Application of the Dep't of Educ., Appeal No. 11-014; Application of the Dep't of Educ., Appeal No. 08-024; Application of the Bd. of Educ., Appeal No. 07-081; Application of the Dep't of Educ., Appeal No. 06-133; Application of a Child with a Disability, Appeal No. 06-021; Application of a Child with a Disability, Appeal No. 05-056; Application of the Bd. of Educ., Appeal No. 02-043; Application of the Bd. of Educ., Appeal No. 98-16; see also J.T. v. Dep't of Educ., 2014 WL 1213911, at *10 [D. Haw. Mar. 24, 2014]; Application of the Dep't of Educ., Appeal No. 08-041). Rather, the IDEA, the New York State Education Law, and federal and State regulations provide that an IHO's decision is final unless appealed to an SRO (20 U.S.C. § 1415[i][1][A]; Educ. Law § 4404[1][c]; 34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]). As such, when the IHO issued her initial decision on September 8, 2023,

2023 was the correct date to calculate the time to appeal and her verified request for review was timely served on the district.

B. Education Law § 3602-c and June 1 Deadline

Turning to the cross-appeal, the district claims the IHO erred in her determination that the district waived its Education Law § 3602-c June 1 deadline defense. The IHO determined that the district waived such defense in "three distinct ways" (IHO Decision at p. 7).

First, the IHO found that the district waived this defense because it failed to comply with the IHO's June 16, 2023, prehearing conference summary and order which required the parties to articulate any known or knowable affirmative defenses within 10-days of the date of such order (IHO Decision at p. 7). Second, the IHO reasoned that because the district representative stated at the impartial hearing that the student was entitled to services recommended in the IESP and raised the issue of the June 1 deadline for the first time during its closing argument, this constituted a waiver (id. at p. 8). Third, the IHO reasoned that because the district partially provided related services during the 2022-23 school year, this also constituted a waiver of the June 1 defense (id.). More specifically, the IHO determined that if an IESP was developed less than a year before the June 1 in question, and the services were to be implemented, as in this matter, for one year, the district made "the conscious choice to proceed after the June 1 deadline" and waived the defense (id.).

The State's dual enrollment statute requires parents of a New York State resident student with a disability who is parentally placed in a nonpublic school and for whom the parents seek to obtain educational services to file a request for such services in the district 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]).

Accordingly, it must first be determined whether the IHO properly found that the district waived its June 1 defense procedurally by first raising the issue at the impartial hearing and not within 10-days of the June 16, 2023 prehearing conference summary and order.

The issue of the June 1 deadline fits with other affirmative defenses, such as the defense of the statute of limitations, which are required to be raised at the initial hearing (see M.G. v. New York City Dep't of Educ., 15 F. Supp. 3d 296, 304, 306 [S.D.N.Y. 2014] [holding that the limitations defense is "subject to the doctrine of waiver if not raised at the initial administrative

her jurisdiction over the matter ended. Allowing issuance of multiple final decisions with substantive changes would create confusion and throw the due process hearing system envisioned by Congress into disarray, resulting in multiple appeals from multiple final decisions. The issuance of multiple final decisions in this case has only added to the disputes between the parties in this proceeding. While a state may adopt a procedure allowing for a clarification or a motion for reconsideration prior to adoption of a final decision within the 45-day timeline, there is no such general State law or regulation in this jurisdiction (see Questions and Answers on IDEA Part B Dispute Resolution Procedures, 61 IDELR 232, at p. 46 [OSEP 2013] [indicating that a state could allow motions for reconsideration before issuance of a final decision]; see also T.G. v. Midland Sch. Dist. 7, 848 F. Supp. 2d 902, 930-31 [C.D. Ill. 2012] [discussing Illinois's statute that permits an IHO to retain jurisdiction to provide clarification of a written decision, so long as the request for such clarification by a party is provided in writing within five days of receipt of that decision and a final decision is reached within the 45-day timeline]).

hearing" and that where a district does "not raise the statute of limitations at the initial due process hearing, the argument has been waived"]; see also R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *4-*6 [S.D.N.Y. Sept. 16, 2011] [noting that the IDEA "requir[es] parties to raise all issues at the lowest administrative level" and holding that a district had not waived the limitations defense by failing to raise it in a response to the due process complaint notice where the district articulated its position prior to the impartial hearing]; Vultaggio v. Bd. of Educ., Smithtown Cent. Sch. Dist., 216 F. Supp. 2d 96, 103 [E.D.N.Y. 2002] [noting that "any argument that could be raised in an administrative setting, should be raised in that setting"]). "By requiring parties to raise all issues at the lowest administrative level, IDEA 'affords full exploration of technical educational issues, furthers development of a complete factual record and promotes judicial efficiency by giving these agencies the first opportunity to correct shortcomings in their educational programs for disabled children.'" (R.B. v. Dep't of Educ. of the City of New York, 2011 WL 4375694, at *6 [S.D.N.Y. Sept. 16, 2011], quoting Hope v. Cortines, 872 F. Supp. 14, 19 [E.D.N.Y. 1995] and Hoeft v. Tucson Unified Sch. Dist., 967 F.2d 1298, 1303 [9th Cir. 1992]; see C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *12 [S.D.N.Y. Sept. 22, 2011]).

Moreover, unless specifically prohibited by regulation, IHOs are provided with broad discretion, subject to administrative and judicial review procedures, in how they conduct an impartial hearing, so long as they "accord each party a meaningful opportunity" to exercise their rights during the impartial hearing (Letter to Anonymous, 23 IDELR 1073 [OSEP 1995]; see Impartial Due Process Hearing, 71 Fed. Reg. 46,704 [Aug. 14, 2006] [indicating that IHOs should be granted discretion to conduct hearings in accordance with standard legal practice, so long as they do not interfere with a party's right to a timely due process hearing]). An IHO must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]).

In this instance, the hearing record includes a prehearing conference summary and order dated June 16, 2023 which reflects that representatives for the parties and the IHO discussed the process for how the impartial hearing would be conducted (see June 16, 2023 Pre-Hr'g Conf. Sum. and Order). According to the prehearing conference summary and order, the parties were required to articulate any known or knowable affirmative defense within 10 calendar days of the date of the prehearing conference summary and order, which included but was not limited to statute of limitations and the June 1 deadline pursuant to Education Law § 3602-c (June 16, 2023 Pre-Hr'g Conf. Sum. and Order ¶ 15). There is no evidence in the hearing record that the district raised the June 1 deadline defense within10 days after June 16, 2023 prehearing order. The district argues that the IHO was improper for the IHO's prehearing conference summary and order to demand that the district raise any and all affirmative defenses, including the June 1 defense, within 10 days of the date on the order. Specifically, the district argues that " with respect to the IHO's first ground for waiver, it was improper for the IHO's prehearing order dated June 16, 2023, to demand that the DOE raise any and all affirmative defenses, including the June 1st defense, within 10 days of the date on the order. However, IHOs cannot circumscribe a litigant's due process rights to the extent attempted by the IHO in this matter." To the contrary, the IHO was well within her authority to manage the proceeding through the prehearing order and went so far as to specifically mention the June 1 notice provision among the nonexclusive list of potential defenses. Not only is it permissible to "circumscribe," or in other words, manage the impartial hearing process in this manner, it is an excellent example of how a proceeding should be managed effectively and

efficiently at the prehearing stage, rather than waiting until the evidentiary phase of the proceeding has already begun.

The district cites to two prior SRO decisions to argue that the June 1 deadline is an affirmative defense that can be preserved until the time that the evidentiary phase of the impartial hearing begins and is considered timely if it is raised at some point during the impartial hearing (see Application of a Student with a Disability, Appeal No. 23-162; Application of a Student with a Disability, Appeal No. 23-114). However, the district misapplies both of those authorities because no prehearing order was issued by the IHO to manage either proceeding (id.). In Application of a Student with a Disability, Appeal No. 23-114, three prehearing conferences took place, all of which the district failed to attend, but unlike this proceeding, there were no prehearing orders in the administrative record that specified parties needed to raise any affirmative defenses within a certain time period (Application of a Student with a Disability, Appeal No. 23-114 at p. 3, n. 3). Moreover, in Application of a Student with a Disability, Appeal No. 23-162, no prehearing order was issued and no prehearing conference of any kind took place and the undersigned indicated that it would have been preferable if the district representative raised the June 1 deadline at a prehearing conference (that is earlier, not later), thus the June 1 issue escaped earlier detection in the hearing process only because the IHO in that matter did not attempt to clarify the disputed issues at an earlier point using prehearing procedures designed to clarify the issues in accordance with the IHO's authority in State regulation (Application of a Student with a Disability, Appeal No. 23-162 at p. 7; see 8 NYCRR 200.5[j][3][xi][a], [e]). The case stood as an example of what a hearing officer should not do (i.e. delay clarification of issues due to a lack of prehearing conferences and orders) and further undermines the district's argument in this proceeding. Thus, district's reliance on Application of a Student with a Disability, Appeal No. 23-162 and Application of a Student with a Disability, Appeal No. 23-114 are misplaced.

Thus, it was well within the IHO's authority to require parties to raise any known or knowable affirmative defenses within 10 days of the prehearing conference summary and order. The district has not put forth an argument as to why such an affirmative defense as the June 1 notice deadline was not known or could not be raised within such time period, and in these circumstances it is difficult to imagine how the district could have missed it other than through its own failure to keep or examine its own records regarding the student, especially after the parent filed two due process complaints (albeit withdrawing the first in January 2023). Moreover, the IHO provided the parties with an opportunity to raise concerns or objections to the IHO's prehearing order, and the district failed to avail itself of that opportunity as well (Pre-Hr'g Conf. Summ. & Order at 4). Therefore, the IHO was correct in her determination that the district procedurally waived the defense by not raising it within the 10-day deadline pursuant to the June 16, 2023 prehearing conference summary and order. It is unnecessary for the undersigned to consider the IHO's remaining determinations why the district waived the June 1 deadline at length given the determination above, other than to note in that it appears that the district correctly states that there is no evidence to support the IHO's finding that the district provided "some of the related services in the IESP" (IHO Decision at p. 7). Thus, that factual finding by the IHO was erroneous. However, the error is harmless because the district nevertheless developed a February 2023 IESP with an implementation date in February 2023 suggesting that the CSE believed it should have been providing the student with services during the 2022-23 school year (Dist. Ex. 3), and in no way does the IHO's erroneous fact finding mitigate the district's failure to comply with the IHO's

reasonable prehearing order. I will now turn to the parent's argument regarding the IHO's awarded relief.

C. Framework and Scope of Review

Although I find that the IHO used excellent prehearing management practices and thereby effectively resolved some issues in the case, I differ with the IHO on the approach to the parent's substantive claims. Having reviewed the IHO's decision and the parent's appeal, for the reasons described further below, this matter must be remanded to the IHO for further proceedings. Specifically, the IHO erred in failing to apply a Burlington/Carter analysis to the parent's claims. Therefore, the IHO's decision must be vacated, and the matter remanded to the IHO for further administrative proceedings utilizing the correct legal standard.

In this matter, both parties and the IHO agreed that the student has been parentally placed in a religious nonpublic school and the parent does not seek tuition reimbursement from the district for the cost of the student's parental placement in the yeshiva. Instead, the parent alleged that the district did not implement the student's mandated public services under the State's dual enrollment statute for the 2022-23 school year and then, as a self-help remedy, the parent unilaterally obtained private instruction from Benchmark for the student without the consent of the school district officials, and then commenced due process to obtain remuneration for the costs thereof. Although the due process complaint notice filed by the lay advocate implies that as proposed relief the parent was seeking an order "compelling the District to implement the student's program of SETSS" which could, standing alone, imply that the parent only wanted the district to implement the services, but the lay advocate added the phrase "at enhanced market rates" and also described Benchmark with whom the parent had privately arranged to provide special education services to the student.

Generally, districts who fail to comply with their statutory mandates to provide special education can be made to pay for special education services privately obtained for which a parent paid or became legally obligated to pay, a process that is essentially the same as the federal process under IDEA. Accordingly, the issue in this matter is whether the parent is entitled to public funding of the costs of the privately obtained instruction. "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."]). Accordingly, the parent's request for district funding of the unilaterally obtained instruction at issue here must be assessed under this framework.

Review of the IHO's decision shows that the IHO treated the relief sought by the parent only as compensatory education (IHO Decision at pp. 8-10). In support of her treatment of the relief as compensatory education, the IHO cited authority for the proposition that compensatory education may include reimbursement or direct payment of educational expenses (see id. at pp. 9-

10, citing Foster v. Bd. of Educ. of the City of Chicago, 611 Fed App'x 874, 878-79 [7th Cir. 2015], and Indep. Sch. Dist. No. 283 v. E.M.D.H ., 2022 WL 1607292, at *3 [D. Minn. 2022]). However, the IHO did not consider that, within the jurisdictions at issue in the cases cited, the burden of proof on all issues at the hearing lay on the party seeking relief, namely the parent, making the distinction between the different types of relief perhaps less consequential (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005]). In contrast, under State law in this jurisdiction, the burden of proof has been placed on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see Hardison v. Bd. of Educ. of the Oneonta City Sch. Dist., 773 F.3d 372, 386 [2d Cir. 2014]; C.F. v. New York City Dep't of Educ., 746 F.3d 68, 76 [2d Cir. 2014]; R.E., 694 F.3d at 184-85). In treating the requested relief as compensatory education, it is problematic to place the burden of production and persuasion on the district to establish appropriate relief when the parent has already unilaterally chosen the provider and obtained the services and is the party in whose custody and control the evidence necessary to establish appropriateness resides.

As a practical matter this kind of dispute can really only be effectively examined using a Burlington/Carter unilateral placement framework because the administrative due process system was not designed to set rate-making policies for what has grown into a completely unregulated industry of independent special education teachers whom parents within the New York City Department of Education are increasingly reliant upon, an industry that is not authorized by the State in the first place. The attempts to resolve such cases that do not use a Burlington/Carter style of analysis have tended to lead to chaos. All IHOs should use a Burlington/Carter style analysis when deciding cases in which a parent requests a school district to directly fund or reimburse costs incurred by the parent on behalf of a student when obtaining private services without the consent of public school officials.

Accordingly, although the IHO viewed the relief sought as a request for compensatory education (see IHO Decision at pp. 9-10), the parent's request for the costs of the privately obtained teacher instruction must be assessed under the Burlington-Carter framework. Thus, a board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 252 [2d Cir. 2009]).[10] 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

[10] 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 Benchmark for the student (Educ. Law § 4404[1][c]).

student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 CFR 300.148).

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

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

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

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

Here the evidence shows that after the district failed to implement the student's IESP services and the parent opted for the self-help remedy of obtaining private special education instruction from Benchmark without the consent of school district officials to remediate the lack of SETSS from a district teacher. The IHO merely stated that the evidence contained proof of the Benchmark's teacher's qualifications and certifications, but the IHO did not discuss the student's special education needs at all or make any factual findings with citation to the evidence that described how the services from Benchmark addressed those needs.

Accordingly, I find this matter should be remanded to the IHO to make factual findings with regard to whether the services unilaterally obtained by the parent appropriately addressed the student's needs and to what extent the student made progress.

I also note that the IHO also blended two forms of equitable relief in this proceeding by ordering reimbursement of the unilaterally obtained instructional services from Benchmark and ordering funding for speech-language services and counseling by providers of the parent's choosing at their "customary and regular rates" for the same time period (February 2023 through June 2023) (IHO Decision at p. 11). However, because the district failed to assert any challenges to those aspects of the IHO's decision to award relief in this manner, I find any such arguments have been waived and I will not disturb the IHO's decision to blend unilateral placement relief and compensatory education relief in this proceeding. I will allow the IHO to correct and adjust the quantity of compensatory education hours due to her well-meaning, but ill-advised attempt to issue a corrected decision with different relief after her final decision had been rendered.

D. Equitable Considerations

The parent also argues that the IHO erred in her determination to limit the awarded relief to a portion of the 2022-23 school year from February 23, 2023 to June 27, 2023, and awarding reimbursement rather than direct funding for the unilaterally obtained instruction from Benchmark. The district argues that the IHO properly weighed the equitable considerations in this matter and that her determination to deny funding for the beginning of the 2022-23 school year was proper. The IHO in her decision generally determined that the equities "demand[ed] a reduction in the award" and that the Benchmark's rate for SETSS was reasonable but did not give specifics as what facts presented were considered that warranted the reduction (IHO Decision at pp. 10-11).

Turning to a review of equitable considerations, the final criterion for a reimbursement award, the federal standard for adjudicating these types of disputes is instructive. Equitable considerations are relevant to fashioning relief under the IDEA (Burlington, 471 U.S. at 374; R.E., 694 F.3d at 185, 194; M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 68 [2d Cir. 2000]; see Carter, 510 U.S. at 16 ["Courts fashioning discretionary equitable relief under IDEA must consider all relevant factors, including the appropriate and reasonable level of reimbursement that should be required. Total reimbursement will not be appropriate if the court determines that the cost of the private education was unreasonable"]; L.K. v. New York City Dep't of Educ., 674 Fed. App'x 100, 101 [2d Cir. Jan. 19, 2017]). With respect to equitable considerations, the IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; 34 CFR 300.148[d]; E.M. v. New York City Dep't of Educ., 758 F.3d 442,

461 [2d Cir. 2014] [identifying factors relevant to equitable considerations, including whether the withdrawal of the student from public school was justified, whether the parent provided adequate notice, whether the amount of the private school tuition was reasonable, possible scholarships or other financial aid from the private school, and any fraud or collusion on the part of the parent or private school]; C.L., 744 F.3d at 840 [noting that "[i]mportant to the equitable consideration is whether the parents obstructed or were uncooperative in the school district's efforts to meet its obligations under the IDEA"]).

Additionally, under the federal statute, reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to their removal of the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 CFR 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; 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]); see Frank G., 459 F.3d at 376; Voluntown, 226 F.3d at 68).

Among other factors that may warrant a reduction in tuition under equitable considerations is whether the frequency of the services or the rate for the services were excessive (see E.M., 758 F.3d at 461 [noting that whether the amount of the private school tuition was reasonable is one factor relevant to equitable considerations]). The IHO may consider evidence regarding whether the rate charged by the private agency was unreasonable or regarding any segregable costs charged by the private agency that exceed the level that the student required to receive a FAPE (see L.K. v. New York City Dep't of Educ., 2016 WL 899321, at *7 [S.D.N.Y. Mar. 1, 2016], aff'd in part, 674 Fed. App'x 100).

Moreover, there has been recent cases with regard to fashioning equitable relief, more specifically whether the parent is intitled to direct funding rather than reimbursement, that the IHO did not consider. SROs in the past have required parents seeking direct funding relief to show a lack of financial resources (see, e.g., Application of a Student with a Disability, Appeal No. 11-049; Application of the Dep't of Educ., Appeal No. 11-041). However, recently, the District Court for the Southern District of New York has ruled in certain cases that such proof is not required before direct funding may be ordered (see Cohen v. New York City Dep't of Educ., 2023 WL 6258147, at *4-*5 [S.D.N.Y. Sept. 26, 2023] [ruling that parents "are not required to establish financial hardship in order to seek direct retrospective payment"]; Ferreira v. New York City Dep't of Educ., 2023 WL 2499261, at *10 [S.D.N.Y. Mar. 14, 2023] [finding no authority requiring "proof of inability to pay . . . to establish the propriety of direct retrospective payment"]; see also Maysonet v. New York City Dep't of Educ., 2023 WL 2537851, at *5-*6 [S.D.N.Y. Mar. 16, 2023] [declining to reach the question of whether parents must show their inability to pay in order to receive an award of direct tuition funding but, instead, considering additional evidence proffered

by the parents about their financial means to award direct tuition payment]). In Cohen, the court acknowledged the prior language in the decisions discussed above, noting that all of the courts which awarded direct funding "mentioned a parent's financial inability to pay tuition" (Cohen, 2023 WL 6258147, at *4, citing E.M., 758 F.3d 442 at 453 n.14, Mr. & Mrs. A, 769 F. Supp. 2d at 406, Connors, 34 F. Supp. 2d 795, and A.R., 2013 WL 5312537, at *11). However, the court found that language about parents' financial risk, arose in "cases where the Burlington prerequisites had not yet been satisfied," whereas in instances "where it has already been established that the district has failed to provide a child with a FAPE and (2) the private educational services obtained by the parents were appropriate, an award for direct retrospective payment would merely require the district to pay 'expenses that it should have paid all along and would have borne in the first instance had it developed a proper IEP'" (Cohen, 2023 WL 6258147, at *5, quoting E.M., 758 F.3d at 453 [internal quotations omitted]). The court further discussed the potential pitfalls of a different requirement, including "disparate requirements for parents of disabled children based on financial resources, notwithstanding the IDEA's requirement that all children with disabilities are entitled to a free education" (Cohen, 2023 WL 6258147, at *5 [emphasis in the original]).

With respect to financial risk (as opposed to parents' inability to pay), the court's decision in Cohen could be read broadly to overlook, in some instances, a parent's failure to establish financial risk if it was established that the district denied the student a FAPE and that the unilateral placement was appropriate (see Cohen, 2023 WL 6258147, at *5). However, such a broad reading would be contrary to longstanding precedent and would likely have problematic consequences for the process and the system.

In Burlington, the Court stated that "[p]arents who unilaterally withdraw their child from the public school and thereafter seek tuition reimbursement for the[ir] child's private placement do so at their own peril," because they bear the financial risk, both as to tuition and legal expense, and the burden of demonstrating the appropriateness of their relief (471 U.S. at 373-74). Congress thereafter took action to emphasize the need for parents to be invested in the process of developing a public school placement for eligible students with disabilities by placing limitations on private school reimbursements under IDEA (20 U.S.C. § 1412[a][10][iii]). This statutory construct is a significant deterrent to false or speculative claims (see Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 543 [2007] [Scalia, J., dissenting] [noting that "actions seeking reimbursement are less likely to be frivolous, since not many parents will be willing to lay out the money for private education without some solid reason to believe the FAPE was inadequate"]).

When the element of financial risk is removed entirely and the financial risk is borne entirely by unregulated private schools or agencies that have indirectly entered the fray in a very palpable way in anticipation of obtaining direct funding from the district, it has practical effects because parents begin seeking the best private placements possible with little consideration given to what the child needs for an appropriate placement as opposed to "everything that might be thought desirable by 'loving parents.'" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]). As the First Circuit Court of Appeals noted, "[t]his financial risk is a sufficient deterrent to a hasty or ill-considered transfer" to private schooling without the consent of the school district (Town of Burlington v. Dep't of Educ. for Com. of Mass., 736 F.2d 773, 798 [1st Cir. 1984], aff'd, Burlington, 471 U.S. 359, 374 [1985] [noting the parents' risk when seeking reimbursement]; see also Forest Grove Sch. Dist. v. T.A., 557 U.S. 230, 247[2009] [citing criteria for tuition reimbursement, as well as the

requirement of parents' financial risk, as factors that keep "the incidence of private-school placement at public expense . . . quite small"]). Further, the financial risk taken by the parents tends to support a view that the costs of the program are reasonable, at least absent contrary evidence in the hearing record.

On the other hand, as the court in Cohen noted, there may be disparate levels of access to tuition reimbursement relief based on parents' financial means (Cohen, 2023 WL 6258147, at *5). The approach of requiring proof of financial need to obtain direct funding of private school tuition, instead of reimbursement, seemed the middle ground that permitted more equitable access to this type of relief. But doing away with the requirement for showing financial need seems to most directly benefit parents that have financial means rather than broadening access to the relief to parents of less means as administrative hearing officers in due process proceedings were already routinely providing direct funding relief to those who lacked the resources to pay the tuition and seek reimbursement. Nevertheless, given the continuing shift in authority within the District Court for the Southern District of New York in favoring direct payment and large cadre of private schools and agencies operating within the boundaries of the New York City Department of Education willing to absorb the risks that parents may not prevail in due process litigation involving unilateral placement, I find that appropriate equitable relief may under certain circumstances include direct funding notwithstanding a lack of evidence about a parent's financial need, so long as there is evidence of financial risk. The district explained its concerns to the Court in Mr. & Mrs. A that private schools and agencies who absorb the risks would artificially inflate costs beyond reasonable market rates and the Court responded that "where there is evidence that a private school has artificially inflated its tuition, hearing officers and courts are required to take this into account in determining an appropriate tuition award, whether that award constitutes prospective relief, retroactive reimbursement, or retroactive direct payment of tuition" (Mr. & Mrs. A, 769 F. Supp. 2d at 429-30). While the costs of private schools and special education services unilaterally obtained by parents overall within this district do seem to have skyrocketed in cases before the undersigned in recent years, thus far, the district has made few efforts to come forward with arguments based on factual evidence in the manner described in Mr. & Mrs. A, or explained why it was prevented from doing so.

In this case the evidence indicates that the student began receiving services from Benchmark on September 12, 2022, the parent sent the district a ten-day notice of unilateral placement dated September 14, 2022, and signed a contract with Benchmark dated September 15, 2023 (Parent Exs. C; D; H). The evidence shows that the teacher is paid $81 per hour and that Benchmark charges the parent $175 per hour (Parent Ex. H). The IHO found the parent's testimony was both relevant but inconsistent, facts which are born out in the hearing record insofar as the parent often did not recall or was unsure of key events, the due process complaint and direct testimony by affidavit were prepared by the lay advocate and/or another unknown individual named "Carla" (Tr. 17, 18-19, 22). But the IHO also found that the Benchmark administrator's testimony credible, and the administrator explained that although unusual, it was possible that Benchmark would take several days after the commencement of services before having a contract executed by a parent (see, e.g., Tr. 29). Thus, it appears that the IHO believed that the services were provided by Benchmark. In while perhaps noting that her testimony was unreliable, it is not clear if the IHO, when finding that the parent acted in "bad faith," reduced an award due do a late notice of unilateral placement (which discretionary), whether the IHO believed the parent failed to cooperate with the district or an effort to implement services, or whether the parent was

somehow colluding with Benchmark another entity for an improper purpose. In light of my determination to remand this matter for further administrative proceedings, the IHO's equitable considerations determination must be set aside and additional determinations must be made in the event that the IHO determines that the unilaterally obtained services were appropriate to meet the student's needs. If, upon remand, the IHO determines that the unilaterally obtained services were appropriate, the IHO should consider the above standards in her equitable consideration determination and make factual findings with sufficient detail to explain her reasoning for reducing or denying funding of the services at Benchmark after September 12, 2022, and similarly explain her reasoning as to why the IHO's computation of the hours of compensatory education for the speech language therapy and counseling would be reduced or denied for the duration of the 2022-23 school year should the IHO find such a reduction is necessary.[11] Furthermore in light of the recent caselaw holding that there is little need to limit direct funding relief in Burlington/Carter cases so long as the parent can show that they are liable for the costs, there was no longer any reason for the IHO to order relief as reimbursement instead of direct funding.

Accordingly, the IHO's decision must be vacated, and the matter remanded to the IHO for further proceedings relating to the parent's claims as set forth in the May 24, 2023 due process complaint notice. The IHO must make factual findings with respect to the student's special education needs and then determine whether the parent's unilaterally obtained SETSS were appropriate for the student, and if so, whether equitable considerations weigh in favor of the parent's requested relief of direct funding of Benchmark's services including the factual findings required to support such considerations. As noted above, the IHO correctly concluded that the district waived its defense related to the June 1 notice provision of Education Law 3602-c as and the district has not otherwise asserted any challenges to the IHO's determination to prospectively grant speech-language therapy and counseling services that are funded by the district as compensatory education by parentally selected providers at customary and regular rates. However, the IHO's decision contains insufficient factual findings with regard to the description of the student's needs, how the relief would place the student in the position he or she would have been in had the district complied with its obligations, or otherwise sufficiently explain why compensatory services should be reduced due to equitable considerations related to parental misconduct. Upon remand, the IHO shall fully develop the hearing record on each issue that must be ruled upon.

[11] The IHO appeared to use a rote approach to the compensatory education with a reduction without providing detailed equitable reasons for reducing the award, and it reads almost as if the decision was to award damages that were reduced by the parent's comparable fault. An award of compensatory education should aim to place the student in the position he or she would have been in had the district complied with its obligations under the IDEA (see Newington, 546 F.3d at 123 [holding that compensatory education awards should be designed so as to "appropriately address[] the problems with the IEP"]; see also Draper v. Atlanta Indep. Sch. Sys., 518 F.3d 1275, 1289 [11th Cir. 2008] [holding that "[c]ompensatory awards should place children in the position they would have been in but for the violation of the Act"]; Bd. of Educ. of Fayette County v. L.M., 478 F.3d 307, 316 [6th Cir. 2007] [holding that "a flexible approach, rather than a rote hour-by-hour compensation award, is more likely to address [the student's] educational problems successfully"]; Reid, 401 F.3d at 518 [holding that compensatory education is a "replacement of educational services the child should have received in the first place" and that compensatory education awards "should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA"]). The IHO should discuss the student's deficits that were to be addressed with the speech language therapy and counseling services.

VII. Conclusion

Having determined that the IHO erred in her analysis and award of relief, the case is remanded to address the parent's claims using the legal standards set forth above to determine the extent to which the parent is entitled to the requested relief. I have considered the remaining contentions and find it is unnecessary to address them in light of my determinations above.

THE APPEAL IS SUSTAINED IN PART.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the IHO decision dated September 8, 2023 is vacated; and

IT IS FURTHER ORDERED that the matter is remanded to the IHO for further proceedings regarding the appropriateness of the parent's unilaterally obtained services for the 2022-23 school year, factual finding regard the student's special education needs, re-computation of the award of compensatory speech language therapy and counseling, and a weighing of equitable considerations that are supported by factual findings in accordance with this decision.

Dated: **Albany, New York**
January 2, 2024

JUSTYN P. BATES
STATE REVIEW OFFICER