



The University of the State of New York

The State Education Department State Review Officer

No. 08-129

Application of a STUDENT WITH A DISABILITY, by her parents, for review of a determination of a hearing officer relating to the provision of educational services by the Board of Education of the [REDACTED] School District

Appearances:

Hodgson Russ LLP, attorneys for respondent, Jeffrey J. Weiss, Esq., of counsel

DECISION

Petitioners (the parents) appeal from those parts of a decision of an impartial hearing officer which denied their request to be reimbursed for "all expenses" related to their daughter's participation in a cheerleading program at Rines Gymnastic Center (RGC) for the period of June 2007 through June 2008 and denied their request to be reimbursed for costs associated with a medical evaluation. The appeal must be sustained in part.

At the time of the impartial hearing in June 2008, the student received daily home instruction from respondent (the district) for three hours per day, in addition to two hours of indirect consultant teacher services per week (Tr. p. 22; Dist. Ex. 39 at p. 1). The student was also participating in All Stars Cheerleading (All Stars) at RGC (Dist. Ex. 1 at p. 3).¹ The student reportedly has the following diagnoses: an attention deficit hyperactivity disorder (ADHD); a fluctuating hearing impairment; and a tic disorder (Dist. Ex. 39 at p. 1). She reportedly experiences severe migraine headaches (Dist. Exs. 9-11). The student's eligibility for special education and related services as a student with an other health impairment (OHI) is not in dispute in this appeal (Dist. Ex. 39; Parent Ex. F at p. 1; see 34 C.F.R. § 300.8[c][9]; 8 NYCRR 200.1[zz][10]).

By letter dated January 2, 2007, the student's physician advised the district that the student was undergoing treatment for migraine headaches and that she had an "adverse reaction to [the] treatment, which included hospitalization" (Dist. Ex. 9). The student's physician

¹ The hearing record describes All Stars as a private cheerleading squad that is based at RGC (Tr. p. 119; Parent Ex. F at p. 6).

requested that the district not penalize the student for missed class work or assignments (id.). He further requested that the district provide her with "reduced assignments, an extended time to complete any and all homework, classwork, including labs and projects, as well as supplemental instructions for any and all periods of time she is absent from school," and recommended that the aforementioned restrictions continue in effect until the end of the school year (id.). A January 12, 2007 letter from the student's physician that was received by the district on January 16, 2007 indicated that the student had "moved into a chronic pain syndrome" with her migraines that were getting worse (Dist. Ex. 10). The student's physician recommended that the student be placed on home instruction and continue to participate in extracurricular activities, like cheerleading, for socialization purposes (id.).

By letter dated January 18, 2007, the student's mother requested that the district's Committee on Special Education (CSE) convene to modify the student's individualized education program (IEP) per her physician's recommendation (see Parent Ex. F at p. 2). On January 26, 2007, the CSE met to review the student's program (Dist. Ex. 56). Meeting participants included the district's CSE chairperson, school principal, school psychologist, regular and special education teachers, and an additional parent member (id. at p. 5). The student's mother and her advocate took part in the January 2007 CSE meeting by telephone (id.). The resultant January 2007 IEP indicated that the student was consistently missing school because of increased migraines (id. at p. 4). The student's physician reportedly recommended home instruction for the student until her migraines could be controlled to allow for half or full participation in academics (id.). Consequently, the January 2007 CSE recommended that the student be placed on home instruction for 2.5 hours per day, four days per week and that the student participate in the general education physical education (PE) program (id. at pp. 1-2). The January 2007 IEP provided for home instruction at a "special location" (id.). The student was also offered five 40-minute periods of resource room per week in addition to testing accommodations and support when needed (id. at pp. 1-2).

By letter dated May 28, 2007, the student's mother filed a state administrative complaint against the district with the New York State Office of Vocational and Educational Services for Individuals with Disabilities (VESID) (Parent Ex. F; see 8 NYCRR 200.5[1]). The complaint alleged, among other things, that the district had denied the student a free appropriate public education (FAPE) due in part to the district's failure to implement home instruction as prescribed by the student's January 2007 IEP (Parent Ex. F at pp. 4-6). According to the student's mother, the January 2007 CSE agreed to provide home instruction to the student at her home (id.). In her complaint, the student's mother alleged that the student had not received any education from the district since January 2007 (id. at p. 6). The student's mother also contended that the district denied the student the opportunity to participate in extracurricular activities, including varsity cheerleading, because of her disability (id.). Among other relief, the student's mother requested that the district reimburse her for "all expenses (fees, uniforms, travel)" related to her daughter's participation in the All Stars cheerleading program at RGC for one year (id.).

By letter dated July 26, 2007, VESID sustained the May 2007 complaint against the district (Parent Ex. F1). As corrective action, VESID ordered the district to reconvene its CSE to clarify and recommend the specific location of the student's home instruction during the 2007-08 school year (id. at p. 2). The district was further directed to submit to VESID the resultant IEP, a list of the extracurricular activities that the student would be expected to participate in during the

2007-08 school year, and a plan describing how the student would be provided access to such extracurricular activities while on home instruction (id.).

On August 24, 2007, the CSE convened to review the student's IEP (Parent Exs. A; A1; C4; G). The student's parents, two parent advocates, the CSE chairperson, the district's school principal, regular and special education teachers, and a school psychologist attended the August 2007 CSE meeting (Tr. p. 115; Parent Exs. A at p. 1; C4 at p. 1; G at p. 5). The August 2007 CSE recommended that the student be placed on home instruction for three hours per day, five days per week at home in conjunction with indirect consultant teacher services for two hours per week (Parent Exs. A at p. 88; G at p. 1). Program and testing modifications were also afforded to the student (Parent Ex. G at pp. 1-2). The resultant IEP indicated that the student would participate in "a specially designed or adapted physical education" program and be afforded opportunities to participate in extracurricular activities (id. at p. 2). According to a transcript of the August 24, 2007 CSE meeting, the CSE chairperson stated that information regarding extracurricular activities and field trips would be given to the student and her mother (Parent Ex. A at p. 89). The transcript also reflects that the CSE discussed the student receiving "compensatory PE" "at [the] district's cost, predated to the day she started" her cheerleading program at RGC and the CSE agreed that "all costs the parent has incurred to this point are reimbursed by district" (id. at pp. 48-49). The CSE chairperson stated that the student's "private cheerleading that is just about 4 days a week, and she'll have four national trips, will be paid for by the district, dating back to June when she first started" (id. at p. 89). The CSE chairperson requested that the student's mother provide her with invoices from the student's cheerleading program and a course description of the program (id. at p. 94; see Parent Ex. A at p. 46). Meeting minutes also revealed that the student would be afforded PE credit for the cheerleading program (Tr. pp. 35, 96; Parent Exs. A at p. 48; C4 at p. 7). Following the August 24, 2007 CSE meeting, the CSE chairperson sent a letter dated September 14, 2007 to the parents indicating that the CSE had recommended that the student's program include home instruction, indirect consultant teacher services and "adaptive PE through Private placement" and sent a letter dated September 26, 2007 to the parents indicating that the district's Board of Education had approved the student's IEP (Parent Exs. C2; C3).

According to the CSE chairperson, the August 24, 2007 CSE believed the student should receive vocational education (Tr. p. 69). However, at the start of the 2007-08 school year, the district did not allow the student to participate in a vocational education program because the student's physician had recommended in his January 12, 2007 letter that the student receive home instruction (Tr. p. 22; Dist. Ex. 4 at p. 1; see Dist. Ex. 10). On September 26, 2007, the CSE chairperson requested that the parents provide her with appropriate medical documentation so that the student could begin her vocational education program (see Dist. Ex. 2 at p. 2). By letter dated October 11, 2007, and received by the district on October 19, 2007, the student's physician recommended that the student be permitted to attend a Board of Education Cooperative Educational Services (BOCES) vocational program in addition to her current home instruction placement, as tolerated by the student based on her pain and stress levels (Dist. Ex. 11; see Parent Ex. E at p. 1). According to the student's physician, the student's migraines were severe and "extremely disabling" (id.). He further noted that exhaust from cars and buses were known triggers of her migraines, and accordingly asked the district to agree to parental transportation to and from school (id.). The student's physician further requested that the student be permitted to take her State exams after 12:00 p.m. due to mild lethargy in the morning that could result from

her medication (id.). The student began to take part in a vocational program on or about October 20, 2007 (Tr. pp. 20, 24).

On September 13, 2007, the student's mother telephoned the CSE chairperson (Parent Ex. D). During their discussion, the CSE chairperson stated that she had spoken with a representative from RGC who indicated that RGC would forward a record of the student's attendance to the district (id. at p. 1). Upon receipt of the student's attendance record, the CSE chairperson indicated that the district would write a check to the parents for mileage (id.). The CSE chairperson further indicated that she required information from RGC before the district could enter into a contract with RGC for payment of the student's other expenses (id. at pp. 2-3).

By letter to the CSE chairperson dated October 26, 2007, VESID requested that the CSE reconvene to review the student's IEP (Parent Ex. F2). Specifically, VESID directed the CSE to consider the extent to which the student will not participate in general education programs and the extent to which the student would not participate in general education PE including whether the student's PE program was considered general PE with accommodations or adapted PE (id.).

By letter to RGC dated November 15, 2007, the CSE chairperson stated that the district required execution of a contract between the district and RGC before paying for the student's participation in the program as well as certain information about RGC's program (Dist. Ex. 26 at p. 1). The CSE chairperson advised that the student's participation in the program "will count as the student's PE credits" (id.). Among the information that the CSE chairperson requested from RGC was: (1) the days that the student attended the program; (2) the price of each class; (3) a program description; (4) the number of competitions and their costs; and (5) information regarding how students get to the competitions, including lodging information (id.). Upon receipt of the requested information, the CSE chairperson advised that a contract between RGC and the district would be drafted and payment would then be rendered (id. at p. 2). The CSE chairperson stated that RGC "would then have to reimburse the parent for any payment that they [sic] already made" (id.).

The CSE convened on December 6, 2007 to review the student's IEP pursuant to VESID's request (Tr. pp. 25, 97; Dist. Exs. 28; 37; 38 at pp. 2, 9; 39; Parent Ex. B at pp. 2, 8). The CSE chairperson, a school psychologist, a special and regular education teacher, the student's home instructor and her liaison from career services attended the meeting, and the student, her mother and a parent advocate participated by telephone (Dist. Exs. 28; 38 at p. 1; 39 at p. 5). By letter dated December 6, 2007, the student's mother requested that the additional parent member be excused (Dist. Ex. 40). The December 2007 CSE discussed the extent to which the student would not participate in the school's general education program as well as the student's PE program (Dist. Ex. 38 at p. 2). The December 2007 CSE agreed that the student would continue to pursue her vocational program in addition to home instruction (id. at p. 14). The December 2007 CSE also agreed that the student's cheerleading program would serve as her "specially designed private" PE program for which she was eligible to earn PE credits (Tr. p. 97; Dist. Ex. 38 at pp. 14-15; Parent Ex. B at p. 7). The hearing record indicates that the student's physician's October 2007 letter was not discussed or reviewed during the December 2007 CSE meeting; however, the CSE chairperson later testified that she ensured that its content was reflected in the resultant IEP (Tr. pp. 28-27; see Dist. Ex. 39 at p. 2).

Following the December 6, 2007 CSE meeting, the student's mother stated in a letter dated December 6, 2007 that she "was not an equal participant in" her daughter's CSE meeting (Dist. Ex. 41 at p. 1). She further requested a copy of the sign-in sheet, the CSE tape recording, handwritten and typed copies of the resultant CSE minutes, a copy of the IEP, and any written record that the district would have provided to VESID, including the transcript of the December 2007 meeting (id.). According to the student's mother, her rights were further denied because her daughter's vocational educational teacher had not participated in the meeting pursuant to her request (id. at pp. 1-2). The student's mother further indicated that her letter would serve as written notice of her disagreement with the CSE's December 2007 recommendations (id. at p. 2).

On December 13, 2007, by telephone, the student's mother and the CSE chairperson discussed reimbursable expenses for the student's cheerleading competitions that had taken place in Pennsylvania and New Jersey (Tr. pp. 51-52). The CSE chairperson indicated that she had agreed to reimburse the student's mother for mileage to and from the Pennsylvania and New Jersey competitions in addition to lodging expenses (Tr. p. 52).

By letter dated January 7, 2008, the student's physician advised the district that the student should be placed on home instruction a maximum of two hours per day for a maximum of four days per week, with one week to complete assignments (Dist. Ex. 12). The physician further advised that all previous recommendations, such as the student's attendance at a BOCES vocational education program, remain in effect (id.).

By letter to the student's mother dated January 14, 2008, and pursuant to their December 13, 2007 conversation, the CSE chairperson advised that the district was willing to pay for the mileage to and from the student's cheerleading competition along with lodging expenses for competitions that were held in Pennsylvania and New Jersey (Dist. Ex. 13).² However, in order for the student's mother to receive reimbursement for the aforementioned expenses, the CSE chairperson asked the student's mother to furnish her with original receipts and documentation showing the mileage that she traveled (id.).

By letter to the parents dated January 9, 2008, the CSE chairperson forwarded them a copy of the December 2007 IEP for their review (Dist. Ex. 44). The CSE chairperson further noted that the student would be provided three hours of home instruction per day and that the student would not take part in the general PE program, but would participate in a specially designed private PE program (id.).

By due process complaint notice dated January 15, 2008, the parents requested an impartial hearing and alleged that the district had failed to reimburse them for "tuition and all expenses" related to the student's participation in the All Stars cheerleading program at RGC as was agreed to by the parties at the August 24, 2007 CSE meeting (Dist. Ex. 1 at p. 3). They further indicated that the district had failed to implement the recommendations made by the August and December 2007 CSEs, which agreed to provide PE credit for the student's participation in the All Stars cheerleading program (id.). According to the parents, they had paid the student's RGC tuition for May through September 2007, and the district had yet to reimburse them or render any tuition payments for the period of October 2007 through January 2008 (id.).

² There appears to be a typographical error in which the date of the parties' telephone conversation is reflected on the exhibit as "December 13, 2008" (Dist. Ex. 13).

The parents requested, among other things, reimbursement for their daughter's "tuition and all expenses incurred" at RGC, payment to RGC for "any and all future tuition and fees," payment of interest to the parents for advancing the funds to RGC, and an admission from the district that it failed to offer the student a FAPE (id. at pp. 3-4). By letter dated January 25, 2008, the district denied each of the parents' claims (Dist. Ex. 3). The district further alleged that it had paid the student's tuition at RGC for the period of May 2007 through January 2008 and that the parents had not submitted proof of payment that they had paid the student's tuition for the period of May through September 2007 (id. at p. 1). With respect to the parents' request for reimbursement for the expenses related to the nine RGC All Stars cheerleading competitions during the 2007-08 season, the district indicated that it had agreed to reimburse the parents' "reasonable expenses" upon receipt of requested documentation (id. at p. 2).

By letter to the student's mother dated January 31, 2008, the CSE chairperson, upon reviewing the audio recording of the August 2007 CSE meeting, clarified that the district would pay for the student's "reasonable" hotel and mileage expenses for the cheerleading competitions that took place during the period of December 13, 2007 and February 1, 2008 (compare Parent Ex. A1 with Parent Ex. C at p. 1).³ According to the CSE chairperson, the August 2007 CSE agreed to pay for the cost of the student's cheerleading tuition as well as the cost of any national cheerleading competition registration fees, which she stated had already been paid by the district (Parent Ex. C at p. 1). Although the CSE chairperson commented that there was no mention of additional payments for mileage and boarding on the audio recording of the August 2007 CSE meeting, she indicated that the district had paid for the student's uniform, choreography fees, sneakers and her team placement fee (id.). For reimbursement purposes, the CSE chairperson asked the student's mother to provide her with original receipts, including AAA Trip Tik or MapQuest results to show mileage (id.; see Tr. p. 44).

By letter to RGC dated February 7, 2008, the student's mother acknowledged receipt of the check that RGC had sent to her in the amount of \$859.50 and an invoice statement, but refused to accept the check and described the invoice statement as "not accurate" (see Dist. Ex. 25; Parent Ex. C1). The student's mother further indicated that she had been involved in an ongoing action against the district, and that in August 2007, the district had agreed to reimburse her for "any and all expenses" relating to her daughter's participation in All Stars, but that "there was no such agreement that [the owner] provide reimbursement to [her]" (Parent Ex. C1). According to the student's mother, the district had since "refused to reimburse [her]," and as a result, she was returning the check, because she believed that it would constitute a different agreement if she were to accept it (id.). She also requested that RGC forward any documentation that it may have received from the district, including contracts or contact logs, and that RGC "reframe [sic] from any and all contact with the district" (id.).

By letter dated February 11, 2008, the district supplemented its response to the parents' January 2008 due process complaint notice (Dist. Ex. 5). Pursuant to the December 13, 2007 conversation between the CSE chairperson and the student's mother as well as the CSE chairperson's January 31, 2008 letter to the student's mother, the district indicated its willingness to pay the student's "reasonable hotel expenses" including mileage for cheerleading competitions

³ The CSE chairperson also indicated that the district was not willing to pay additional expenses that occurred outside of the specified time period (Parent Ex. C at p. 1).

that occurred between December 13, 2007 and February 1, 2008, upon receipt of original receipts and documentation (id. at p. 1).

By a second due process complaint notice dated February 21, 2008, the parents requested another impartial hearing (Dist. Ex. 2). In the February 2008 due process complaint notice, the parents asserted that they obtained a medical evaluation at their expense pursuant to a demand by the CSE chairperson (id. at p. 3). The February 2008 due process complaint notice also alleged that during the December 2007 CSE meeting, the district failed to review and consider the student's physician's October 2007 letter (id.). As a possible solution to the complaint, the parents requested, among other things: (1) an admission from the district that the student was denied a FAPE; (2) that the district's CSE reconvene to review and consider the October 2007 letter; and (3) reimbursement for mileage for transportation to and from the student's physician's office for what they deemed a "district-required evaluation" (id.).⁴

On February 27, 2008, the district responded to the allegations raised in the February 2008 due process complaint notice (Dist. Ex. 4). In addition to denying the parents' substantive allegations, the district maintained that its actions were consistent with the recommendations of the student's physician and that the parents were not entitled to reimbursement for transportation expenses to and from the physician's office (id. at p. 2). The district further contended that the October 2007 letter from the student's physician did not constitute an independent educational evaluation (IEE), and that the parents were not entitled to reimbursement (id.).

On June 6, 2008, an impartial hearing was held (Tr. p. 1). By decision dated October 6, 2008, employing a Burlington/Carter⁵ analysis, the impartial hearing officer found that the district had acknowledged that it failed to offer appropriate PE program to the student and that it was responsible for her tuition for the RGC cheerleading program (IHO Decision at p. 13).⁶ The impartial hearing officer further determined that the district was responsible for the student's transportation costs to her cheerleading program because the district conceded that it was responsible for the student's tuition at RGC (id. at p. 14). Accordingly, the impartial hearing officer directed the district to reimburse the parents for the transportation costs for the student's cheerleading program upon the parents' submission to the district of complete and accurate verification of their travel expenses and/or mileage (id. at pp. 14, 22). However, the impartial hearing officer determined that the district had paid RGC \$806.50 for "various items" for which the parents were responsible and therefore reduced the parents' transportation reimbursement award by \$806.50 (id. at pp. 19-20).

⁴ Although this matter was assigned to a different impartial hearing officer, per the district's request and with the parents' consent, the proceedings were consolidated into one impartial hearing, which is the subject of this appeal (Tr. p. 4; IHO Decision at p. 11).

⁵ Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359 [1985]; Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]. These two cases are typically referred to together as the "Burlington/Carter" analysis for tuition reimbursement.

⁶ The impartial hearing officer did not award tuition for March 2008 through June 2008 because he found that there was no evidence regarding the student's attendance, tuition due, or tuition paid for this period (IHO Decision at pp. 18-19).

Notwithstanding his award for transportation reimbursement, the impartial hearing officer denied the parents' request for reimbursement for other expenses related to the cheerleading program, such as the student's uniform, choreography and registration fees, because he found that the parents failed to demonstrate that they were a necessary component of the student's PE program (IHO Decision at p. 15). Although noting that certain August 2007 CSE members might have indicated a willingness to reimburse the parents for all costs incurred to that point, the impartial hearing officer found that the CSE did not make any formal recommendation regarding reimbursement nor did they execute an open-ended agreement to reimburse such costs in the future (id.). The impartial hearing officer further found that the August 24, 2007 IEP did not include a statement about reimbursement (id.). Additionally, the impartial hearing officer noted that although the parents sought to enforce representations made by the CSE chairperson regarding reimbursable expenses following the August and December 2007 CSE meetings, her claims were outside the scope of the impartial hearing (id. at p. 16).

Upon reviewing equitable considerations of the parents' claims, the impartial hearing officer noted that the district had requested that the parents provide receipts and verification of their travel expenses, and ultimately determined that the parents failed to comply with the district's requests (IHO Decision at p. 17). He further noted that although the parents alleged that the invoice statements from RGC were inaccurate and did not represent everything they had paid, the parents had failed to provide any documentation of the expenses they incurred and therefore, even if he had found the district liable for other expenses, it would be "impossible for the District to reimburse them directly" (id. at pp. 17-18). Accordingly, the impartial hearing officer found that the parents' failure to cooperate forced the district to pay RGC directly, instead of the parents, which he deemed a "relevant factor" in fashioning a remedy (id. at p. 18). The impartial hearing officer determined that the district had previously paid the student's tuition directly to RGC,⁷ therefore, he declined to award tuition reimbursement to the parents, further noting that to do so would result in a financial hardship to the district that was directly attributable to the parents' failure to cooperate (id.).

With respect to the parents' claims surrounding the October 2007 letter from the student's physician, the impartial hearing officer concluded that the October 2007 letter did not constitute an evaluation for which the parents were entitled to reimbursement (IHO Decision at p. 21). Moreover, he determined that the parents failed to comply with State regulations governing IEEs, because the parents did not express disagreement with a district evaluation, nor did they request that the district pay for an evaluation prior to commencing an impartial hearing (id.). Accordingly, the impartial hearing officer denied the parents' claim for reimbursement for an IEE (id.).

The parents appeal and request that the impartial hearing officer's determination be annulled to the extent that it denied reimbursement for "all expenses" related to the student's cheerleading program at RGC. Specifically, the parents allege that the impartial hearing officer erred: (1) to the extent that he weighed equitable considerations in fashioning relief; (2) by failing to order the district to reimburse the parents for transportation and lodging costs for national competitions, as they were part of the student's cheerleading program; (3) because the

⁷ The impartial hearing officer also noted that once the RGC tuition had been paid by the district, the parents rejected RGC's attempt to provide them with reimbursement, a remedy which the impartial hearing officer indicated is still available to the parents (IHO Decision at pp. 16, 19).

hearing record does not indicate that the district paid the student's tuition during the period of February 2008 through June 2008, although the student attended the program throughout that time; (4) by relying on the invoices from RGC submitted during the impartial hearing that do not represent all of the parents' payments; (5) by finding that the parents failed to cooperate; and (6) by denying reimbursement of all of the expenses related to the cheerleading program because they were not delineated on the student's IEP. The parents maintain that other expenses incurred for the student's specially designed PE program were the district's responsibility.

With respect to parents' IEE reimbursement claim, the parents assert that the impartial hearing officer erred by concluding that no physical examination of the student took place. The parents further contend that they were aggrieved by the impartial hearing officer's determination that the CSE reviewed and considered the physician's October 2007 letter. The parents argue that the October 2007 letter constituted an IEE and therefore, they were entitled to reimbursement for any costs associated with that report. Accordingly, the parents seek transportation costs and expenses incurred to fulfill the district's demand for the October 2007 letter.

Additionally, the parents assert that the impartial hearing officer violated their due process rights by granting extensions for the time period in which he was required to render a decision. The parents allege that the impartial hearing officer's delay in rendering his decision caused them "an unreasonable financial burden" because they were forced to "front" the money" for the student's cheerleading program.

In its answer, the district denies nearly all of the parents' allegations and does not cross-appeal the impartial hearing officer's decision. In its accompanying memorandum of law, the district maintains that the impartial hearing officer employed an improper legal analysis in addressing the parents' claims; however, asserts that the impartial hearing officer appropriately applied an equitable analysis. The district contends that the impartial hearing officer correctly found that the parents were not entitled to reimbursement for other expenses because they were not related to the student's specially designed PE program, including the entry fees for regional cheerleading competitions, as well as transportation and boarding expenses for competitions. Additionally, the district maintains that it is not liable for these other expenses because they are not explicitly enumerated in the student's IEP. Furthermore, the district contends that there is no indication in the hearing record that the parents relied on the CSE chairperson's statements that the district would pay for all expenses related to the student's cheerleading program to her financial detriment. Lastly, the district requests that a State Review Officer uphold the impartial hearing officer's determination that the award for transportation expenses be offset by \$806.50 for which he found the parents responsible.

Regarding the parents' claims surrounding the student's physician's October 2007 correspondence, the district contends in its memorandum of law that the parents are not entitled to any payment related to the physician's letter. Specifically, the district argues that the impartial hearing officer correctly ruled that the letter did not constitute an IEE, or even an evaluation. In the alternative, even if the physician's October 2007 letter were to be deemed an IEE, the district claims that the parents would not be entitled to relief, because she failed to comply with the State regulations governing IEEs.

I will initially address the procedural matters raised in this appeal. First, the parents have attached a number of e-mails between the parties and the impartial hearing officer regarding extensions of the timeline for rendering the impartial hearing officer's decision and requests that a State Review Officer consider the documents as additional evidence. Generally, documentary evidence not presented at an impartial hearing may be considered in an appeal from an impartial hearing officer's decision only if such additional evidence could not have been offered at the time of the impartial hearing and the evidence is necessary in order to render a decision (see, e.g., Application of a Student with a Disability, Appeal No. 08-030; Application of the Dep't of Educ., Appeal No. 08-024; Application of a Student with a Disability, Appeal No. 08-003; Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 06-040; Application of a Child with a Disability, Appeal No. 05-080; Application of a Child with a Disability, Appeal No. 05-068; Application of the Bd. of Educ., Appeal No. 04-068). In this case, none of the e-mails that the parents submitted as additional evidence were available at the time of the impartial hearing, and as expressed in greater detail below, they are necessary to render a decision with regard to the issue of whether the parents were prejudiced by the impartial hearing officer's failure to render a decision within the timelines prescribed by State and federal regulations. Accordingly, I will accept the additional evidence.

The parents allege that the impartial hearing officer failed to render a determination within the 45-day timeline, which resulted in financial hardship. The district contends that it requested extensions of the time period for which the impartial hearing officer was required to render a decision to prevent the impartial hearing officer from recusing himself and thus prolonging the proceeding even further (Pet. Exs. B; C; D). Federal and State regulations require an impartial hearing officer to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 C.F.R. § 300.515[c]; 8 NYCRR 200.5[j][5][i]). Compliance with the federal and State 45-day requirement is mandatory (34 C.F.R. § 300.515[a]; 8 NYCRR 200.5[j][5]). Impartial hearing officers must also comply with State regulations requiring careful written documentation granting extensions of time that includes the reasons why extensions were granted, as well as admission of such documentation into the hearing record (see 8 NYCRR 200.5[j][5][i]-[iv]). In the instant case, although the hearing record reveals that the impartial hearing officer failed to comply with State and federal guidelines governing the duration of an impartial hearing, there is no indication in the hearing record that this administrative delay prejudiced or endangered the student's right to a FAPE (Grim v Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381-82 [2d Cir. 2003]). The hearing record indicates that the parents requested an extension to accommodate the scheduling of the impartial hearing, which was granted by the impartial hearing officer (IHO Ex. 2 at p. 1). Moreover, the hearing record illustrates that at no time throughout the proceeding was the student denied an opportunity to participate in the All Stars program as a result of the impartial hearing officer's failure to render his determination in a timely fashion, and the parents have not demonstrated that the impartial hearing officer's failure to comply with the timeline for rendering a decision had any effect on the parents' decision making or that there was any specific loss of educational opportunity that was attributable to the delay (Heather S. v Wisconsin, 125 F.3d 1045, 1059-60 [7th Cir. 1997]; see Grim, 346 F.3d at 382; Amann v. Stow Sch. Sys., 982 F.2d 644, 653 [1st Cir. 1992]).

To the extent that the parents argue that they are entitled to relief due to financial harm, I note that monetary damages, including compensatory damages, are not available to remedy

violations of the Individuals with Disabilities Education Act (IDEA) (Taylor v. Vt. Dep't. of Educ., 313 F.3d 768, 786 n.14 [2d Cir. 2002]; Polera v. Bd. of Educ., 288 F.3d 478, 486 [2d Cir. 2002]; see Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147, 152-53 [N.D.N.Y. 1997]). In Polera, the Court of Appeals concluded that "the purpose of the IDEA is to provide educational services, not compensation for personal injury, and a damages remedy—as contrasted with reimbursement of expenses—is fundamentally inconsistent with this goal" (Polera, 979 F. Supp. at 485-86). In addition, the United States Supreme Court distinguished reimbursement from monetary damages noting that reimbursement "merely requires the [district] to belatedly pay expenses that it should have paid all along" (Burlington, 471 U.S. at 370-71; Carter, 510 U.S. 7; see Muller v. Comm. on Spec. Ed. of East Islip, 145 F.3d 95, 105 [2d Cir. 1998]). Based on the foregoing, I find that the parents' arguments that they are entitled to relief due to the impartial hearing officer's delay in rendering a decision are without merit.

The parents also contend that the impartial hearing officer erred by denying reimbursement of all of the expenses related to the student's cheerleading program because they were not delineated on her IEP. Likewise, the parents argue that other expenses incurred for the student's specially designed private PE program were the district's responsibility in light of discussions that took place during the August 2007 and December 2007 CSE meetings. A review of the hearing record indicates that the CSE agreed to reimburse the parents for the costs incurred as a result of the student's cheerleading program; notwithstanding that the student's IEP was not amended accordingly. In making changes to a student's IEP after the annual IEP meeting for a school year, the parent and the district may agree not to convene a CSE meeting for the purposes of making such changes, and instead may develop a written document to amend or modify the student's current IEP (20 U.S.C. § 1414 [d][3][D]). Similarly, changes to the student's IEP may be made by either the entire CSE or as provided above by amending the IEP (20 U.S.C. § 1414 [d][3][F]). The Official Analysis of Comments to the revised IDEA regulations indicates that an agreement to change a student's IEP need not be in writing in order to be binding:

[T]he Act does not require the agreement between the parent and the public agency to be in writing . . . However, it would be prudent for the public agency to document the terms of the agreement in writing, in the event that questions arise at a later time.

Agreement, 71 Fed. Reg. 46685 (Aug. 14, 2006).

The hearing record reveals that the August 2007 and December 2007 CSEs agreed that the student's cheerleading program at RGC served as her specially designed PE program (Parent Exs. A at pp. 46, 48, 56; B at p. 7; C2; C3). Additionally, the August 2007 CSE reached consensus that the district would reimburse the parents for "all costs [that they had] incurred" to that point; however, the district failed to itemize what costs were covered (Parent Ex. A at p. 49). The student's IEP was not amended to reflect as such (see Parent Ex. G). In a December 13, 2007 conversation with the student's mother, the CSE chairperson agreed to reimburse the student's mother for mileage to and from the Pennsylvania and New Jersey competitions in addition to lodging expenses (Tr. pp. 51-52). By letter dated January 14, 2008 to the student's mother, and pursuant to their December 13, 2007 conversation, the CSE chairperson advised her in writing that upon the parents' submission of original receipts, the district was willing to pay

for the mileage to and from the student's cheerleading competitions along with lodging expenses for competitions that were held in Pennsylvania and New Jersey (Dist. Ex. 13). The CSE chairperson further clarified by writing her January 2008 letter that the August 2007 CSE agreed to pay for the cost of the student's cheerleading tuition as well as the cost of any national cheerleading competition registration fees, which she stated had already been paid by the district (Parent Ex. C at p. 1). Despite the lack of specification for which costs the district was financially responsible during the August 2007 CSE meeting, the CSE chairperson indicated that the district had actually paid for the student's uniform, choreography fees, sneakers and her team placement fee (*id.*). Although not incorporated into the student's IEP, her IEP was in effect modified by virtue of the CSE's agreement to reimburse the parents for the costs of the student's cheerleading program as well as the CSE chairperson's further written representations to the student's mother that the CSE would reimburse her for lodging and travel expenses. Based on the foregoing, I find that the district effectively assumed financial responsibility for the costs of the student's cheerleading program provided by RGC, which served as her specially designed PE program. Accordingly, I will annul the impartial hearing officer's decision to the extent that he offset his transportation award by \$806.50. I will also direct that the district reimburse the parents, upon proof of payment and mileage, for the student's hotel and mileage expenses for national cheerleading competitions. A failure by the parents to cooperate and submit the requested documentation within twenty days from the date of this decision will constitute a waiver of this award for reimbursement for hotel and mileage expenses. To the extent the hearing record indicates that there were other, unidentified expenses incurred by the parents (*see, e.g.,* Tr. pp. 124-26; Parent Exs. C1; D at p. 2; Parent Post-Hr'g Br. at p. 15), the parents did not specifically enumerate these expenses in their due process complaint notice or at the impartial hearing. Accordingly, I find that the parents are not entitled to relief for such other expenses that they failed to specify during the impartial hearing or in their petition for review (*see* 8 NYCRR 200.5[i], 279.4)

In addition, I note that under the circumstances of this case, it was appropriate for the district to pay RGC directly. There is no evidence in the hearing record suggesting that RGC failed to provide the specially designed PE program to the student or that the district refused to render payments directly to RGC for the costs of the student's program. I further note that the parents have previously rejected reimbursement from RGC (Parent Ex. C1). To the extent that the parents asserted that RGC failed to accurately record payments made by the parents, these claims, essentially made against a nonparty, are not appropriately addressed in an impartial hearing regarding the provision of services to a student with a disability.⁸ To the extent that the parents claim that the district failed to submit invoices reflecting payment rendered for the time period of March 2008 through June 2008, I note that any financial or contractual disputes between the district and third party service providers perceived by the parents are not properly raised or resolved at an impartial hearing filed pursuant to the IDEA.⁹ Impartial hearings filed under the IDEA are limited to issues concerning the identification, evaluation and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of a Child with a Disability, Appeal No. 03-070).

⁸ The hearing record does not contain a description of the alleged inaccuracies (*see* Parent Ex. C1).

⁹ The parents themselves assert that the student actually attended the All Stars cheerleading program for 12-months, from June 2007 though June 2008 (Pet. ¶ 27).

Lastly, I turn to the parents' allegation that the impartial hearing officer erred by finding that the student's physician's October 11, 2007 letter did not constitute an IEE for which they are entitled to reimbursement. The parents maintain that the district requested the letter and they complied with the district's request. The hearing record fails to substantiate the parents' allegation. First, a review of the parents' February 2008 due process complaint notice shows that the parents did not request reimbursement for a doctor's visit, instead they alleged that they were entitled to reimbursement for mileage for transportation to and from the physician's office (Dist. Ex. 2 at p. 3). A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 C.F.R. §§ 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint notice is amended prior to the impartial hearing per permission given by an impartial hearing officer at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; see A.B. v. San Francisco Unified Sch. Dist., 2008 WL 4773417, at *9 [N.D. Cal. Oct. 30, 2008]; Saki v. Hawaii, 2008 WL 1912422, at *6-*7 [D. Hawaii April 30, 2008]; Application of the Dep't of Educ., Appeal No. 08-037; Application of a Child with a Disability, Appeal No. 06-139; Application of a Child with a Disability, Appeal No. 06-065). The hearing record does not indicate that the parents made any attempts to amend their due process complaint notice. Therefore, the parents' request for reimbursement for what they allege constituted an IEE was not properly raised below. Regardless of whether the parents properly initiated a claim for all expenses relating to the student's physician's October 2007 letter, the hearing record does not demonstrate that the October 2007 letter was based on any new testing, procedures or assessments (8 NYCRR 200.1[aa]). Accordingly, I concur with the impartial hearing officer that it was not an evaluation as defined by State regulations.

However, even if I were to conclude that the October 2007 letter from the student's physician was an evaluation, as stated more fully below, the parents are precluded from a reimbursement award for expenses relating to the October 2007 letter, because, as stated herein, the hearing record shows that they did not comply with the State and federal regulations governing IEEs. The regulations provide that a parent has the right to an IEE at public expense if the parent disagrees with an evaluation obtained by the school district (34 C.F.R. § 300.502[b][1]; 8 NYCRR 200.5[g][1]). If a parent requests an IEE at public expense, the school district must, without unnecessary delay, ensure that either an IEE is provided at public expense or initiate an impartial hearing to show that its evaluation is appropriate or that the evaluation obtained by the parent does not meet the school district criteria (34 C.F.R. § 300.502[b][2][i]-[ii]; 8 NYCRR 200.5[g][1][iv]; see, e.g., R.L. v. Plainville Bd. of Educ., 363 F. Supp. 2d. 222, 235 [D. Conn. 2005]; A.S. v. Norwalk Bd. of Educ., 183 F. Supp. 2d 534, 549 [D. Conn. 2002] [upholding an order of reimbursement where the district failed to demonstrate that its evaluation was appropriate]). If the impartial hearing officer finds that a school district's evaluation is appropriate, a parent may not obtain an IEE at public expense (34 C.F.R. § 300.502; 8 NYCRR 200.5[g]; Application of the Bd. of Educ., Appeal No. 05-009; Application of a Child with a Disability, Appeal No. 04-082; Application of a Child with a Disability, Appeal No. 04-027). In the present case, the parents concede that they did not disagree with a district evaluation (Pet. ¶ 38; see R.L., 363 F. Supp. 2d. at 234 [finding parental failure to disagree with an evaluation obtained by a public agency defeated parent's claim for IEE at public expense]). Additionally, there is no indication in the hearing record showing that the parents requested a private evaluation of their daughter. Lastly, a review of the October 2007 letter shows that it did

not identify any new educational needs (Application of a Child with a Disability, Appeal No. 07-039). In light of the foregoing, I decline to award reimbursement for any costs related to the October 2007 letter from the student's physician.

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated October 6, 2008 is annulled to the extent he reduced the parents' transportation award by \$806.50; and

IT IS FURTHER ORDERED, if it has not done so already, that the district, upon the parents' submission of proof of payment and mileage, reimburse the parents for the student's hotel and mileage expenses for national cheerleading competitions during the 2007-08 school year; and

IT IS FURTHER ORDERED that a failure by the parents to cooperate and submit the requested proof of payment and mileage documentation within twenty days from the date of this decision will constitute a waiver of the award for reimbursement for hotel and mileage expenses for national cheerleading competitions.

Dated: **Albany, New York**
 December 3, 2008

ROBERT G. BENTLEY
STATE REVIEW OFFICER