



The University of the State of New York

The State Education Department

State Review Officer

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No. 09-104

Application of a STUDENT WITH A DISABILITY, by his parent, for review of a determination of a hearing officer relating to the provision of educational services by the [REDACTED]

Appearances:

Partnership for Children's Rights, attorneys for petitioner, Erin McCormack-Herbert, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Emily R. Goldman, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which denied his request that respondent (the district) fund his son's tuition costs at the Rebecca School for the 2008-09 school year. The district cross-appeals from the impartial hearing officer's determination that the parent had sustainable claims for tuition reimbursement at and direct funding to the Rebecca School for the 2008-09 school year. The appeal must be dismissed. The cross-appeal must be sustained in part.

At the time of the impartial hearing, the student was enrolled at the Rebecca School (Tr. p. 586; Parent Ex. A at p. 2). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (Tr. p. 116; Parent Exs. A at p. 1; B at p. 2; see NYCRR 200.1[d], 200.7).¹ According to the hearing record, the student has received diagnoses of an attention deficit hyperactivity disorder (ADHD); an impulse control disorder, not otherwise specified (NOS); "R/O"² mood dysregulation disorder; mild mental retardation; "R/O" moderate mental retardation; and Fragile

¹ I note that the hearing record contains multiple duplicative exhibits. Specifically, Parent Exhibits "A" and "C" are identical to Parent Exhibits "2" and "1," respectively. To maintain consistency within this decision, I cite only to Parent Exhibits "A" and "C." It is the responsibility of the impartial hearing officer to exclude evidence that he determines to be irrelevant, immaterial, unreliable, or unduly repetitious (8 NYCRR 200.5[j][3][xii][c]).

² Although not defined in the hearing record, "R/O" is presumed to mean "rule out."

X syndrome,³ with a history of behavior that "becomes explosive and uncontrollable at times in school," manifesting itself in attacks upon his teachers and others, and the use of inappropriate language (Parent Ex. L at pp. 2, 4-6). The student's eligibility for special education programs and services as a student with autism is not in dispute in this appeal (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).⁴

According to the hearing record, the student attended a district school during the 2003-04, 2004-05, and 2005-06 school years, receiving his initial diagnosis of Fragile X syndrome in late 2004 to early 2005 (Tr. pp. 504, 513-14). In November 2005, the district generated a psychoeducational update report relative to the student (Dist. Ex. 1). The evaluator noted that at the time of the evaluation, the student was considered a non-reader and unable to follow the lessons and activities in his 12:1+1 special education classroom setting (id. at pp. 1, 3). The evaluator explained that "social[ly] and emotionally, [the student] is said to have made significant progress since past years," although he was observed to have experienced difficulty adjusting to changes, demonstrated a tendency to become increasingly agitated and verbal when routines were changed, and "[did] not respond well when teased, pressured, or if 'mishandled' physically or verbally by peers" (id. at p. 3). Results of the Behavior Assessment System for Children: Second Edition (BASC-2) Teacher Rating Scales indicated that the student's aggression, adaptability, social skills, and leadership fell within the "at risk" range and placed him in the "clinically significant" range for learning problems, adaptive skills, functional communication, and study skills (id.). Results of the Vineland Adaptive Behavior Scales placed the student in the "moderate deficient" range for adaptive behavior, communication, and socialization, while daily living skills, assessed as "mildly deficient," were a relative strength (id.). The evaluator also noted the student's Fragile X syndrome diagnosis (id. at p. 4).

The student was first enrolled by his parent in the Rebecca School in September 2006 and completed the 2006-07⁵ and 2007-08 school years there (Tr. pp. 434-36; see Dist. Exs. 6 at p. 1; 7 at p. 1; Parent Exs. A at p. 1; B at p. 2; C at p. 3).

In April 2008, the Rebecca School generated an occupational therapy (OT) progress report (Dist. Ex. 5). The reporting occupational therapist confirmed that the student was receiving OT twice per week for 30 minutes per session, focusing on "improving sensory processing abilities, fine and gross motor coordination and control, visual perceptual/visual motor skill, bilateral integration skills, and attention/focus and improving interactions in group activities" (id. at p. 1). The reporting occupational therapist observed that the student

³ "Fragile X syndrome" is described in the hearing record as "a rare genetic disorder in which a gene on the X chromosome is incapacitated and fails to produce a protein needed for typical brain development and self-control/modulation of the body's attention and arousal systems" (Tr. pp. 340-43).

⁴ After the student received a classification of autism from the Committee on Special Education (CSE) in the May 23, 2008 individualized education program (IEP) (Dist. Ex. 9 at pp. 1-2), the parent and the student's grandmother objected to this classification (see Tr. pp. 520-23; Dist. Ex. 13; Parent Ex. B at pp. 1-2). The hearing record indicates that the CSE changed the student's original classification from a student with multiple disabilities to a student with autism so that it could recommend a "highly structured program with a concentration to [the student's] language development ... To deal with [his] language issue, attentional issue, [and] social issue as well" (Tr. pp. 91-92; see Tr. pp. 103-04, 124, 126-27; Dist. Ex. 9 at p. 2). However, the parent does not raise the issue of the student's classification on appeal.

⁵ Pursuant to a statement of agreement and order issued by another impartial hearing officer on June 26, 2006 relative to a prior unrelated appeal, the Rebecca School was designated as the student's pendency placement (Parent Ex. C at p. 5).

"exhibit[ed] progress in his flexibility play repertoire with adults and peers," that his "overall conversational skills and peer related interactions [were] more appropriate and purposeful," and that he was "able to initiate more conversation without using past scripted sequences" (id.). The reporting occupational therapist recommended that the student would benefit from an evaluation by a developmental optometrist, "as his visual spatial and visual motor skills greatly impact all areas of development" (id. at p. 2). The therapist also noted that the student's "visual skills affect his attention and influence his success in all academic and functional tasks" (id.).

On April 11, 2008, the Rebecca School generated a counseling progress report (Dist. Ex. 6). The reporting social worker advised that the student was receiving counseling services once per week for 30 minutes per session, and described progress observed in the areas of physical and emotional regulation, shared attention, engagement, relating, and two-way purposeful communication (id. at pp. 1-2). In addition to the student's progress, however, she also noted that the student's "limited amount of vocabulary still harbors [sic] him from initiating communication consistently," and that he is "still moving towards his ability to create symbols and ideas while building logical bridges" (id. at p. 2). The report included "objectives for upcoming floortime sessions" and the reporting social worker noted that it would be beneficial for the student to have "meaningful social interactions at home and in his community, in addition to his sessions at school, in order to keep his upward movement through the developmental levels" (id.).

On April 16, 2008, the Rebecca School completed a speech-language progress report (Dist. Ex. 7). In addition to confirming that the student was receiving speech-language therapy twice per week for 30 minutes per session in a 1:1 setting and once per week in a group of at least eight students, the reporting clinician advised that the student had "shown great gains with his ability to self-regulate, retain pertinent information and to motivate and participate in games and academic activities" (id. at p. 1). The report included goals and objectives that were targeted during that school year and new goals to be targeted in the future (id. at pp. 1-2). The reporting clinician recommended that the student continue to receive speech-language therapy two times per week individually and one time per week in a group of eight (id. at p. 2).

In May 2008, the student's teachers at the Rebecca School generated the student's progress report (Dist. Ex. 8). Reporting teachers opined that the student was "loved by the other members of his class and [was] able to relate and engage with them in various activities" (id. at p. 1). They further commented that with prompting, the student "ha[d] made great gains in his ability to elaborate on peer conversations and spontaneously answer and ask questions when in a small group setting" (id.).

On May 23, 2008, the CSE convened for the purpose of developing the student's IEP for the 2008-09 school year (Dist. Ex. 9). In attendance were a special education teacher who also acted as a district representative, a school psychologist, and the student's grandmother; a special education teacher from the Rebecca School appeared telephonically (id. at p. 2).⁶ The CSE recommended changing the student's classification to autism,⁷ and recommended that the student

⁶ According to the minutes from the May 23, 2008 CSE meeting, a regular education teacher from the district also attended the meeting (see Dist. Ex. 10; Tr. pp. 82-83); however, this is not indicated in the May 23, 2008 IEP (see Dist. Ex. 9 at p. 2).

⁷ The hearing record reflects that the student previously received a classification of a student with multiple disabilities in a prior IEP dated December 19, 2007 (Dist Exs. 4 at pp. 1, 3; 9 at p. 2; see 34 C.F.R. § 300.8[c][7]; 8 NYCRR 200.1[zz][8]).

attend a 12-month program consisting of a 6:1+1 special class in a specialized school, with pull-out related services consisting of speech-language therapy twice per week for 40 minutes per session in a 1:1 setting and once per week for 40 minutes per session in a group of two, counseling once per week for 40 minutes per session in a group of two, physical therapy (PT) twice per week for 40 minutes per session in a 1:1 setting, and OT twice per week for 40 minutes per session in a 1:1 setting, and program modifications consisting of redirection, repetition, and visual and verbal cues and prompts (*id.* at pp. 1-2, 13, 15; *see* Tr. pp. 91-92, 124-27; Dist. Ex. 11). The May 2008 IEP further indicated that the student had Fragile X Syndrome (*id.* at pp. 1, 5).

On June 14, 2008, the district forwarded a final notice of recommendation (FNR) to the student's grandmother, recommending a 6:1+1 special class and related services consisting of speech-language therapy, counseling, OT, and PT in accordance with the May 2008 IEP at a specific district school (Dist. Ex. 12). The FNR listed the name and telephone number of a district contact person who the grandmother could contact if she wanted to discuss the recommendations or schedule another CSE meeting, and advised that unless contacted by June 30, 2008, the district would implement the recommended program for the student's 2008-09 school year (*id.*).

By letter dated June 24, 2008, the student's grandmother wrote to the district rejecting both the placement recommended in the June 14, 2008 FNR and the classification change to autism, maintaining that neither met the student's special education needs (Dist. Ex. 13). She cited the "great growth" and "great progress" that the student had experienced at the Rebecca School, and advised that "[i]f another IEP is needed then we need to do another one. We will not accept his classification of autism because of the similarity to Fragile X" (*id.*). By a letter dated June 27, 2008, the student's grandmother wrote to the district again rejecting the placement in the June 14, 2008 FNR (Parent Ex. H). The June 27, 2008 letter reiterated many of the student's grandmother's statements made in the June 24, 2008 letter (*compare* Dist. Ex. 13, *with* Parent Ex. H). The June 27, 2008 letter indicated that it was also sent to the parent's counsel (Parent Ex. H).

On August 12, 2008, the parent and the student's grandmother executed an enrollment contract with the Rebecca School, placing the student there for the 2008-09 school year (Parent Ex. J; *see* Tr. pp. 329-30).

On October 23, 2008, the parent, through counsel, filed an amended due process complaint notice (Parent Ex. B; *see* 20 U.S.C. §1415[c][2][E][i][II]; 34 C.F.R. § 300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]).⁸ The parent objected to the district's changing of

⁸ The parent, through counsel, filed a due process complaint notice on August 19, 2008 (Parent Ex. A). This due process complaint notice contained similar substantive content to the parent's October 23, 2008 amended due process complaint notice, except that the August 19, 2008 due process complaint notice erroneously referenced a 12:1+4 program at a different public school instead of the 6:1+1 special class recommended in the May 2008 IEP and the school recommended in the June 14, 2008 FNR (*compare* Parent Ex. A at p. 2, *and* Dist. Ex. 4 at pp. 1-2, 5, 12, *with* Dist. Ex. 9 at pp. 1-2, 13, *and* Dist. Ex. 12). On August 25, 2008, the district responded to the parent's August 19, 2008 due process complaint notice contending that: (1) the classification change to autism recommended in the May 2008 IEP was based upon a psychoeducational evaluation, related service progress reports and evaluations, teacher progress reports, teacher observations, and medical records; and (2) the 6:1+1 special class in a District 75 specialized school recommended in the June 14, 2008 FNR was reasonably calculated to enable the student to receive educational benefits and constituted an offer of a free appropriate public education (FAPE) for the 2008-09 school year (Dist. Ex. 14). The district did not object in its response dated August 25, 2008 to the program discrepancy contained in the parent's August 19, 2008 due process complaint notice. However, it appears from the totality of evidence contained in the hearing record that

the student's classification from "multiply handicapped" to autism as "inaccurate" (id. at pp. 1-2). He criticized the May 2008 CSE's alleged failure to recommend a 1:1 aide in the IEP, despite the CSE's acknowledgement that such an aide was "necessary to assist [the student] in the classroom" (id. at p. 2). He further alleged that the district failed to provide the student with a free appropriate public education (FAPE),⁹ and contended that the May 2008 IEP was "defective procedurally and substantively," asserting that the description of the student's academic and learning characteristics was "deficient as not based on appropriate evaluations," and alleging that there was no functional behavioral assessment (FBA) "to support the computer-generated [b]ehavior[al] [i]ntervention [p]lan [BIP]" (id.). The parent cited the student's alleged progress while attending the Rebecca School and maintained that the 6:1+1 special class recommended by the district was inappropriate and unable to meet the student's emotional, social, and academic needs (id.). The parent sought a reinstatement of the student's original classification of "multiply disabled," and an order directing the district to effectuate direct payment to the Rebecca School for the time period of July 1, 2008 through June 30, 2009 (id.).

An impartial hearing convened on October 2, 2008, and concluded on June 8, 2009, after six days of testimony.¹⁰ On August 7, 2009, the impartial hearing officer issued a "corrected" decision¹¹ which, at the outset, addressed three arguments raised by the district. First, the impartial hearing officer determined that the district's argument that the Rebecca School could not be the recipient of reimbursement or direct tuition payment because it is a for profit institution under 20 U.S.C. § 1412(a)(10)(C)(ii) and 34 C.F.R. § 300.148(c) was without merit, because the referenced statutes only addressed the district's ability to contract with schools, and the district presented no authority or precedent supporting its argument that such provisions restrict a parent's access to redress for a denial of a FAPE (IHO Decision at p. 15). Second, the impartial hearing officer rejected the district's argument that the parent's claim for direct payment violated the Spending Clause of the United States Constitution, noting that the district failed to cite to any authority in support of its position (id. at p. 16). Third, the impartial hearing officer discounted the district's arguments that the parent's request for prospective tuition payment directly to the Rebecca School was improper in this case, and that reimbursement was the only available relief available to the parent (id.).

the parent filed the October 23, 2008 amended due process complaint notice to supersede the prior August 19, 2008 due process complaint notice. Accordingly, I will not consider the August 19, 2008 due process complaint notice, and I will refer only to October 23, 2008 amended due process complaint notice in this decision.

⁹ The term "free appropriate public education" means special education and related services that--
(A) have been provided at public expense, under public supervision and direction, and without charge;
(B) meet the standards of the State educational agency;
(C) include an appropriate preschool, elementary school, or secondary school education in the State involved;
and
(D) are provided in conformity with the individualized education program required under section 1414(d) of this title.
(20 U.S.C. § 1401[9]; see 34 C.F.R. § 300.17).

¹⁰ Two days of the impartial hearing addressed a pendency issue (Tr. pp. 1-20) and procedural and evidentiary issues (Tr. pp. 24-47).

¹¹ The hearing record indicates that the impartial hearing officer issued his original decision on August 6, 2009, but issued a "corrected" decision on the following day, noting that he made an unspecified correction to page 13 of the original decision (IHO Decision at pp. 1, 19). Neither the original decision nor an explanation of the nature of the correction are contained the hearing record. For the purposes of the instant appeal, all further references to the impartial hearing officer's decision refer to the August 7, 2009 decision.

The impartial hearing officer next turned to the issue of whether or not the district offered a FAPE to the student for the 2008-09 school year (IHO Decision at pp. 16-18). The impartial hearing officer found that the district denied the student a FAPE for the 2008-09 school year because: (1) the hearing record demonstrated that the May 2008 CSE lacked a "thorough understanding" of Fragile X syndrome; (2) the May 2008 IEP did not recommend a 1:1 aide for the student, even though elsewhere in the IEP, the CSE noted that the student required a 1:1 crisis management paraprofessional in the classroom; (3) the May 2008 IEP did not clearly delineate the student's sensory issues or sensory integration needs, and the parent's expert witness testified that all students with Fragile X syndrome have significant sensory needs; (4) the parent's expert witness testified that the student should not be educated in a classroom with autistic students; however, the district's recommended placement contained autistic students; and (5) the district's alleged failures to conduct an appropriate review, to create an appropriate IEP, and to develop an appropriate program and placement significantly impeded the parent's opportunity to participate in the decision making process, and ultimately denied the student a FAPE (*id.*).

Having determined that the district failed to offer the student a FAPE for the 2008-09 school year, the impartial hearing officer then concluded that the parent failed to meet his burden of proving that the Rebecca School was an appropriate placement (IHO Decision at p. 19). The impartial hearing officer determined that: (1) the hearing record indicated that the student had classes at the Rebecca School with other students who were on the autism spectrum (i.e., with Asperger's syndrome); that these other students exhibited behaviors in the classroom including scripting, screaming, and repetitive behaviors; and that this was inconsistent with the recommendation of the parent's expert witness that the student not be educated in a class with autistic students; (2) the hearing record lacked sufficient evidence of progress made by the student at the Rebecca School; (3) the hearing record contained neither evidence indicating that the "DIR/Floor Time"¹² methodology used by the Rebecca School was appropriate for use with students with Fragile X syndrome, nor that the student had made progress under this methodology; and (4) although the parent contended that the student no longer exhibited serious behavioral issues, testimonial evidence contained in the hearing record established that these behavioral concerns were extinguished prior to the start of the 2008-09 school year at the Rebecca School (*id.* at pp. 18-19). The impartial hearing officer concluded that the parent failed to meet his burden of proving that the Rebecca School was an appropriate placement for the student for the 2008-09 school year, and he denied the parent's request for payment of tuition to the Rebecca School without considering the equities (*id.* at p. 19).

The parent appeals, alleging that "upon information and belief," the district already rendered payment to the Rebecca School in the amount of \$77, 449.00 for the 2008-09 school

¹² The hearing record defines the "DIR" methodology as "Developmental Individual Difference Relationship Based Model," which is "a developmental model for working with children with these neural developmental delays" (Tr. pp. 416-17). The methodology theorizes that typical students develop through six basic developmental stages, usually before they turn six years of age: sensory regulation, engagement, communication, shared social problem solving, pretend play/fantasy play/abstract thinking, and building logical bridges between ideas (Tr. pp. 417-18). According to the Rebecca School's program director, "the difference from other programs is that [DIR] is a developmental model, that we are looking at a child's development and their delays or their absences in their development," as opposed to "a behavioral model, which is where we are trying to build skills or get rid of skills," adding that "because [these children's] deficits are developmental and not behavioral, we are trying to get them at their core ... and build them up that way, rather than come top down" (*id.*).

year pursuant to a prior impartial hearing officer's order dated June 26, 2006 (see Parent Ex. C).¹³ The parent seeks an order from a State Review Officer directing the district to pay the balance of the student's tuition (\$9,735.00) for the 2008-09 school year directly to the Rebecca School. The parent argues that the impartial hearing officer erred in finding that the Rebecca School was not an appropriate placement for the student for the 2008-09 school year because: (1) the impartial hearing officer erroneously required the parent to demonstrate that the student progressed significantly at the Rebecca School during the 2008-09 school year; (2) the hearing record demonstrated that the Rebecca School's special education program was reasonably calculated to provide the student with educational benefits; (3) the Rebecca School addressed the student's special education needs; (4) the parent's expert witness testified that the student received educational benefits at the Rebecca School and opined that the student continued to need the type of educational environment that the Rebecca School provided; (5) although the parent's expert witness testified that the student should not be educated in a classroom where the other students are exclusively autistic or who have behavior problems, she further opined that the student could learn in a classroom comprised partly of autistic students, provided that key programmatic elements were present, all which were present at the Rebecca School; and (6) the student made progress at the Rebecca School. The parent also contends that equitable considerations support his claim for direct payment.

The district answers, conceding that pursuant to an interim order on pendency, the district has paid a portion of the tuition and that the parent has not made any payments toward the balance due (Answer ¶ 70). The district also maintains that the impartial hearing officer correctly found that the parent failed to sustain his burden of proving that the Rebecca School was an appropriate placement for the student because the hearing record established that: (1) placement at the Rebecca School did not meet the recommendations of the parent's own expert witness; (2) the parent failed to present evidence that the Rebecca School's program was reasonably calculated to enable the student to receive educational benefits; and (3) the parent did not incur any out-of-pocket expenses, suffered no out-of-pocket loss, and therefore, has no entitlement to reimbursement.

The district also cross-appeals those portions of the impartial hearing officer's decision which determined that the parent could seek payment to the Rebecca School directly and that equitable considerations favored the parent.¹⁴ The district attaches one piece of additional evidence to its answer and cross-appeal.

The parent answers the district's cross-appeal, contending that: (1) the district's attempt to introduce additional documentary evidence attached to its cross-appeal should not be considered because the document was available at the time of the impartial hearing and is not necessary to consider in adjudicating the instant appeal; (2) the district's cross-appeal contains multiple

¹³ The petition refers to an interim decision issued on November 6, 2008, and amended on November 18, 2008, in which the impartial hearing officer in this case ruled that "[the student's] pendency placement was established through the unappealed order of [the prior impartial hearing officer] which directs the District to prospectively pay for the full program at Rebecca School" (Pet. ¶ 51). The petition also references a second interim decision issued by this impartial hearing officer on November 20, 2008, which allowed the student's family to visit the district's recommended placement accompanied by the parent's expert witness (Pet. ¶ 52). These interim orders were neither included in the hearing record nor referenced in the impartial hearing officer's August 7, 2009 decision.

¹⁴ Although the district cross-appeals on the issue of equitable considerations, the impartial hearing officer did not render a decision on that issue (IHO Decision at p. 19).

allegations per paragraph in contravention of 8 NYCRR 279.8(a)(3); (3) contrary to the district's allegations, equitable considerations do in fact favor the parent and do not preclude an award of tuition reimbursement in the instant appeal; and (4) contrary to the district's argument, direct tuition payment is an available remedy under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) to parents whose student has been denied a FAPE.

The district concedes on appeal that it failed to offer the student a FAPE during the 2008-09 school year, and does not appeal the impartial hearing officer's determination to that effect (IHO Decision at pp. 17-18). Therefore, that aspect of the decision is final and binding on the parties (34 C.F.R. § 300.514[a]; 8 NYCRR 200.5[j][5]; see Application of a Student with a Disability, Appeal No. 09-079; Application of the Bd. of Educ., Appeal No. 09-057; Application of a Student with a Disability, Appeal No. 09-013; Application of a Student with a Disability, Appeal No. 08-073; Application of a Student with a Disability, Appeal No. 08-046; Application of the Dep't of Educ., Appeal No. 08-025; Application of a Student with a Disability, Appeal No. 08-013; Application of a Child with a Disability, Appeal No. 07-050; Application of a Child with a Disability, Appeal No. 07-026; Application of a Child Suspected of Having a Disability, Appeal No. 06-092; Application of a Child with a Disability, Appeal No. 06-085; Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-108; Application of a Child with a Disability, Appeal No. 02-100).

At the outset, I will address several procedural matters arising on appeal. First, although the parent correctly states that the district included multiple allegations per paragraph in the cross-appeal in contravention of 8 NYCRR 279.8(a)(3), consonant with the discretion afforded me by the State regulations, I decline to dismiss the cross-appeal on this ground (see Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-048; Application of a Child with a Disability, Appeal No. 07-099).

I will now address the issue of the additional documentary evidence attached to the district's cross-appeal. 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. 09-073; 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). The cross-appeal demonstrates that the district is offering the additional documentary evidence to establish that several prior hearing dates were allegedly cancelled by the parent prior to the commencement of the impartial hearing on October 2, 2008. This information was available to the district at the time of the impartial hearing, but the district did not introduce it into the hearing record. Furthermore, even if this documentary evidence was not available at the time of the impartial hearing, it is not necessary in order to render a decision on the appeal before me. Consequently, I decline to consider it.

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as

amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007; therefore, it applies to the instant case (see Application of the Bd. of Educ., Appeal No. 08-016).

Turning to the issues on appeal, I will first address the district's cross-appeal that the impartial hearing officer erred in determining that the parent is entitled to an order of tuition reimbursement and direct funding to the Rebecca School when the parent has not incurred any out-of-pocket expenses related to the student's tuition for the 2008-09 school year. It is well settled that parents who choose to unilaterally place their child at a private school without consent or referral by the school district do so at their own financial risk (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 15 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 373-74 [1985]; see Forest Grove Sch. Dist. v. T.A., 129 S. Ct. 2484, 2496 [2009]). The United States Supreme Court in Burlington held that retroactive reimbursement of private educational expenses is appropriate as an available remedy under the IDEA (Burlington, 471 U.S. at pp. 370-71; see Carter, 510 U.S. at 14-15; see also Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007] [explaining that parents who believe that their child has been denied a FAPE may, at their own financial risk, enroll the child in a private school and seek retroactive reimbursement for the cost of the private school]; Diaz-Fonseca v. Commonwealth of Puerto Rico, 451 F.3d 13, 32, 40 [1st Cir. 2006] [concluding that reimbursement under the IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005] [noting the availability of "retroactive tuition reimbursement" under the IDEA]; Muller v. Comm. on Special Educ. of East Islip, 145 F.3d 95, 106 [2d Cir. 1998] [holding that compensation for "out of pocket expenses" was appropriate]; Streck v. Bd. of Educ., 642 F. Supp. 2d 105, 107 [N.D.N.Y. July 17, 2009] [noting that "it is well settled that the IDEA allows parents to recover only actual, not anticipated, expenses for private school tuition and related expenses"]; see generally Emery v. Roanoke City Sch. Bd., 432 F.3d 294, 299 [4th Cir. 2005]). While the IDEA provides that a court shall grant such relief that is determined to be appropriate (20 U.S.C. § 1415[i][2][C][iii]; Forest Grove, 129 S. Ct. at 2488), the IDEA does not expressly provide for payment of tuition costs in the circumstance herein. The IDEA does provide that "a court or a hearing officer may require the [school district] to reimburse the parents for the cost of [private school] enrollment if the court or hearing officer finds that the [school district] had not made a [FAPE] available to the child in a timely manner prior to that enrollment" (emphasis added) (20 U.S.C. § 1412[a][10][C][ii]; see 34 C.F.R. § 300.148[c]; see also Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't of Educ., Appeal No. 07-032; Application of the Bd. of Educ., Appeal No. 04-037).¹⁵

The hearing record reflects that on August 12, 2008, the parent and the student's grandmother entered into an enrollment contract with the Rebecca School applicable to the 2008-09 school year, in which both the parent and the student's grandmother agreed that they "are individually and jointly responsible for the tuition payments" and

¹⁵ I do note, however, that the United States Court of Appeals for the Second Circuit has determined that under the pendency doctrine, school districts may be required to directly fund pendency placements (see Bd. of Educ. v. Schutz, 290 F.3d 476, 482-84 [2d Cir. 2002]; Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 297 F.3d 195, 200-01 [2d Cir. 2002]), and that courts have ordered prospective payment to afford access to awards of compensatory education (see, e.g., Streck v. Bd. of Educ., 2008 WL 2229141[2d Cir. May 30, 2008]; Draper v. Atlanta Indep. Sch. System, 518 F.3d 1275, 1286 [11th Cir. 2008]). Moreover, a public agency may, under certain circumstances, place a student in an approved private school; however, if it does so, the placement must be at public expense and meet state standards (20 U.S.C. §1412[a][10][B]).

In consideration of the foregoing, [the parent and student's grandmother] agree to seek funding from the [district] and to cooperate fully with the [district] in the placement process and to cooperate with their own counsel and the Rebecca School in the process of impartial review and, if necessary, appeal to [a] State Review Officer.

If [parent and student's grandmother] do not cooperate fully in the placement and review procedures, Rebecca School may, upon thirty days notice, terminate the student's enrollment.

If [parent and student's grandmother] do not qualify financially for prospective payment of tuition or [they] are denied payment by a final unappealed decision resolving their claim for prospective payment of tuition, [they] will remain responsible for tuition costs per the Enrollment Agreement and will complete a new payment schedule

(Parent Ex. J at pp. 2-4; see also Tr. pp. 494-99; but see Tr. pp. 331-32 [parent testified that it was his understanding that the student's tuition for the 2008-09 school year was to be paid by the district], 334 [parent testified that he never discussed with the Rebecca School how payment of tuition would be handled in the event that he lost at the impartial hearing]).

Although the parties concede that the district paid a portion of the student's tuition at the Rebecca School for the 2008-09 school year pursuant to the prior impartial hearing officer's order dated June 26, 2006, the hearing record demonstrates that the Rebecca School has not received payment for the student's summer program, which extended from July 2008 to August 2008 (see Tr. p. 502; Parent Ex. I; see also Tr. p. 332; Parent Ex. C at p. 5). During the impartial hearing, the parent testified that he had not rendered any tuition payments to the Rebecca School for the student's 2008-09 school year (Tr. p. 331). The evidence contained in the hearing record establishes that the parent has neither paid any tuition nor incurred any out-of-pocket expenses in connection with the student's 2008-09 school year at the Rebecca School (see Streck., 642 F. Supp. 2d at 107, citing Diaz-Fonseca, 451 F.3d at 32-33; Emery, 432 F.3d at 298-300). There is no evidence contained in the hearing record indicating that the Rebecca School has ever sought payment of the student's tuition for the 2008-09 school year from the parent or the student's grandmother, or that it has any intention of doing so (see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *8-*9 [S.D.N.Y. March 30, 2009]). Consequently, under the circumstances of the instant appeal, I disagree with the impartial hearing officer's conclusion that the parent has standing to seek tuition reimbursement.

With respect to the impartial hearing officer's determination that that the parent has a viable claim for direct funding to the Rebecca School for the 2008-09 school year, the evidence contained in the hearing record indicates that it was the Rebecca School, not the parent, who incurred the financial burden associated with the student's education for the 2008-09 school year. However, the Rebecca school is not a party in this case, and is not entitled to relief under the IDEA. Furthermore, the parent cannot assert a claim for the particular relief he has requested on behalf of a private entity that lacks standing under the IDEA to maintain a claim against a school district in its own right (see Emery, 432 F.3d at 299; Piedmont Behavioral Health Center LLC v. Stewart, 413 F. Supp. 2d 746, 755-56 [S.D. W.Va. 2006]; see also Malone v. Nielson, 474 F.3d 934, 937 [7th Cir. 2007]).

The parent maintains that he is entitled to direct funding under Connors v. Mills, 34 F. Supp. 2d 795, 805-06 (N.D.N.Y. 1998). However, Connors is readily distinguishable from the circumstances of the instant appeal. In Connors, the Court dismissed the parents' claim for tuition, and, in dicta,¹⁶ discussed the concept of "prospective" tuition payment after the Court made a finding that the school district conceded that it could not provide an appropriate education for the student and that the private placement was appropriate (34 F. Supp. 2d at 806). By contrast, in the case at bar, although the district has conceded that it failed to offer the student a FAPE for the 2008-09 school year, it disputes that the parent's unilateral placement at the Rebecca School was appropriate for the student, and the impartial hearing officer found that Rebecca School was not appropriate. Furthermore, as the 2008-09 school year is now over, the parent in this case is seeking retrospective tuition, not prospective funding as in Connors. Based upon the foregoing, I do not concur with the impartial hearing officer's conclusion that the parent had standing to request direct funding to the Rebecca School of his son's tuition for the 2008-09 school year. Accordingly, I determine that the parent was not entitled to direct funding of tuition at the Rebecca School for the 2008-09 school year (20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.403[c]; see generally Burlington, 471 U.S. 359; Carter, 510 U.S. 7; A.A. v. Bd. of Educ., 196 F. Supp. 2d 259, 264 [E.D.N.Y. 2002]; Application of a Student with a Disability, Appeal No. 09-079; Application of a Student with a Disability, Appeal No. 08-050; Application of the Dep't. of Educ., Appeal No. 07-032).

In view of the foregoing, I will annul the impartial hearing officer's decision to the extent that he determined that the parent had standing under the IDEA to seek tuition reimbursement and direct funding of the student's tuition at the Rebecca School for the 2008-09 school year.

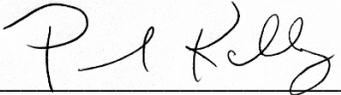
In light of my decision, it is not necessary for me to address the parties' remaining contentions.

THE APPEAL IS DISMISSED.

THE CROSS-APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED, that the impartial hearing officer's decision is annulled to the extent that he determined that the parent had standing under the IDEA to seek tuition reimbursement and direct funding of his son's tuition at the Rebecca School for the 2008-09 school year.

Dated: Albany, New York
November 25, 2009



PAUL F. KELLY
STATE REVIEW OFFICER

¹⁶ see S.W., 2009 WL 857549, at *10.