



The University of the State of New York

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

No. 09-055

**Application of the NEW YORK CITY DEPARTMENT OF
EDUCATION for review of a determination of a hearing officer
relating to the provision of educational services to a student with
a disability**

Appearances:

Michael Best, Special Assistant Corporation Counsel, attorney for petitioner, Tracy Siligueller, Esq., of counsel

Briccetti, Calhoun & Lawrence, LLP, attorneys for respondent, Clinton W. Calhoun, III, Esq., of counsel

DECISION

Petitioner (the district) appeals from the decision of an impartial hearing officer which found that it failed to offer an appropriate educational program to respondent's (the parent's) daughter and ordered it to reimburse the parent for a portion of her daughter's tuition costs at the Family Foundation School (Family Foundation) for the 2005-06 and 2007-08 school years. The appeal must be sustained in part.

At the time the parent requested an impartial hearing in July 2008, the student was attending Family Foundation (Parent Ex. A at p. 1). Family Foundation has not been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7). The student's eligibility for special education and related services as a student with an emotional disturbance is not in dispute in this appeal (34 C.F.R. § 300.8[c][4]; 8 NYCRR 200.1[zz][4]; see Parent Ex. D at pp. 4, 9).

The information in the hearing record regarding the student's educational history is sparse. The parent previously interposed a tuition reimbursement claim against the district in January 2007, alleging that the district failed to offer the student a free appropriate public education (FAPE) for the 2006-07 school year and that the parent was entitled to reimbursement for the costs of unilaterally placing the student at Family Foundation (Parent Ex. D at pp. 2-4). According to an order by an impartial hearing officer (Hearing Officer 1) dated July 2, 2007, the student was referred to the Committee on Special Education (CSE) in March 2006 and upon evaluation,

received diagnoses of a non-verbal learning disorder, bipolar disorder, and oppositional defiant disorder (id. at p. 5). Hearing Officer 1 determined that the parent proved that she was entitled to tuition reimbursement and Hearing Officer 1 awarded the parent the tuition costs at Family Foundation for the 2006-07 school year, upon proof of payment (id. at p. 18). There is no indication in the hearing record that either of the parties appealed the decision of Hearing Officer 1 (see IHO Decision at p. 3).

In a due process complaint notice dated July 3, 2008, the parent, through her attorney, asserted that the student "had never been offered a FAPE" (Parent Ex. A at p. 1). The parent alleged that the district failed to tender payment for the student's tuition at Family Foundation for the 2005-06 school year in accordance with a settlement agreement reached by the parties (id. at p. 1). The parent further asserted that the district underpaid the parent for reimbursement of the student's tuition at Family Foundation for the 2006-07 school year under the July 2007 order issued by Hearing Officer 1 (id. at pp. 1-2). The parent also alleged that she had filed a due process complaint notice in February 2007 for the 2007-08 school year and that the district should pay the cost of the student's tuition for Family Foundation during the 2007-08 school year by virtue of pendency (id. at p. 2).

An impartial hearing convened on March 24, 2009, at which documentary evidence was entered in to evidence and the parent's attorney, who was the sole witness at the impartial hearing, testified regarding how he obtained some of the documentary evidence from the parent (Tr. pp. 8-15; Parent Exs. A-G). In a decision dated April 2, 2009, the impartial hearing officer (Hearing Officer 2) found that the district failed to present any evidence that it offered a FAPE to the student for the 2005-06 school year (IHO Decision at p. 4). With regard to parent's unilateral placement, Hearing Officer 2 determined that "an inference" that Family Foundation was appropriate for the student for the 2005-06 school year could be drawn from the stipulation of settlement that had been prepared by the district for the 2005-06 school year and the district's decision not to appeal from Hearing Officer 1's decision regarding the 2006-07 school year (id.). According to Hearing Officer 2, the parent was also entitled to tuition reimbursement for the 2007-08 school year by virtue of pendency (id. at p. 5). Hearing Officer 2 awarded the parent tuition reimbursement for the 2005-06 and 2007-08 school years to the extent that the parent had submitted "written proof" of payment into the hearing record (id. at pp. 4-5). However, with regard to the parent's claim that the district had underpaid the reimbursement costs for the 2006-07 school year, Hearing Officer 2 denied the parent's requested relief because the parent did not submit any written proof of payment to Family Foundation for that school year into the hearing record (id. at p. 5).

The district appeals those portions of the decision of Hearing Officer 2 that awarded the parent partial reimbursement for the 2005-06 and 2007-08 school years. The district contends that the parent's 2005-06 school year claim is barred by the statute of limitations and is not supported by the evidence insofar as Hearing Officer 2 relied upon an unexecuted stipulation to find, among other things, that Family Foundation was an appropriate placement for the student for the 2005-06 school year. The district argues that the parent failed to present any evidence that Family Foundation was appropriate for the student.

With respect to the parent's 2007-08 school year claim, the district asserts that the student was entitled to a pendency at Family Foundation after the parent filed a different due process complaint notice with the district on December 27, 2007, but that the student's entitlement to

pendency ended when the parent withdrew this complaint on February 1, 2008.¹ The district also submits as additional evidence with its petition for review, a settlement agreement with regard to the parent's claims for the 2007-08 school year that was executed on August 29, 2008 and asserts that due to this stipulation of settlement, Hearing Officer 2's award of partial tuition reimbursement for the 2007-08 school year should be set aside on equitable grounds. According to the district, with respect to the parent's 2007-08 claim, the evidence shows that Hearing Officer 2 erroneously awarded the parent certain amounts paid to Family Foundation that were related to the student's tuition costs for the 2008-09 school year, which were beyond the scope of the impartial hearing. For relief, the district request that the portions of the decision of Hearing Officer 2 that address the 2005-06 school year and the 2007-08 school year be annulled.²

In her answer, the parent denies the district's allegations, notes that the district presented no evidence at the impartial hearing, and objects to the district's request to submit additional evidence on appeal because the documentary evidence proffered on appeal was available at the time of the impartial hearing.³ With regard to the parent's claim for the 2005-06 school year, the parent argues that the district should be precluded from raising the statute of limitations defense for the first time on appeal. The parent also asserts that the dates set forth on the parent's checks to Family Foundation are not a sufficient basis to establish that they were payments related to the 2008-09 school year and are insufficient for overturning Hearing Officer 2's award for the 2008-09 school year.

In a reply to the procedural defenses raised in the answer, the district asserts that it had no duty to raise its statute of limitations defense at the impartial hearing. The district also concedes that the parties' settlement agreement was available at the time of the impartial hearing and argues, among other things, that a State Review Officer should nevertheless accept the evidence as necessary in order to prevent the parent from being "unjustly enriched."

Two purposes of the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) are (1) to ensure that students with disabilities have available to them a FAPE that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living; and (2) to ensure that the rights of students with disabilities and parents of such students are protected (20 U.S.C. § 1400[d][1][A]-[B]; see generally Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]).

A FAPE is offered to a student when (a) the board of education complies with the procedural requirements set forth in the IDEA, and (b) the IEP developed by its CSE through the IDEA's procedures is reasonably calculated to enable the student to receive educational benefits (Rowley, 458 U.S. at 206-07; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). While school districts are required to comply with all IDEA procedures, not all procedural errors render an IEP legally inadequate under the IDEA (A.C. v. Bd. of Educ., 553 F.3d 165, 172 [2d

¹ The district submits documentary evidence of the December 2007 due process complaint notice and February 2008 withdrawal as additional evidence with the petition for review.

² The district does not appeal Hearing Officer 2's findings with regard to the 2006-07 school year. Therefore, that school year is not before me on appeal.

³ The parent retained different counsel on appeal.

Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]; Perricelli v. Carmel Cent. Sch. Dist., 2007 WL 465211, at *10 [S.D.N.Y. Feb. 9, 2007]). Under the IDEA, if a procedural violation is alleged, an administrative officer may find that a student did not receive a FAPE only if the procedural inadequacies (a) impeded the student's right to a FAPE, (b) significantly impeded the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the student, or (c) caused a deprivation of educational benefits (20 U.S.C. § 1415[f][3][E][ii]; 34 C.F.R. § 300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; E.H. v. Bd. of Educ., 2008 WL 3930028, at *7 [N.D.N.Y. Aug. 21, 2008]; Matrejek v. Brewster Cent. Sch. Dist., 471 F. Supp. 2d 415, 419 [S.D.N.Y. 2007] aff'd, 2008 WL 3852180 [2d Cir. Aug. 19, 2008]).

The IDEA directs that, in general, an impartial hearing officer's decision must be made on substantive grounds based on a determination of whether the student received a FAPE (20 U.S.C. § 1415[f][3][E][i]). A school district offers a FAPE "by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction" (Rowley, 458 U.S. at 203). However, the "IDEA does not itself articulate any specific level of educational benefits that must be provided through an IEP" (Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 130 [2d Cir. 1998]; see Rowley, 458 U.S. at 189). The statute ensures an "appropriate" education, "not one that provides everything that might be thought desirable by loving parents" (Walczak, 142 F.3d at 132, quoting Tucker v. Bay Shore Union Free Sch. Dist., 873 F.2d 563, 567 [2d Cir. 1989] [citations omitted]; see Grim, 346 F.3d at 379). Additionally, school districts are not required to "maximize" the potential of students with disabilities (Rowley, 458 U.S. at 189, 199; Grim, 346 F.3d at 379; Walczak, 142 F.3d at 132). Nonetheless, a school district must provide "an IEP that is 'likely to produce progress, not regression,' and . . . affords the student with an opportunity greater than mere 'trivial advancement'" (Cerra, 427 F.3d at 195, quoting Walczak, 142 F.3d at 130 [citations omitted]; see P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]; Perricelli, 2007 WL 465211, at *15). The IEP must be "reasonably calculated to provide some 'meaningful' benefit" (Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1120 [2d Cir. 1997]; see Rowley, 458 U.S. at 192). The student's recommended program must also be provided in the least restrictive environment (LRE) (20 U.S.C. § 1412[a][5][A]; 34 C.F.R. §§ 300.114[a][2][i], 300.116[a][2]; 8 NYCRR 200.1[cc], 200.6[a][1]; see Newington, 546 F.3d at 114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 111 [2d Cir. 2007]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

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).

I will first address the district's procedural contentions that the parent's tuition reimbursement for the 2005-06 school year the claim was barred by the two-year statute of limitations and that the district had no obligation to assert this defense at the impartial hearing. The statute of limitations is an affirmative defense (see, e.g., Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-072), and the district had the responsibility to raise the issue before the original tribunal, which in this case was Hearing Officer 2, and not for the first time on appeal (see, e.g., Nichols v Diocese of Rochester, 42 A.D.3d 903, 905 [4th Dep't 2007]; 45-02 Food Corp. v. 45-02 43rd Realty, LLC, 37 A.D.3d 522, 526 [2nd Dep't 2007]). In this case, the district did not raise or develop the hearing record with respect to this issue before Hearing Officer 2 and, therefore, I decline to consider it.

Turning next to the parties' arguments regarding the 2005-06 school year, I agree with Hearing Officer 2 that the district failed to present any evidence at the impartial hearing and, therefore, failed to meet its burden of production and persuasion that the student was offered a FAPE (IHO Decision at p. 4). However, for the reasons set forth below, I disagree with Hearing Officer 2's determination that the parent established that Family Foundation was appropriate.

A private school placement must be "proper under the Act" (Carter, 510 U.S. at 12, 15; Burlington, 471 U.S. at 370), i.e., the private school offered an educational program which met the student's special education needs (see Gagliardo, 489 F.3d at 112, 115; Walczak, 142 F.3d at 129; Matrejek, 471 F. Supp. 2d at 419). A parent's failure to select a program approved by the State in favor of an unapproved option is not itself a bar to reimbursement (Carter, 510 U.S. at 14). The private school need not employ certified special education teachers or have its own IEP for the student (Carter, 510 U.S. 7; Application of the Bd. of Educ., Appeal No. 08-085; Application of the Dep't of Educ., Appeal No. 08-025; Application of the Bd. of Educ., Appeal No. 08-016; Application of the Bd. of Educ., Appeal No. 07-097; Application of a Child with a Disability, Appeal No. 07-038; Application of a Child with a Disability, Appeal No. 02-014; Application of

a Child with a Disability, Appeal No. 01-105). Parents seeking reimbursement "bear the burden of demonstrating that their private placement was appropriate, even if the IEP was inappropriate" (Gagliardo, 489 F.3d at 112; see M.S. v. Bd. of Educ., 231 F.3d 96, 104 [2d Cir. 2000]). "Subject to certain limited exceptions, 'the same considerations and criteria that apply in determining whether the [s]chool [d]istrict's placement is appropriate should be considered in determining the appropriateness of the parents' placement...'" (Gagliardo, 489 F.3d at 112; Frank G. v. Bd. of Educ., 459 F.3d at 364 [2d Cir. 2006] [quoting Rowley, 458 U.S. at 207 and identifying exceptions]). Parents need not show that the placement provides every special service necessary to maximize the student's potential (Frank G., 459 F.3d at 364-65). When determining whether the parents' unilateral placement is appropriate, "[u]ltimately, the issue turns on" whether that placement is "reasonably calculated to enable the child to receive educational benefits" (Frank G., 459 F.3d at 364; see Gagliardo, 489 F.3d at 115 [citing Berger v. Medina City Sch. Dist., 348 F.3d 513, 522 [6th Cir. 2003] [stating "evidence of academic progress at a private school does not itself establish that the private placement offers adequate and appropriate education under the IDEA"]]). A "private placement is only appropriate if it provides 'education instruction specifically designed to meet the unique needs of a handicapped child'" (Gagliardo, 489 F.3d at 115 [emphasis in original], citing Frank G., 459 F.3d at 365 quoting Rowley, 458 U.S. at 188-89).

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

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

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

With regard to the issue of whether Family Foundation was appropriate for the student under the circumstances of this case, Hearing Officer 2 relied upon an undated stipulation of settlement of the parent's 2005-06 school year tuition reimbursement claim that was offered into evidence by the parent, but had not been executed by the district (IHO Decision at p. 4; Parent Ex. C). Based upon the evidence in the hearing record, I find that it was not appropriate to rely upon the purported settlement agreement to establish that Family Foundation was appropriate (Parent Ex. C). The resolution of disputes by agreement through settlement is preferable to litigation (see Application of a Child with a Disability, Appeal No. 06-039; Application of a Child with a Disability, Appeal No. 98-33; see generally Mitchell v. New York Hosp., 61 NY2d 208 [1984]), and reliance upon evidence regarding an offer of compromise made during confidential settlement

negotiations that relates to the disputed issues is generally disfavored due to the negative effect of discouraging settlements (see Moubry v. Kreb, 58 F. Supp. 2d 1041, 1043 n1 [D.Minn 1999]; Charles Hyman, Inc. v. Olsen Industries, Inc., 227 A.D.2d 270, 276-77 [1st Dep't 1996] [holding that reliance upon a draft settlement offer in establishing liability was improper because it was an offer of compromise]; Sabin-Goldberg v. Horn, 179 A.D.2d 462, 463 [1st Dep't 1992] [holding that offers to settle or compromise are not generally admissible]; see also 34 C.F.R. § 300.506[b][7]; 8 NYCRR 200.5[h][1][v] [providing that discussions in mediation sessions must be confidential]).⁴ Based on the evidence in the hearing record, I find that the draft stipulation was an offer to compromise and that there is no testimonial or documentary evidence in the hearing record that the district actually agreed to the terms set forth in the unsigned, undated stipulation of settlement (Parent Ex. C).

With regard to Hearing Officer 2's finding that the Family Foundation was appropriate for the student for the 2005-06 school year because the district failed to appeal Hearing Officer 1's decision that Family Foundation was appropriate for the student for the 2006-07 school year, there are a variety of reasons why a party may decide not to appeal and, in general, such a decision is not construed as an admission with respect to a separate claim for a different school year (see generally Dalrymple v. United Servs. Auto. Ass'n, 40 Cal.App.4th 497, 523 [Cal. Ct. App. 1995] [holding that a party's decision not to appeal was not an admission of any lack of merit of its previous position]; Florence v. Gabinski, 1985 WL 2503 [N.D.Ill. Sept. 11, 1985] [holding that a party's decision not to appeal may be made for a variety of reasons and that such a decision is not an admission]; see also Mrs. C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Omidian v. Board of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]). In this case, I find that it was not reasonable to construe the district's decision not to appeal Hearing Officer 1's July 2007 decision as an admission that Family Foundation was appropriate for the 2005-06 school year, particularly when the July 2007 decision involved the analysis of the parent's claim for a different school year and the time period in which the district was eligible to seek review of the July 2007 decision predated the parent's July 2008 due process complaint notice in the instant case by nearly a year (Parent Exs. A; D at pp. 12-18).

Furthermore, Hearing Officer 2's determination is not supported by the evidence in the hearing record, which fails to describe the services provided to the student at Family Foundation during the 2005-06 school year. Moreover, the purported stipulation of settlement itself, from which the impartial hearing officer inferred that Family Foundation was appropriate, expressly states that

Neither (a) this Stipulation, or (b) [the district's] reimbursement to the parent for the cost of, related services, transportation or any other materials or services for the student during the 2005-2006 school year, whether provided pursuant to this Stipulation or otherwise, shall be relied upon by any party

⁴ I note that evidence regarding the resolution meeting has not been accorded the same confidential treatment as evidence related to settlement negotiations or mediation sessions (see 20 U.S.C. § 1415[f][1][B]; 34 C.F.R. § 300.510; 8 NYCRR 200.5[j][2]; Davis v. District of Columbia, 2006 WL 3917779, at *7 [D.D.C September 28, 2006]; Application of a Child with a Disability, Appeal No. 06-109).

to indicate, establish or support the position that it constitutes either a recommendation by the [district], or an agreement by the parties, that the student attend [Family Foundation] or that [Family Foundation] constitutes an appropriate placement

(Parent Ex. C at p. 6). For the reasons described above, I find that the parent did not meet her burden to prove that Family Foundation was appropriate for the student and, accordingly, the determination of Hearing Officer 2 that Family Foundation was appropriate for the 2005-06 school year and the resulting award of partial tuition reimbursement for that claim must be annulled (IHO Decision at pp. 4-5).

I will next address the district's request to submit on appeal the August 2008 stipulation of settlement and a cancelled check as they relate to the parties' dispute over the 2007-08 school year tuition reimbursement claim (Pet. Exs. 8-9). 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, the August 2008 stipulation of settlement was executed by both the parent and the district approximately two months after the parent filed her July 2008 due process complaint notice in this case (*compare* Parent Ex. A, *with* Pet. Ex. 8). The August 2008 stipulation of settlement set forth, among other things, the district's promise to reimburse the parent a fixed sum related to the parent's unilateral placement of the student at Family Foundation for the 2007-08 school year and, in exchange, the parent's agreement to discontinue her claim and release the district from all claims arising out of the 2007-08 school year (Parent Ex. 8 ¶¶ 4-6). The district has also submitted a copy of a cancelled check dated December 29, 2008, which was payable to the parent, drawn in the amount set forth in the August 2008 stipulation of settlement, and accompanied by a copy of the parent's endorsement (Pet. Ex. 9). For the reasons more fully described below, I will consider these two exhibits because, as a matter of discretion, I find that they are necessary for my decision.

The impartial hearing in this case was conducted nearly seven months after the parties reached a settlement of the parent's 2007-08 claims and three months after the parent was paid in accordance with the August 2008 stipulation of settlement (Tr. p. 3; Pet. Exs. 8-9). For reasons that remain unexplained, the parties reached a settlement agreement, which I find was dispositive with respect to 2007-08 school year claims set forth in the parent's due process complaint notice, yet the parties failed to disclose to Hearing Officer 2 that this settlement had been achieved and its terms had been carried out by the time the impartial hearing convened (*id.*). I find that it was incumbent upon both parties to disclose to Hearing Officer 2 the fact that the parent's 2007-08 claims had been settled. Although the parent's assertion that allowing the district to submit the August 2008 stipulation of settlement for the first time on appeal amounts to a "second bite at the apple," under the unusual circumstances of this case, I find that ignoring evidence that the 2007-08 school year claim had been settled prior to the impartial hearing, and allowing the parent to proceed with her claim after reaching a mutual agreement to settle it will have the much more

serious effect of encouraging needless litigation through impartial hearings and undermine the policy of encouraging parties to resolve their disputes cooperatively through negotiated settlements. In light of the foregoing evidence, I find that Hearing Officer 2's award for the 2007-08 school year must be annulled because the parties actually reached and implemented a negotiated settlement of all claims arising out of the 2007-08 school year (IHO Decision at p. 5; Pet. Exs. 8-9).

I have examined the parties' remaining contentions and find that it is unnecessary to address them in light of my determinations herein.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the portions of the decision of Hearing Officer 2 dated April 2, 2009 which awarded the parent partial tuition reimbursement for the 2005-06 and 2007-08 school years are annulled.

Dated: **Albany, New York**
 July 1, 2009

PAUL F. KELLY
STATE REVIEW OFFICER