The University of the State of New York

The State Education Department
State Review Officer
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No. 10-089

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, Jessica C. Darpino, Esq., of counsel

Law Offices of Regina Skyer and Associates, attorneys for respondents, Sonia Mendez-Castro, 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 respondents' (the parents') son and ordered it to reimburse the parents for the cost of programming received by their son at home for the 2009-10 school year. The appeal must be sustained.

At the time of the impartial hearing, the student was in a "full-time home program" and was receiving related services outside of the home pursuant to related service authorizations (RSAs) from the district (Tr. pp. 22, 61, 95, 257, 402). The student is eligible for special education programs and related services as a student with autism (Tr. pp. 17, 21, 23, 29-30; Parent. Ex. B at p. 1; see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]). The student's classification is not in dispute although the extent of the district's obligation to provide the student with certain special education services is in dispute in this appeal (id.; Tr. pp. 16-25, 402-03).

The student began receiving Early Intervention (EI) services at home prior to the age of two (Tr. p. 30). He subsequently attended several different center-based programs under the auspices of EI and later, the district (Tr. pp. 30-35; see Tr. p. 22; Parent Ex. F at p. 2). At the age of five, during the 2007-08 school year, the student attended a private school supplemented with a private home program (Tr. pp. 38-41).

On April 9, 2008, the Committee on Special Education (CSE) met for an annual review and developed an individualized education program (IEP) for the student for the 2008-09 school

year (Tr. p. 43; Parent Ex. C). The CSE classified the student as a student with autism and recommended a 12-month school year program in a 6:1+1 special class in a specialized school with the related services of occupational therapy (OT), speech-language therapy, and physical therapy (PT) (Parent Ex. C at pp. 1, 14, 16). The resultant IEP reflected that the CSE had considered placing the student in a special class in a community school with a 12:1+1 or 12:1 staffing ratio but that it was not deemed appropriate to address his needs at that time (id. at p. 15).

During the 2008-09 school year, the student was home schooled (Tr. pp. 44-46). The hearing record indicates that the parents had submitted to the district a notice of their intent to instruct the student at home, an IHIP,[1] and quarterly reports to the district for the 2008-09 school year (Tr. pp. 61-62, 82-83, 234).[2]

On June 24, 2009, the CSE met for an annual review of the student and developed an individualized education service plan (IESP) for the student for the 2009-10 school year (Parent Ex. B). Meeting attendees included a district social worker, a district school psychologist who also attended as a district representative, a district special education teacher, the parents, one of the student's home-based service providers, and an additional parent member (Tr. pp 275-77; Dist. Ex. 2 at p. 1; Parent Ex. B at p. 2). The CSE recommended that the student receive a 10- month general education program with special education teacher support services (SETSS) and the related services of OT, speech-language therapy, and PT (Parent Ex. B at pp. 1, 16). The IESP reflected the student's placement was being changed from a special class in a specialized school to a "home school" program (id. at p. 2). It also reflected that no other programs were considered for the student because he was "parentally placed" (id. at p. 15).

The parents sent a letter dated July 30, 2009 to the district that was addressed to an individual in "Home Schooling & Youth Development" (Dist. Ex. 1). In the letter, the parents thanked the addressee for "all [her] help throughout [the] last year" and stated that they "planned to continue homeschooling [the student] for the 2009-2010 school year" (id.). The parents identified the letter as their "formal letter of intent to that effect" (id.). The parents also stated that they were "happy to provide any paperwork that the [district] require[d]" and that they "would very much like to come to [the addressee's] office and meet [her] in person" (id.).

On October 16, 2009, the student's father sent an e-mail to the district stating that the student had "been transferred out of [the district's special education program]" and requesting that the CSE reconvene "immediately so that [the student] c[ould] continue receiving his related services" (Parent Ex. Q).[3] According to the student's father, the district did not respond to his e-mail (Tr. p. 64).

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[1] Although not explicitly defined in the hearing record, the acronym IHIP appears to refer to an individualized home instruction plan (see 8 NYCRR 100.10[c]; see, e.g., Application of a Student with a Disability, Appeal No. 09-094; Application of a Child with a Disability, Appeal No. 05-128).

[2] The hearing record does not reflect the actual dates that the parents submitted these documents to the district.

[3] It is not clear from the hearing record on what the student's father was basing his statements contained in the e-mail, although the parents state in an October 20, 2009 due process complaint notice that they "learned that the [related service authorizations (RSAs)] that were issued and in their possession for the related services [were] in fact in imminent jeopardy of being terminated based on an administrative determination" (Parent Ex. A at p. 2).

On or about October 20, 2009, the parents filed a due process complaint notice seeking an impartial hearing (Parent Exs. A). In the due process complaint notice, the parents alleged that the district failed to provide the student with a free appropriate public education (FAPE),[4] therefore, they had "unilaterally designed and funded a home-based program for [the student] consisting of approximately 45 hours of special education and related services as they appear[ed] on his IEP" (id. at p. 1). The parents alleged that they "gave notice of their concerns with a public school placement, the home program that they were proposing to implement, and their intent to seek funding for this program at the last IEP meeting held on June 24, 2009" (id.). The parents stated they were seeking reimbursement for the "home program" from July 1, 2009 through June 30, 2010 (id.).

Specifically, the parents alleged that the district inappropriately terminated an IEP for the student and changed it to an IESP; that the district failed to conduct any current objective evaluations prior to making significant changes to the student's program recommendation; that the CSE lacked a mandated regular education teacher; that the goals developed for the student were inappropriate and insufficient; that the CSE incorrectly indicated that the student's behaviors did not seriously interfere with instruction and failed to create a behavior intervention plan for the student; that no special education program had been provided or offered; and that the district had not provided valid and current RSAs to meet the student's mandates for related services (Parent Ex. A at pp. 2-5). The parents further alleged that the student's "home program" was appropriate to address the student's needs and was reasonably calculated to enable the student to receive educational benefit (id. at p. 5). The parents contended that there were no equitable considerations that would bar reimbursement (id.).

The district responded to the parents' due process complaint notice in an answer dated October 26, 2009 and denied the majority of the parents' allegations (Parent Ex. R).

An impartial hearing convened on December 7, 2009 and concluded on April 14, 2010, after four days of testimony. The parents called three witnesses, including the student's father, and submitted 18 exhibits into evidence (Tr. pp. 27, 114, 339; Parent Exs. A-R). The district did not present any testimony as part of its direct case but called one witness as a rebuttal witness (Tr. pp. 25-26, 270). The district submitted two exhibits into evidence (Dist. Exs. 1-2). The impartial hearing officer entered two exhibits into evidence (IHO Exs. I-II).

At the impartial hearing, the parents maintained their allegations that the district failed to provide the student with a FAPE, that the programming the student received at home was appropriate, and that equitable considerations favored an award of reimbursement (Tr. pp. 22-25; 402-03). The district argued that it was not obligated to provide the student with special education services in the form of a FAPE because the parents chose to "home school" the student (Tr. pp.

[4] 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).

16-21; 402-03).[5] In the alternative, if the impartial hearing officer determined that the district was obligated to provide the student with a FAPE, the district conceded that it had not done so (id.). However, the district argued that the programming that the student received at home was inappropriate and that equitable considerations did not favor an award of reimbursement to the parents (id.).

In a decision dated August 6, 2010, the impartial hearing officer rejected the district's contention that it had no obligation to provide the student with a FAPE (IHO Decision at p. 5). She found that there was no dispute that the student was a student with a disability and therefore he was entitled to a FAPE under the plain language of the Individuals with Disabilities Education Act (IDEA) (id.). She stated that the district

> cannot avoid its obligations under the IDEA by characterizing a home-based program on the special education continuum, 8 NYCRR 200.6(i), or a home-based special education program provided by a parent who rejects a CSE's proposed program and placement recommendations as being the same thing as a parent who opts to provide "home instruction (a/k/a "home schooling") as described in Part 100 of the Regulations (8 NYCRR 100.10)

(id.).

The impartial hearing officer further determined that neither the CSE nor the parents' actions were consistent with the home schooling requirements set forth in State regulations at 8 NYCRR 100.10, noting that the parents did not provide written notice to the district of their intent to educate the student at home prior to July 1, 2009, that the district failed to provide the parents with a copy of 8 NYCRR 100.10, and that there was no compliance review of an IHIP (IHO Decision at p. 5). The impartial hearing officer further determined that the parents sent their July 30, 2009 letter to the district stating that they would continue to home school their son because the district told them that the letter was necessary in order for the student to receive related services (id. at p. 6).

The impartial hearing officer further noted that the June 24, 2009 CSE meeting was scheduled with telephonic notice, that a scheduling notice was not sent to the parents, and that the parents were not provided with any notice of the "CSE's proposed change from an IEP to an IESP" prior to the CSE meeting (IHO Decision at p. 5). She determined that the parents had "no understanding of what the IESP was" (id. at pp. 5-6). She opined that the CSE minutes entered into evidence by the district, which described the parents' intent to home school the student and the parents' acceptance of financial responsibility for his education, had "no probative value regarding what actually transpired at the CSE meeting" (id. at p. 5). According to the impartial hearing officer, the "main focus" of the June 24, 2009 CSE meeting was the "CSE staff telling the [p]arents that the [district] would not pay for a home program" (id. at p. 6). The impartial hearing officer determined that the change in the student's recommended program from a 6:1+1 special class to a general education program with SETSS was not known to the parents until they received the student's IESP several weeks after the CSE meeting (id.).

[5] The parents noted at the impartial hearing that the district had not raised in its October 26, 2009 response to the parents' due process complaint notice that the student was not entitled to a FAPE (Tr. p. 24).

Moreover, the impartial hearing officer determined that the "CSE's actions (and inactions) [led her] to conclude that it utilized the fact that [the student] was receiving special education instruction in the home during the 2008-2009 school year to divest itself of the obligation to provide him with an appropriate program and services for the following year" and "[t]he fact that the CSE didn't make a good faith effort to implement [the student's 2009-10] IESP and that it instead threatened to terminate all related services [led her] to conclude that the CSE had simply determined that it wasn't going to provide services" to the student (IHO Decision at p. 6).

Based on the foregoing, the impartial hearing officer determined that the district had an obligation to provide the student with a FAPE (IHO Decision at p. 7). The impartial hearing officer noted that the district conceded that it had not provided the student a FAPE (id.). She also determined that the parents met their burden to prove that the programming the student received at home was appropriate and that equitable factors supported the parents' claim for reimbursement (id. at pp. 7-9). Accordingly, she ordered the district to reimburse the parents for the cost of the student's "home-based ABA programming and instruction" during the 2009-10 school year (id. at pp. 9-10). Regarding related services, the impartial hearing officer determined that there was no remaining dispute as to the provision of related services since the district had continued to provide them via RSAs during the course of the 2009-10 school year and, as such, the request for RSAs did not need to be addressed (IHO Decision at p. 9).

This appeal ensued. The district alleges that it was not required to provide the student with a FAPE because the student was being home schooled. Specifically, the district alleges that the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools and that the district's obligation to provide a FAPE to the student under the IDEA was superseded by the parents' decision to home school the student. The district alleges that school districts are required to furnish equitable services to students who are residents of the State and who attend nonpublic schools located within the district upon written request of the parent, and that students who are home schooled by their parents are to be treated as though they attend nonpublic schools for this purpose.

The district alleges that the impartial hearing officer incorrectly concluded that the district utilized the fact that the student was receiving special education instruction in the home during the 2008-09 school year to divest itself of the obligation to provide him with an appropriate program and services for the following year. Rather, the district alleges that the parents were "entirely clear" in their intent to continue to home school the student. In addition, the district alleges that the impartial hearing officer incorrectly relied upon 8 NYCRR 200.6(i), pertaining to students that a CSE recommends for home and/or hospital instruction, in holding that the district failed to provide the student with a FAPE, and that the impartial hearing officer erred in concluding that the CSE minutes had no probative value.

Assuming, for the sake of argument, that the district was required to provide the student with a FAPE, the district concedes that it did not do so for the 2009-10 school year. Further, the district alleges that the parents did not demonstrate that the "home school program" is appropriate for the student because the parents failed to prove that it met the student's needs. According to the district, the home school program is inappropriate because it cannot satisfy any of the student's related service needs, is too restrictive as the student should be in a school setting to provide him with the socialization that he needs, and the student's "primary instructor" is not qualified to act as such. Regarding equitable considerations, the district alleges that the equities do not favor an

award of reimbursement to the parents because, among other things, the parents only intended to home school the student and did not ask the district for another program. As relief, the district seeks an order annulling the August 6, 2010 decision of the impartial hearing officer.

In their answer, the parents deny many of the allegations made by the district. Specifically, the parents allege that the district was required to provide the student with a FAPE because he was unilaterally placed rather than home schooled. The parents allege a denial of a FAPE based on the district's failure to offer an IEP recommending a public school placement and argue that none of their actions were consistent with an intent to implement a home schooling program for the student.

Further, the parents allege that they demonstrated that the "[h]ome [s]chool [p]rogram" was appropriate for the student. They allege that the program conferred an educational benefit on the student, that the program includes both a "home-program" and special education services that the district has provided through RSAs, and that no public school program was provided despite their interest in one. The parents further allege that equitable considerations support an award of relief as the district acted in bad faith by focusing its CSE meeting solely on developing an IESP without giving the parents notice of the purpose of the CSE meeting and advising the parents that they were financially responsible for the "home-program," and by not explaining the ramifications of the development of an IESP instead of an IEP. The parents also allege that the hearing record does not indicate that the parents acted in bad faith or impeded the district in formulating a program and offering a placement. The parents request that due deference be given to the August 6, 2010 decision of the impartial hearing officer.

A board of education must offer a FAPE to each student with a disability residing in the school district who requires special education services or programs (20 U.S.C. § 1412[a][1][A]; Educ. Law § 4402[2][a],[b][2]). However, the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools (Bay Shore Union Free Sch. Dist. v. Kain, 485 F.3d 730, 733-34 [2d Cir. 2007] [noting that the IDEA incorporates some but not all state law concerning special education]). Although districts are required by the IDEA to participate in a consultation process for making special education services available to students who are enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to receive some or all of the special education and related services they would receive if enrolled in a public school (see 34 C.F.R. §§ 300.134, 300.137[a], [c], 300.138[b]). With regard to students that are home schooled (see 8 NYCRR 100.10), the Official Analysis of Comments to the revised IDEA regulations indicates that:

> [a] few commenters requested revising § 300.133 to include home-schooled children with disabilities in the same category as parentally-placed private school children with disabilities.
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> Discussion: Whether home-schooled children with disabilities are considered parentally-placed private school children with disabilities is a matter left to State law. Children with disabilities in home schools or home day cares must be treated in the same way as other parentally-placed private school children with disabilities for purposes of Part B of the Act only if the State recognizes home schools or home day cares as private elementary schools or secondary schools.

(Expenditures, 71 Fed. Reg. 46594 [August 14, 2006]).

This analysis is consistent with and further clarifies the guidance previously issued by the United States Department of Education Office of Special Education Programs (OSEP), which occurred prior to both the 1999 federal regulations implementing IDEA 1997 and the 2006 federal regulations implementing IDEA 2004 (Letter to Sarzynski, 29 IDELR 904 [OSEP 1997]; Letter to Williams, 18 IDELR 742 [OSEP 1992]). Thus, the IDEA, as implemented by the United States Department of Education, provides that home schooled students shall receive special education services to the same extent that other parentally-placed private school students receive services if home schools are recognized under state law as private elementary (34 C.F.R. § 300.13) or secondary schools (34 C.F.R. § 300.36).

Under New York State law, a student with a disability whose parent has decided to home school the student pursuant to State regulations may be deemed to be a student enrolled in and attending a nonpublic school for the purpose of receiving special education services (Educ. Law § 3602-c[2-c]; 8 NYCRR 100.10). In New York State, a district is obligated to provide special education services to students with disabilities who are enrolled by their parents in nonpublic schools provided that a request for such services is filed with the board of education on or before the first day of June preceding the school year for which the request is made (Educ. Law § 3602-c[2][a]; see generally Bd. of Educ. v. Kain, 60 A.D.3d 851, 852 [2d Dep't 2009]; Application of the Bd. of Educ., Appeal No. 04-079). An exception to the June 1 deadline for filing a written request for special education services for a home schooled student provides that a parent may request services within 30 days after a change of the district of residence or 30 days after being identified as a student with a disability (Educ. Law § 3602-c[2-c]).

The CSE of the school district of location is required to review a timely request for special education services and develop an IESP for a student with a disability "based on the student's individual needs in the same manner and with the same contents as an individualized education program" (Educ. Law § 3602-c[2][b][1]). The CSE must

> assure that special education programs and services are made available to students with disabilities attending nonpublic schools located within the school district on an equitable basis, as compared to special education programs and services provided to other students with disabilities attending public or nonpublic schools located within the school district

(id.). A parent may seek review of the recommendation of the CSE pursuant to the impartial hearing and State-level review procedures pursuant to Education Law § 4404 (id.).

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 burden of proof is on the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of proof regarding the appropriateness of such placement (Educ. Law § 4404[1][c]; see M.P.G. v. New York City Dep't of Educ., 2010 WL 3398256, at *7 [S.D.N.Y. Aug. 27, 2010]).

In this case, a threshold issue with regard to the parents' reimbursement claim is whether the student was enrolled in the district, or home schooled and considered enrolled and attending a nonpublic school for purposes of receiving special education services (8 NYCRR 100.10).[6] However, after conducting an impartial review of the hearing record in this matter for purposes of reaching an independent decision (20 U.S.C. § 1415[g]; see 34 C.F.R. § 300.514[b]; Educ. Law § 4404[2]; 8 NYCRR 200.5[k], I differ with the conclusion reached by the impartial hearing officer and, for the reasons described more fully below, find that the student was home schooled by the parents in this matter.

State regulations set forth the procedures that parents and school districts follow for students who are home schooled. Parents are required to provide written notice to the district of their intent to home school their child by July 1st of each school year, or, for parents who decide to home school their child after the start of the school year, within 14 days following the commencement of home schooling (8 NYCRR 100.10[b][1], [2]). Following receipt of the parents' written notice to home school their child, a school district must provide the parents with a copy of 8 NYCRR 100.10 and a form for the parents to submit an IHIP (8 NYCRR 100.10[c]). If requested by the parents, a district must provide assistance to the parents in completing the IHIP and the parents must submit the completed IHIP to the district (8 NYCRR 100.10[c][3]). The regulation further provides that parents submit quarterly reports to the district containing information including the number of hours of instruction for that quarter; a description of the material covered in each subject listed in the IHIP; a grade for the student in each subject or a written narrative evaluating the student's progress; and a written explanation in the event that less than 80 percent of the amount of the course materials as set forth in the IHIP planned for that quarter has been covered in any subject (8 NYCRR 100.10[g]).

For the 2009-10 school year, the student received programming at home and related services outside of the home through district RSAs (Tr. pp. 64-67, 257).[7] Based on my review of the hearing record, I find that the parents' actions evidenced an intent to home school the student and were overall consistent with the requirements set forth in 8 NYCRR 100.10. First, although not in and of itself dispositive, the evidence shows that the parents had decided to home school the student during the 2008-09 school year and they appeared satisfied with the student's success in

[6] The hearing record references that the student received instruction at home. It is clear from a review of the hearing record that neither the parties nor the impartial hearing officer intended to indicate that this matter involves services to a student who received "home and hospital instruction" while enrolled in a district school (8 NYCRR 200.6[i]). Rather, it is apparent that any reference in the hearing record to instruction at home relates to a dispute over whether the student was home schooled by the parent (8 NYCRR 100.10). Accordingly, although State regulations refer to "home instruction," for clarity, I will use the term home schooling when referring to services provided pursuant to 8 NYCRR 100.10.

[7] The hearing record reflects that beginning in July 2009, the student received two hours of OT, one hour of PT, and two hours of speech-language therapy weekly (Parent Ex. F at p. 4).

home schooling (Tr. pp. 46-48, 77).[8] I am also persuaded that the district reasonably believed that the parents intended to home school the student, based on the testimony of the student's father that the student would probably always have some home program "element,"[9] that the student's father expressed to the CSE that he wanted to home school the student in the hopes of preparing him for a school-based program for the 2010-11 school year, that the student's father informed the CSE that he was going to continue the student's home program, and that the parents did not request any other program for the student (Tr. pp. 40, 58, 80, 279).[10] Additionally, I note that the impartial hearing officer did not address the testimony of a social worker who was present at the June 24, 2009 CSE meeting and who testified that at the beginning of the CSE meeting the student's father indicated that he wanted to keep the student "home for one more year" (Tr. p. 279). Furthermore, the social worker testified that she explained the ramifications of formulating an IEP versus formulating an IESP to the parents on two occasions during the CSE meeting (Tr. pp. 282; 310-11).

Following the CSE meeting, the parents filed a written notice of their intent to home school the student for the 2009-10 school year by letter dated July 30, 2009 (Dist. Ex. 1). Although the parents' notice of intent to home school was filed after the regulatory target of July 1st, the student's father testified that the parents filed the letter for the purpose of complying with the home schooling requirements (Tr. p. 62).[11] The student's primary instructor filed an IHIP on behalf of the parents for the 2009-10 school year (Tr. pp. 83-84, 198-99). The parents also provided the district with a quarterly report dated November 9, 2009, which, upon review, was sufficiently consistent with the content requirements set forth in the regulation (compare Parent Ex. E, with 8 NYCRR 100.10[g]).

The evidence presented in this case shows that the student's father reported a degree of familiarity with the regulatory requirements for home schooling and, in particular, requirements pertaining to filing a "letter of intent" and pertaining to an IHIP (Tr. pp. 60, 82-83). I also note that in this case, the student's parents had experienced the process for seeking reimbursement for a unilateral private placement as the hearing record indicates they had sought reimbursement for a private placement during a prior school year when FAPE was at issue (Tr. p. 89). However, in this instance, the hearing record does not contain a notice of unilateral placement identifying the nature of a problem or notification that the parents were seeking public funding for a private program prior to the parents' due process complaint notice. The impartial hearing officer found that the parents gave oral notice at the June 24, 2009 CSE meeting that they intended to seek

[8] The student's father testified that the student made "significant progress" at home during the 2008-09 school year (Tr. pp. 46-47). He also testified that the student made progress at home during summer 2009 (Tr. p. 64).

[9] The student's father testified that the parents have "never stopped the home program" and "probably never will" (Tr. p. 40).

[10] I note that the student's father testified that his reason for informing the district at the CSE meeting that he intended to home school the student was because he "understood that to be [his] purpose there"; however, the understanding of the student's father as to his purpose at the CSE meeting is irrelevant to the parents' intent to home school the student (Tr. p. 80).

[11] For the purpose of reaching a decision in this case, I need only decide the limited issue of whether the parent evinced the desire to parentally place the student outside of public school or to enroll the student in the district's special education program. Accordingly, there is no need to address the degree of the parents' compliance with the home schooling regulations.

reimbursement for the cost of the student's home-based program, yet this finding is unsupported by the hearing record. The only evidence to this effect in the hearing record is the content of the parents' October 20, 2009 due process complaint notice, which alleges the same (Parent Ex. A at p. 1). Testimony by the student's father indicated that he did not "comment" in response to the district telling the parents that they would not "get any money" for the home programming (Tr. p. 59).

The impartial hearing officer made several findings subsequent to her determination that the district had an obligation to provide the student with a FAPE. These determinations, including that the CSE minutes contained in the hearing record was a "self-serving document created to (sic) the CSE in an attempt to divest itself of its responsibility to make an appropriate program and placement recommendation for this student;" that the parents' letter to the district stating that they intended to continue to home school the student was sent because the district told them that the letter was necessary in order to receive related services; that the CSE's actions led her to conclude that it had utilized the fact that the student was receiving instruction at home during the 2008-09 school year to divest itself of the obligation to provide him with an appropriate program and services for the following year; and that the CSE threatened to terminate the student's related services led her to conclude that the CSE had determined that it was not going to provide services for the student are unnecessary to address in light of my determination that the student was home schooled during the 2009-10 school year.

After a complete and thorough review of the hearing record I find that it was reasonable under the factual circumstances presented in this case for the district to rely on the parents' assertions and conclude that the parents wished to exercise their right under state law to home school the student for the 2009-10 school year as a dually enrolled student and, having excised that right, district was not obligated to develop and put into effect an IEP for the student under the IDEA (see, e.g., Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K., 14 N.Y.3d 289, 292, [2010]; Application of the Bd. of Educ., Appeal No. 04-079).[12] I note that the district has adopted the position that the student is a student with a disability who is home schooled and that he may receive special education programs and services on an equitable basis pursuant to an IESP (Pet. ¶¶ 6, 11, 13; see Educ. Law § 3602-c[2][b][1]).[13] The impartial hearing officer determined that there was no dispute as to the provision of related services to the student since the district had continued to provide them to the student via RSAs during the course of the 2009-10 school year. This determination is not at issue on appeal, and no other issue regarding the provision of services on an equitable basis or otherwise has been articulated on appeal.[14] Accordingly, the necessary inquiry is at an end.

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[12] I also note that a parent who has elected to parentally place a student with a disability and dually enroll the home school student for purposes of receiving special education services under an IESP has the option to discontinue the dual enrollment, reenroll the student in the district and seek special education services from the district pursuant to an IEP.

[13] I note that the dual enrollment statute, Education Law § 3602-c, was amended after the underlying disputes arose in dual enrollment cases such as Bd. of Educ. of Bay Shore Union Free Sch. Dist. v. Thomas K. (14 N.Y.3d 289) and Bd. of Educ. v. Wieder, (72 NY2d 174 [1988]) to add language regarding the provision of services on an "equitable basis" (see Educ. Law 3602-c[2][b][1] as amended by Ch. 378 of the Laws of 2007).

[14] Notably, neither party has articulated the appropriate standard of review for determining whether equitable services have been provided to a student with a disability receiving services under Education Law § 3602-c.

In light of my determinations herein, it is unnecessary for me to address the remaining issues on appeal.

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated August 6, 2010 ordering that the district reimburse the parents for programming received by the student at home for the 2009-10 school year is hereby annulled.

Dated: **Albany, New York**
November 12, 2010

JUSTYN P. BATES
STATE REVIEW OFFICER