The University of the State of New York

The State Education Department
State Review Officer
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No. 10-124

**Application of the BOARD OF EDUCATION OF THE KINGSTON CITY SCHOOL DISTRICT for review of a determination of a hearing officer relating to the provision of educational services to a student with a disability**

**Appearances:**
Shaw, Perelson, May & Lambert, LLP, attorneys for petitioner, Garrett L. Silveira, Esq., of counsel

Sussman & Watkins, attorneys for respondents, Michael H. Sussman, 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 costs of their son's tuition at the Chapel Haven School (Chapel Haven) for the 2008-09 and 2009-10 school years. The appeal must be sustained.

At the time of the impartial hearing, the student was completing his second year at Chapel Haven (Tr. pp. 1, 127, 274-76; see Parent Exs. G-H). Although the student's continuing eligibility to receive special education programs and related services is at issue in this proceeding, his classification as a student with autism is not otherwise in dispute (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]; Tr. pp. 7-16).

For ninth grade (2004-05 school year) and tenth grade (2005-06 school year), the student attended a program operated by the Board of Cooperative Educational Services (BOCES) located in another school district (district of location 1), which had been recommended by the district's Committee on Special Education (CSE) (see Tr. pp. 25-32). During ninth and tenth grade, the student participated in the same "full" and "regular" course load as his nondisabled peers (see Tr. p. 28; Dist. Exs. 16-18; 22; 24-25; 27-28; see also Dist. Ex. 6). The student also received related services during ninth and tenth grade—including individual and group speech-language therapy and individual and group counseling—provided by district of location 1 (Dist. Exs. 19; 21; 23; 26; 30).

For eleventh grade (2006-07 school year), the parents placed the student in a nonpublic school (NPS) located in another school district (district of location 2) because the BOCES program described above had dissolved (see Tr. pp. 31-35, 188-90; Dist. Ex. 14 at p. 1; see also Dist. Ex. 31). For twelfth grade (2007-08 school year), the district CSE's recommended placement in a BOCES' day program; however, the parents rejected this offer and continued the student's placement at NPS in district of location 2 (see Dist. Ex. 14 at p. 1; see also Tr. pp. 70-73; Dist. Exs. 10-11; 31).[1]

On April 1, 2008, the parents executed, and provided to the district, a "Parent Nonpublic School Placement Acknowledgement/Consent Form" (Dist. Ex. 12; see Tr. pp. 171-73).[2] Beneath the heading, the form noted that "[f]or the coming school year I have elected to place my child in a nonpublic school, at my own expense, as indicated below" (Dist. Ex. 12). The parents crossed out "at my own expense," and initialed and dated the marking "4/1/08" (id.; Tr. p. 173). On the form, the parents identified the student, the nonpublic school where the student would be placed—Chapel Haven—along with Chapel Haven's address and telephone number, and the school district within which Chapel Haven was located (Dist. Ex. 12). The form offered the parents three choices regarding the planning of special education services for the student, and the parents checked the following selection:

> According to federal and State requirements, as the nonpublic school is not located within the geographic boundaries of this district, I understand that I must discuss and arrange for special education services with the school district where my child's nonpublic school is located. I give permission for the Committee on Special Education to exchange all pertinent educational information including my child's Individualized Education Program (IEP) or Individualized Education Services Program (IESP), with the school district in which the nonpublic school is located.

(id.).

By letter dated May 7, 2008, Chapel Haven forwarded copies of a two-year enrollment contract to the parents for the student's attendance in the program from July 2008 through July 2010 (Parent Ex. H at pp. 1, 3). The letter noted that payment for the "first quarter of the program year" was due by June 1, 2008 (id. at p. 3). The parents executed the enrollment contract on May 19, 2008 (id. at p. 2).

By letter dated June 18, 2008, the parents thanked the district's director of special education (district director) for providing copies of the student's transcripts from district of location 1, which documented the student's attendance in the BOCES' program during the 2004-05 and 2005-06 school years (IHO Ex. I at p. 7). The parents requested a copy of the district's "official" transcript

[1] In May 2008, district of location 2 conducted an educational evaluation and a psychological reevaluation of the student (Dist. Exs. 10-11).

[2] According to an evaluation report dated June 13, 2008, the parents privately obtained a neuropsychological evaluation of the student, which noted that testing occurred between April 30 and June 4, 2008 (Parent Ex. I at pp. 1, 12). The evaluator indicated in the report that the student would be "entering" Chapel Haven in "the Fall 2008-09" (id. at p. 1).

for the student (id.). By letter dated June 18, 2008, the district director thanked the parents for requesting an "official transcript" from the district, and noted that she had requested copies of the student's NPS transcript and that she was "requesting [the parents'] assistance in obtaining them" (Dist. Ex. 9).

On June 25, 2008, the district's CSE convened to "discuss [the student's] progress" (Tr. pp. 38-39; see Tr. pp. 40-41, 171-72; see also Tr. pp. 16-17). The student's mother and the director of NPS (NPS director), among others, attended the CSE meeting (Tr. pp. 75-76, 171-72). Discussions arose at the CSE meeting regarding the student's graduation status and Regents credits (Tr. pp. 39-41, 75-84, 105-06, 173-74; see IHO Ex. I at p. 4). The district director testified that at the CSE meeting the NPS director had "casually alluded" that the student was "ready to graduate," and further, that although "[w]e felt he was ready to graduate . . . we required the substantiating documents to help us with that" (Tr. pp. 23, 40-41, 84-85; see IHO Ex. I at p. 4; but see Tr. pp. 218-19). At the CSE meeting, the district director asked for a copy of the student's NPS school transcript from the NPS director (Tr. pp. 23, 40-41, 233-35).[3, 4] At the impartial hearing, the district director testified that at the time of the CSE meeting, she believed the student was "graduating from [the district]," and that upon attaining graduation status, the district considered a disabled student "exited from special education" (Tr. pp. 58-60, 84-85). The CSE did not develop an IEP for the student at the June 2008 meeting.

Having not received the student's NPS transcript as requested at the CSE meeting, the district director wrote to the NPS director on August 1, 2008, to, again, request the student's NPS transcript (Dist. Ex. 8). By letter dated August 15, 2008, the parents requested a copy of the district's "official" transcript for the student, and questioned why the district had not yet "accept[ed] or reject[ed]" the credits previously earned by the student in the BOCES' program (IHO Ex. I at p. 4). The parents also noted that at the June 2008 CSE meeting, the district indicated that a guidance counselor would review the student's transcripts to "determine [the student's] eligibility to graduate" (id.).

On September 11, 2008, the district director sent another letter to the NPS director to, again, request a copy of the student's NPS transcript (Dist. Ex. 7). In a letter dated March 13, 2009, the district wrote to the parents, indicating that the district had not yet received a copy of the student's NPS transcript (Dist. Ex. 6). The district noted that it had requested the NPS transcript on "more than one occasion" and that "[a]ny transcript information from [NPS] would be greatly appreciated" (id.). By letter dated November 11, 2009, the district contacted the New York State

[3] At the impartial hearing, the student's mother testified that she had obtained a copy of the student's NPS transcript "in or around spring 2008" and that she did not provide the district with a copy of the NPS transcript upon the district's request at the June 2008 CSE meeting because she did not have a copy of the NPS transcript with her (Tr. pp. 233-35).

[4] According to a November 11, 2009 letter, the NPS director stated at the June 2008 CSE meeting that "they would not provide transcripts, as the parent ha[d] not paid the tuition in full" (Dist. Ex. 5).

Office of Vocational and Educational Services for Individuals with Disabilities seeking assistance in its efforts since "May and June 2008" to obtain the student's NPS transcript (Dist. Ex. 5).[5]

By due process complaint notice, dated December 11, 2009, the parents requested an impartial hearing, alleging that the district failed to provide the student with an educational placement and services for the 2008-09 and 2009-10 school years, and failed to provide access to the student's educational records (IHO Ex. I at pp. 1-3).[6] As relief, the parents requested reimbursement for the costs of their son's tuition, fees, and services at Chapel Haven; related services; transportation to and from Chapel Haven; and transitional services (id. at p. 3). The parents also requested that the impartial hearing officer order the district to provide an "official" district transcript for the student (id.).

By letter dated December 21, 2009, the district responded to the parents' due process complaint notice (IHO Ex. II at p. 1). The district asserted that it had no obligation to provide the student with post-graduate instruction under the Individuals with Disabilities Education Act (IDEA) when a student met "all of the requirements for graduation" (id. at pp. 1-2). In addition, the district noted that at the June 2008 CSE meeting, the NPS director "confirmed for the meeting attendees that [the student] had completed all of the requirements for graduation" and that repeated efforts to obtain the student's NPS transcript had failed to produce the document (id. at p. 2). The district asserted that there was no legal basis upon which the parents could successfully obtain tuition reimbursement (id.).

On March 23, 2010, the parties proceeded to an impartial hearing that occurred over the course of two nonconsecutive days and concluded on March 25, 2010 (Tr. pp. 1, 127). At the impartial hearing, the district's high school principal (principal) testified on behalf of the district (Tr. pp. 130-68). The principal testified about the New York State requirements needed to earn a Regents diploma and a local diploma (Tr. pp. 133-42). During the week of the impartial hearing, the principal reviewed the student's NPS transcript and the district's transcript, and she determined that the student had earned a total of 23 credits and had passed 4 Regents examinations (Tr. pp. 142-51; Dist. Exs. 16; 31). Based upon that information, the principal concluded that the student had earned a Regents diploma by June 2008 (Tr. pp. 150-51).

In her decision, dated November 12, 2010, the impartial hearing officer determined that the student had not received a "high school diploma," "actually graduated," or "reached the age of twenty-one prior to the 2008-2009 and 2009-2010 school years," and therefore, the student "remained eligible for classification as a student with a disability" (IHO Decision at pp. 6-7). The impartial hearing officer concluded that despite the principal's testimony, the district had only reviewed the student's diploma eligibility during the week of the impartial hearing, and thus, the student did not "have the status of a graduated student as of the beginning of the 2008-2009 and

[5] At the impartial hearing, the student's mother admitted that she did not provide the district with a copy of the student's NPS transcript in her possession despite having seen the district's request for the NPS transcript in letters dated June 18, 2008 and March 19, 2009 (Tr. pp. 235-37; Dist. Exs. 6; 9). The student's mother also testified at the impartial hearing that she did not provide the district with a copy of the student's NPS transcript in her possession because the district had not provided her with a copy of a the district's official transcript of the student (Tr. pp. 211, 244-45).

[6] Although the parents noted in a letter dated May 14, 2009, that the student did not have an "IEP this year," the parents also noted that the May 14, 2009 letter was "not a request for an impartial hearing" (Parent Ex. D).

2009-2010 school years" (id. at p. 8). As such, the impartial hearing officer found that the district was obligated to offer the student a free appropriate public education (FAPE) during those school years (id.). Because the district did not prepare an IEP for the student or recommend any placements for the 2008-09 and 2009-10 school years, the impartial hearing officer concluded that the district failed to offer the student a FAPE for both school years (id. at pp. 8-10).[7] The impartial hearing officer then analyzed whether the parents sustained their burden to establish the appropriateness of the student's unilateral placement at Chapel Haven, and based upon her findings, the impartial hearing officer concluded that Chapel Haven met the student's special education needs for the 2008-09 and 2009-10 school years (id. at pp. 10-14). Finally, the impartial hearing officer dismissed the district's argument that equitable considerations precluded an award of tuition reimbursement in this case because the parents cooperated with the CSE, provided notice to the CSE of their intent to place the student at Chapel Haven, and continued to remain in contact with the district regarding the "transcript and [R]egents examination issues" (id. at p. 14). Therefore, the impartial hearing officer directed the district to reimburse the parents for the costs of the student's enrollment and attendance at Chapel Haven for the 2008-09 and 2009-10 school years and to provide reimbursement for the costs of transportation upon proper proof of payment (id. at pp. 14-15).

On appeal, the district contends that the impartial hearing officer erred in concluding that the student had not attained graduation status prior to the 2008-09 school year, that he remained eligible to receive special education programs and services from the district for the 2008-09 and 2009-10 school years, and that the district was obligated to offer the student a FAPE for the 2008-09 and 2009-10 school years. The district also argues that the impartial hearing officer erred in finding that the district was obligated to offer the student a FAPE after the parents notified the district—via the "Parent Nonpublic School Placement Acknowledgement/Consent Form" dated April 1, 2008—of their intent to enroll the student in a nonpublic school located in another school district for the 2008-09 school year. The district asserts that the parents' deletion of the phrase "at my own expense" on the form did not constitute notice to the district that FAPE was at issue or that the parents would seek reimbursement from the district for the student's enrollment in a nonpublic school. In addition, the district argues that absent an obligation to offer the student a FAPE, the impartial hearing officer erred in finding that there was a legal basis to award tuition reimbursement. Finally, the district contends that the impartial hearing officer erred in concluding that the parents sustained their burden to establish that Chapel Haven met the student's special education needs and that equitable considerations supported an award of tuition reimbursement. The district asserts that the impartial hearing officer ignored evidence that the parents improperly interfered with the district's attempts to determine the student's graduation status by deliberately withholding the student's NPS transcript and by failing to provide proper notice of the student's unilateral placement at Chapel Haven for the 2008-09 and 2009-10 school years. The district seeks to reverse the impartial hearing officer's decision in its entirety.

In their answer, the parents deny most of the district's assertions and seek to sustain the impartial hearing officer's decision in its entirety.

[7] The impartial hearing officer also dismissed the district's argument that it was not obligated to offer the student a FAPE for the school years in question pursuant to Education Law § 3602-c and that § 3602-c prohibited the parents from seeking tuition reimbursement from the district (see IHO Decision at pp. 8-10).

Two purposes of the 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 Forest Grove v. T.A., 129 S. Ct. 2484, 2491 [2009]; 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 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]).

In New York State, a student who is otherwise eligible as a student with a disability may continue to obtain services under the IDEA until he or she receives either a local or Regents high school diploma (8 NYCRR 100.5[b][7][iii]; see 34 C.F.R. § 300.102[a][3][i]; Application of the Bd. of Educ., Appeal No. 05-084; Application of the Bd. of Educ., Appeal No. 05-037), or until the conclusion of the school year in which he or she turns age 21 (Educ. Law §§ 3202[1], 4401[1], 4402[5]; 8 NYCRR 100.9[e], 200.1[zz]; see 34 C.F.R. § 300.102[a][1], [a][3][ii]; Application of a Child with a Disability, Appeal No. 04-100). Pursuant to State regulations, "[e]arning a Regents or local high school diploma shall be deemed to be equivalent to receipt of a high school diploma pursuant to Education Law, section 3202(1) and shall terminate a student's entitlement to a free public education pursuant to such statute" (8 NYCRR 100.5[b][7][iii]; see 34 C.F.R. § 300.102[a][3][i]; Educ. Law § 3202[1]).

Turning to the merits of the district's appeal, an independent review of the hearing record demonstrates that the student did attain graduation status prior to the 2008-09 school year, contrary to the impartial hearing officer's decision (see IHO Decision at pp. 6-8). Although neither an impartial hearing officer nor a State Review Officer may pass upon the academic standards required by the State of New York for graduation in an impartial hearing, which must be limited to the special education programs and services provided by the district (Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 96-67; Application of a Child with a Disability, Appeal No. 94-31), both an impartial hearing officer and a State Review Officer may, in the context of a due process proceeding, render factual findings relating to whether a student has met the stated graduation requirements (see Application of a Student with a Disability, Appeal No. 09-145; Application of a Student with a Disability, Appeal No. 09-056; Application of the Bd. of Educ., Appeal No. 08-071; Application of a Child with a Disability, Appeal No. 02-011;

Application of a Child with a Disability, Appeal No. 98-6). In this case, the principal testified that in order to earn a Regents diploma, the student had to earn "22 credits in designated subject areas" and pass one Regents examination with a minimum score of 65 (Tr. pp. 130-39; Dist. Ex. 32). Having reviewed the student's transcripts, the principal concluded that the student had earned 23 credits in the designated subject areas and passed four Regents examinations with minimum scores of 65 by June 2008, and thus, the student had earned a Regents diploma (Tr. pp. 136-38, 142-51, 164-65; Dist. Exs. 16; 31-32). The principal also testified that the student earned a "low pass" on the biology Regents examination with a score of 55 (see Tr. pp. 132-38, 144-45, 149-50, 164-65; Dist. Exs. 16; 31-32). Although the parents questioned the student's ability to fulfill the biology laboratory requirements, and thus, whether the district properly awarded credit to the student for passing the course and taking the biology Regents examination, the principal credibly testified that students must meet the laboratory requirements to be eligible to sit for the Regents examination (Tr. pp. 145-48, 151-56, 165-67).[8, 9, 10] Even assuming, for the sake of argument, that the district improperly credited the student for passing both the biology course and the biology Regents, the student's other course credits and successful passage of other Regents examinations otherwise qualified the student to obtain a local diploma by June 2008, ended the student's eligibility to receive special education programs and related services, and negated the district's obligation

[8] State regulations support the principal's testimony: "[o]nly those persons who have satisfactorily met the laboratory requirements as stated in the State syllabus for a science shall be admitted to a Regents examination in such science" (8 NYCRR 8.2[c]).

[9] Furthermore, disputes over a district's decision to award or its failure to award academic course credit are not properly raised or resolved at an impartial hearing filed under the IDEA. Impartial hearings filed under the IDEA are not the proper forum for such education disputes because such hearings are limited to issues concerning the identification, evaluation, and educational placement of the student, or the provision of a FAPE to a student (20 U.S.C. § 1415[b][6]; 34 C.F.R. § 300.507[a][1]; 8 NYCRR 200.5[i]; Application of the Bd. of Educ., Appeal No. 08-071; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037; Application of a Child with a Disability, Appeal No. 03-070; Application of a Child with a Disability, Appeal No. 02-011; Application of a Child with a Disability, Appeal No. 96-67; Application of a Child with a Disability, Appeal No. 94-31; see Letter to Silber, 213 IDELR 110 [OSEP 1987] [responding to a series of questions posed by a parent on topics including classification and a local agency's rules regarding the accumulation of credits toward graduation and holding that the only issue amenable to an impartial hearing under federal law was whether the student should be classified]).

[10] It is not beyond an impartial hearing officer's authority to hear evidence related to a district's decision to award or disallow credit or to issue a diploma insofar as such evidence may be relevant to the identification, evaluation, and the provision of special education programs and services to a student with a disability (see 8 NYCRR 200.5[j][1]; Application of the Bd. of Educ., Appeal No. 08-071 fn.7).

thereafter to offer the student a FAPE for the 2008-09 and 2009-10 school years (see 8 NYCRR 100.5; Educ. Law § 3202[1]). [11]

Therefore, absent sufficient evidence or arguments to rebut the evidence presented regarding the credits earned or the Regents examinations passed by the student, the impartial hearing officer's decision is not supported by the weight of the evidence, and the order directing the district to reimburse the parents for the costs of their son's tuition at Chapel Haven for the 2008-09 and 2009-10 school years must be annulled.

Finally, although I have concluded the parents cannot prevail on their tuition reimbursement claims and it is therefore unnecessary to reach a determination on the merits regarding whether equitable considerations would preclude an award of tuition reimbursement in this case, I note that the parents' actions in withholding a copy of the student's NPS transcript from the district after the district requested it at the June 2008 CSE meeting were unreasonable and significantly interfered with the district's ability to more quickly assess the student's graduation status. [12] In particular, the evidence indicates the following: the parents already possessed a copy of the student's NPS transcript prior to the June 2008 CSE meeting, but did not provide the transcript to the district; the parents were aware that the district director requested a copy of the student's NPS transcript from the NPS director at the June 2008 CSE meeting, but did not provide the transcript to the district; the parents understood that the district was attempting to determine the student's eligibility for graduation as noted in their August 15, 2008 letter to the district director, but did not provide the transcript to the district; and the parents were aware that the district continued in its efforts to seek a copy of the student's NPS transcript as late as March 19, 2009, but did not provide the transcript to the district at that time (Tr. pp. 211, 233-37, 244-45; Dist. Exs. 6; 9; IHO Ex. I at p. 4). Given these facts, which the impartial hearing officer failed to address in

[11] I note that graduating from high school with a regular high school diploma constitutes a change in placement, which obligates a district to provide parents with prior written notice and a summary of the student's academic achievement and functional performance (34 C.F.R. §§ 300.102[a][3][iii], 300.305[e][2], [3], 300.503; 8 NYCRR 200.1[h], 200.4[c][4], 200.5[a][5][ii]). Although the parents did not allege any procedural violations based upon these grounds, 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 hearing record in this case does not reveal whether prior written notice was issued. In the event it did not, I remind the district to comply with the procedural requirements associated with a student's graduation from high school with a regular high school diploma in the future.

[12] The IDEA also provides that reimbursement may be reduced or denied when parents fail to raise the appropriateness of an IEP in a timely manner, fail to make their child available for evaluation by the district, or upon a finding of unreasonableness with respect to the actions taken by the parents (20 U.S.C. § 1412[a][10][C][iii]; see S.W. v. New York City Dep't of Educ., 2009 WL 857549, at *13-14 [S.D.N.Y. March 30, 2009]; Thies v. New York City Bd. of Educ., 2008 WL 344728 [S.D.N.Y. Feb. 4, 2008]; M.V. v. Shenendehowa Cent. Sch. Dist., 2008 WL 53181, at *5 [N.D.N.Y. Jan. 2, 2008]; Bettinger v. New York City Bd. of Educ., 2007 WL 4208560, at *4 [S.D.N.Y. Nov. 20, 2007]; Carmel Cent. Sch. Dist. v. V.P., 373 F. Supp. 2d 402, 417-18 [S.D.N.Y. 2005], aff'd, 2006 WL 2335140 [2d Cir. Aug. 9, 2006]; Werner v. Clarkstown Cent. Sch. Dist., 363 F. Supp. 2d 656, 660-61 [S.D.N.Y. 2005]; see also Voluntown, 226 F.3d at n.9; Wolfe v. Taconic Hills Cent. Sch. Dist., 167 F. Supp. 2d 530, 533 [N.D.N.Y. 2001]; Application of the Dep't of Educ., Appeal No. 07-079; Application of the Dep't of Educ., Appeal No. 07-032).

her analysis regarding equitable considerations, the parents' lack of cooperation in the district's efforts to obtain a copy of the student's NPS transcript weighs strongly against a finding that equitable considerations supported an award of tuition reimbursement in this case.

Moreover, as argued by the district, the hearing record contains no evidence that the parents provided the district with notice prior to unilaterally placing the student at Chapel Haven for the 2009-10 school year, which also weighs strongly against a finding that equitable considerations supported an award of tuition reimbursement. It is well settled that the IDEA allows that reimbursement may be reduced or denied if parents do not provide notice of the unilateral placement either at the most recent CSE meeting prior to removing the student from public school, or by written notice ten business days before such removal, "that they were rejecting the placement proposed by the public agency to provide a [FAPE] to their child, including stating their concerns and their intent to enroll their child in a private school at public expense" (20 U.S.C. § 1412[a][10][C][iii][I]; see 34 C.F.R. § 300.148[d][1]). This statutory provision "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a [FAPE] can be provided in the public schools" (Greenland Sch. Dist. v. Amy N., 358 F.3d 150, 160 [1st Cir. 2004]). Although a reduction in reimbursement is discretionary, courts have upheld the denial of reimbursement in cases where it was shown that parents failed to comply with this statutory provision (Greenland, 358 F.3d at 160; Ms. M. v. Portland Sch. Comm., 360 F.3d 267 [1st Cir. 2004]; Berger v. Medina City Sch. Dist., 348 F.3d 513, 523-24 [6th Cir. 2003]; Rafferty v. Cranston Public Sch. Comm., 315 F.3d 21, 27 [1st Cir. 2002]); see Frank G. v. Bd. of Educ., 459 F.3d 356, 376 [2d Cir. 2006]; Voluntown, 226 F.3d at 68; Lauren V. v. Colonial Sch. Dist.; 2007 WL 3085854, at * 13 [E.D. Pa. Oct. 22, 2007]).

Having reviewed the parties' remaining contentions, I find that in light of my determinations herein, I need not address them.

**THE APPEAL IS SUSTAINED.**

**IT IS ORDERED** that the impartial hearing officer's decision is annulled to the extent that it determined that the student had not attained graduation status by June 2008 and remained eligible for special education programs and services from the district; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision is annulled to the extent that it determined that the district failed to offer the student a FAPE for the 2008-09 and 2009-10 school years; and

**IT IS FURTHER ORDERED** that the impartial hearing officer's decision is annulled to the extent that it ordered the district to reimburse the parents for the costs of their son's tuition expenses at Chapel Haven for the 2008-09 and 2009-10 school years, and ordered the district to reimburse the parents for transportation costs associated with the student's enrollment and attendance at Chapel Haven for the 2008-09 and 2009-10 school years.

**Dated:** **Albany, New York**
**February 3, 2011**

**JUSTYN P. BATES**
**STATE REVIEW OFFICER**