



The University of the State of New York

The State Education Department

State Review Officer

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No. 12-139

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

Appearances:

Littman Krooks, LLP, attorneys for petitioner, Lauren I. Mechaly, Esq., of counsel

Courtenaye Jackson-Chase, Special Assistant Corporation Counsel, attorney for respondent, Ilana A. Eck, Esq., of counsel

DECISION

I. Introduction

This proceeding arises under the Individuals with Disabilities Education Act (IDEA) (20 U.S.C. §§ 1400-1482) and Article 89 of the New York State Education Law. Petitioner (the parent) appeals from a decision of an impartial hearing officer (IHO) which determined that the educational program and services respondent's (the district's) Committee on Special Education (CSE) had recommended for her son for the 2010-11 school year was appropriate. The appeal must be sustained in part.

II. Overview—Administrative Procedures

When a student in New York is eligible for special education services, the IDEA calls for the creation of an individualized education program (IEP), which is delegated to a local CSE that includes, but is not limited to, parents, teachers, a school psychologist, and a district representative (Educ. Law. § 4402; see 20 U.S.C. § 1414[d][1][A]-[B]; 34 CFR 300.320, 300.321; 8 NYCRR 200.3, 200.4[d][2]). If disputes occur between parents and school districts, incorporated among the procedural protections is the opportunity to engage in mediation, present State complaints, and initiate an impartial due process hearing (20 U.S.C. §§ 1221e-3, 1415[e]-[f]; 34 CFR 300.151-300.152, 300.506, 300.511; Educ. Law § 4404[1]; 8 NYCRR 200.5[h]-[l]).

New York State has implemented a two-tiered system of administrative review to address disputed matters between parents and school districts regarding "any matter relating to the identification, evaluation or educational placement of a student with a disability, or a student suspected of having a disability, or the provision of a free appropriate public education to such student" (8 NYCRR 200.5[i][1]; see 20 U.S.C. § 1415[b][6]-[7]; 34 CFR 300.503[a][1]-[2], 300.507[a][1]). First, after an opportunity to engage in a resolution process, the parties appear at an impartial hearing conducted at the local level before an IHO (Educ. Law. § 4404[1][a]; 8 NYCRR 200.5[j]). An IHO typically conducts a trial-type hearing regarding the matters in dispute in which the parties have the right to be accompanied and advised by counsel and certain other individuals with special knowledge or training; present evidence and confront, cross-examine, and compel the attendance of witnesses; prohibit the introduction of any evidence at the hearing that has not been disclosed five business days before the hearing; and obtain a verbatim record of the proceeding (20 U.S.C. § 1415[f][2][A], [h][1]-[3]; 34 CFR 300.512[a][1]-[4]; 8 NYCRR 200.5[j][3][v], [vii], [xii]). The IHO must render and transmit a final written decision in the matter to the parties not later than 45 days after the expiration period or adjusted period for the resolution process (34 CFR 300.510[b][2],[c], 300.515[a]; 8 NYCRR 200.5[j][5]). A party may seek a specific extension of time of the 45-day timeline, which the IHO may grant in accordance with State and federal regulations (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5]). The decision of the IHO is binding upon both parties unless appealed (Educ. Law § 4404[1]).

A party aggrieved by the decision of an IHO may subsequently appeal to a State Review Officer (SRO) (Educ. Law § 4404[2]; see 20 U.S.C. § 1415[g][1]; 34 CFR 300.514[b][1]; 8 NYCRR 200.5[k]). The appealing party or parties must identify the findings, conclusions, and orders of the IHO with which they disagree and indicate the relief that they would like the SRO to grant (8 NYCRR 279.4). The opposing party is entitled to respond to an appeal or cross appeal in an answer (8 NYCRR 279.5). The SRO conducts an impartial review of the IHO's findings conclusions and decision and is required to examine the entire hearing record; ensure that the procedures at the hearing were consistent with the requirements of due process; seek additional evidence if necessary; and render an independent decision based upon the hearing record (34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). The SRO must ensure that a final decision is reached in the review and that a copy of the decision is mailed to each of the parties not later than 30 days after the receipt of a request for a review, except that a party may seek a specific extension of time of the 30-day timeline, which the SRO may grant in accordance with State and federal regulations (34 CFR 300.515[b], [c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

Upon review and consideration of the hearing record and as discussed more fully below, this decision will not include a recitation of the student's educational history or address the merits of the parent's appeal because the issues in controversy are no longer live and no meaningful relief can be granted, thereby rendering the instant appeal moot.

The student's eligibility for special education programs and related services as a student with autism is not in dispute in this proceeding (Dist. Ex. 3 at p. 1; see 34 CFR 300.8[c][1]; 8 NYCRR 200.1[zz][1]). Briefly, on March 19, 2010, the CSE convened to develop the student's

educational program for the 2010-11 school year (Tr. pp. 47-48; Dist. Ex. 1). For the 2010-11 school year, the March 2010 CSE recommended a 12-month placement in a 6:1+1 special class in a specialized school with related services (Dist. Ex. 1 at p. 1).

A. Due Process Complaint Notice

By due process complaint notice dated June 16, 2010, the parent requested an impartial hearing and she invoked the student's rights pursuant to pendency (Parent Ex. I). As relief, the parent requested the provision of the student's home-based program, comprised of ten hours of 1:1 applied behavioral analysis (ABA) instruction (*id.* at pp. 2-3). In pertinent part, the parent alleged that the March 2010 CSE failed to offer the student a free appropriate public education (FAPE) during the 2010-11 school year, because it did not recommend the provision of home-based ABA services (*id.* at p. 2). The parent further maintained that the district lacked evaluative data to support its decision to discontinue the student's home-based program, which she further contended had proven effective for the student, and afforded him an educational benefit (*id.*).

B. Impartial Hearing Officer Decisions

On August 13, 2010, the parties proceeded to an impartial hearing, and following five days of testimony concluded on June 3, 2011 (Tr. pp. 1-278). By interim order on pendency dated September 16, 2010, an IHO determined that the provision of ten hours per week of home-based ABA instruction formed the basis for the student's pendency placement (IHO Interim Decision at pp. 2-3). On June 1, 2012, an IHO rendered a decision in which he found that the March 2010 CSE offered the student a FAPE during the 2010-11 school year and denied the parent's request for the provision of ten hours per week of home-based instruction (IHO Decision at pp. 18-19).¹ With respect to the provision of a FAPE, although the IHO noted that a school psychologist and an additional parent member did not attend the March 2010 CSE meeting, he did not conclude that their absence rose to the level of a denial of a FAPE (*id.* at pp. 15, 18-19). Moreover, he found that the district afforded the parent an opportunity to participate in the development of the student's IEP (*id.* at p. 18). Regarding the parent's request for the provision of ten hours per week of home-based ABA instruction, the IHO took note of testimony from both parties that the student had progressed during the 2010-11 school year (*id.* at p. 17). He further noted that the student's home-based ABA therapist could not confirm if the home-based program was duplicative of the programs on which the student was working during the school day, which the IHO surmised could result in nine hours of ABA instruction for the student five days per week (*id.* at pp. 17-18). The IHO ultimately concluded that the March 2010 IEP sufficiently addressed the student's need for ABA services and 1:1 instruction and the student had progressed (*id.* at p. 18). Under the circumstances, he determined that the March 2010 IEP constituted the student's least restrictive environment (LRE) and was reasonably calculated to enable him to receive educational benefits (*id.* at p. 18).

IV. Appeal for State-Level Review

¹ For reasons not articulated in the hearing record or in the IHO decision, on December 2, 2011, the IHO who issued the Interim Decision on Pendency and presided over the impartial hearing recused himself (IHO Decision at p. 2; Tr. pp. 1-278; Pet. ¶ 13). On December 15, 2011, the IHO who issued the underlying decision on the merits was appointed (IHO Decision at p. 2).

The parent appeals and requests a reversal of the IHO's decision. The parent maintains that the IHO erred in finding that the district offered the student a FAPE during the 2010-11 school. Specifically, the parent submits that the March 2010 CSE discontinued the student's home-based program despite the lack of evaluative data to demonstrate that the student no longer required it. In addition, the parent contends that the two-year period between the commencement of the impartial hearing and an issuance of a decision on the merits in the instant matter prejudiced the student and deprived him of a FAPE.

In an answer, the district alleges that the IHO properly found that it provided the student with a FAPE during the 2010-11 school year. Preliminarily, the district requests that the petition be dismissed, because, among other things, the parent failed to articulate the reasons for challenging the IHO's decision, and identify the specific findings, conclusions and orders to which the parent has taken exception. The district characterizes the parent's allegations as "generalized" and "conclusory," and further notes that such allegations are insufficient to challenge the IHO's decision. Additionally, the district contends that the parent failed to include citations to the hearing record in her petition, which taken together with the aforementioned deficiencies, warrants a dismissal of the petition. With respect to the merits, the district argues that the March 2010 CSE's decision not to recommend the provision of ten hours per week of home-based ABA instruction did not deprive the student of a FAPE. Additionally, the district maintains that the March 2010 IEP was, on its own, reasonably calculated to enable the student to receive educational benefits, and therefore, an additional home-based ABA program was not a necessary component of a FAPE for him. It further contends that the March 2010 CSE had appropriate and sufficient evaluative data on which to base its determination to discontinue the student's home-based services. The district also asserts that the IHO properly found that the district afforded the parent the opportunity to participate in the development of the student's educational program.

Regarding the parent's claims that the student was prejudiced by the delay in rendering a decision on the merits, the district contends that the parent has not established that the student was prejudiced, because, as a result of his pendency entitlements, the student has received all of the requested relief. The district further maintains that the IHO's failure to render a timely decision did not deprive the student of a FAPE.

The parent submitted a reply and argued that the petition complied with State regulation, and accordingly should not be dismissed on those grounds.

V. Applicable Standards and Discussion

Initially, I decline to dismiss the petition on the basis of insufficiency in this case, as it sufficiently identified the findings of the IHO to which the parent takes exception. However, I find that this case has been rendered moot. As other SROs have long held in administrative reviews of IHO decisions, the dispute between the parties in an appeal must at all stages be "real and live," and not "academic," or it risks becoming moot (see Lillbask v. State of Conn. Dep't of Educ., 397 F.3d 77, 84 [2d Cir. 2005]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]; J.N. v. Depew Union Free Sch. Dist., 2008 WL 4501940, at *3-*4 [W.D.N.Y.

Sept. 30, 2008]; see also Chenier v. Richard W., 82 N.Y.2d 830, 832 [1993]; Hearst Corp. v. Clyne, 50 N.Y.2d 707, 714 [1980]; Application of a Child with a Disability, Appeal No. 07-139). In general, cases dealing with issues such as desired changes in IEPs, specific placements, and implementation disputes may become moot at the end of the school year because no meaningful relief can be granted (see, e.g., Application of the Bd. of Educ., Appeal No. 06-044; Application of the Bd. of Educ., Appeal No. 05-058; Application of a Child with a Disability, Appeal No. 04-027; Application of a Child with a Disability, Appeal No. 00-037; Application of the Bd. of Educ., Appeal No. 00-016; Application of a Child with a Disability, Appeal No. 96-37). Administrative decisions rendered in cases that concern such issues that arise out of school years since expired may no longer appropriately address the current needs of the student (see Daniel R.R. v. El Paso Indep. Sch. Dist., 874 F.2d 1036, 1040 [5th Cir. 1989]; Application of a Child with a Disability, Appeal No. 07-139; Application of the Bd. of Educ., Appeal No. 07-028; Application of a Child with a Disability, Appeal No. 06-070; Application of a Child with a Disability, Appeal No. 04-007).

However, an exception provides that a claim may not be moot despite the end of a school year for which the student's IEP was written, if the conduct complained of is "capable of repetition, yet evading review" (see Honig v. Doe, 484 U.S. 305, 318-23 [1988]; Lillbask, 397 F.3d at 84-85; Daniel R.R., 874 F.2d at 1040; Application of a Child with a Disability, Appeal No. 04-038). The exception applies only in limited situations (City of Los Angeles v. Lyons, 461 U.S. 95, 109 [1983]), and is severely circumscribed (Knaust v. City of Kingston, 157 F.3d 86, 88 [2d Cir. 1998]). First, it must be apparent that "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration" (Murphy v. Hunt, 455 U.S. 478, 482 [1982]; see Knaust, 157 F.3d at 88; Application of a Child with a Disability, Appeal No. 07-139). Second, controversies are "capable of repetition" when there is a reasonable expectation that the same complaining party would be subjected to the same action again (Weinstein v. Bradford, 423 U.S. 147, 149 [1975]; see Hearst Corp., 50 N.Y.2d at 714-15; Application of a Child with a Disability, Appeal No. 07-139). To create a reasonable expectation of recurrence, repetition must be more than theoretically possible (Murphy, 455 U.S. at 482; Russman v. Bd. of Educ., 260 F.3d 114, 120 [2d Cir. 2001]; Application of a Child with a Disability, Appeal No. 07-139). Mere speculation that the parties will be involved in a dispute over the same issue does not rise to the level of a reasonable expectation or demonstrated probability of recurrence (Russman, 260 F.3d at 120; Application of a Child with a Disability, Appeal No. 07-139). Mootness may be raised at any stage of litigation (In re Kurtzman, 194 F.3d 54, 58 [2d Cir. 1999]; Application of a Child with a Disability, Appeal No. 07-139).

Here, the parent has received all of the relief she sought at the impartial hearing by virtue of pendency and the 2010-11 school year at issue has expired. Next, the hearing record contains an interim order on pendency, and, in its answer, the district has indicated that the student has been receiving ten hours per week of home-based ABA instruction pursuant to the student's pendency rights (IHO Interim Decision; Answer ¶ 39). A significant portion of the evaluative information in the hearing record dates from 2008 through early 2010 and, at this juncture, this matter has been pending for over three years, and the time to reevaluate the student under the statute to consider anew the parents' concerns whether the student should receive home-based ABA services has elapsed (20 U.S.C. § 1414[a][2][B][ii]; 34 CFR 300.303[b][2]; 8 NYCRR

200.4[b][4]). I will direct the CSE to consider the issue in light of the student's progress in the years while this case has been pending.

Therefore, upon careful consideration of the evidence in the hearing record, I find that regardless of the merits of a decision concerning whether the district offered the student a FAPE for the 2010-11 school year, no further meaningful relief may be granted to the parent because she has received all of the relief sought pursuant to pendency, and thus, the parent's appeal has been rendered moot (V.M. v N. Colonie Cent. School Dist., 2013 WL 3187069, at *13-*15 [N.D.N.Y. June 20, 2013] [explaining that claims seeking changes to the student's IEP/educational programming for school years that have since expired are moot, especially if updated evaluations may alter the scrutiny of the issue]).

In this case, there can no longer be any live controversy relating to the parties' dispute over the placement or program offered by the district for the 2010-11 school year, which has long since expired. Here, even if a determination on the merits demonstrated that the district did not offer the student a FAPE for the 2010-11 school year, in this instance, it would have no actual effect on the parties because the 2010-11 school year expired on June 30, 2011, and the student remained entitled to his home-based services pursuant to pendency funded by the district through the conclusion of the administrative due process.

C. IHO's Failure to Render a Timely Decision in this Matter

Even if I were to find that the instant appeal had not been rendered moot by virtue of the IDEA's pendency provisions, I am not persuaded by the parent's claim that the student suffered prejudice or was denied a FAPE, as result of the IHOS' failure to render a decision within the 45-day timeline prescribed by the IDEA and State regulations. Both federal and State regulations require an IHO to render a decision not later than 45 days after the expiration of the 30-day resolution period or the applicable adjusted time periods (34 CFR 300.515[a]; 8 NYCRR 200.5[j][5]), unless an extension has been granted at the request of either party (34 CFR 300.515[c]; 8 NYCRR 200.5[j][5][i]). Extensions may only be granted consistent with regulatory constraints and an impartial hearing officer must ensure that the hearing record includes documentation setting forth the reason for each extension (8 NYCRR 200.5[j][5][i]). In particular, an extension "shall be for no more than 30 days" and absent a compelling reason or a specific showing of substantial hardship, "a request for an extension shall not be granted because of school vacations, a lack of availability resulting from the parties' and/or representatives' scheduling conflicts" (8 NYCRR 200.5[j][5][iii]). Moreover, an "[a]greement of the parties is not a sufficient basis for granting an extension" (*id.*). Additionally, IHO's are not permitted to accept appointment unless they are available to conduct a hearing in a timely manner (8 NYCRR 200.5[j][3][i][b]). State regulations further set forth that each party shall have "up to one day" to present its case, and additional hearing days shall be scheduled on consecutive days to the extent practical (8 NYCRR 200.5[j][3][xiii]).

I note that there is nothing in the hearing record that indicates a reason for the delay between the filing of the due process complaint notice on June 16, 2010 and the record close date of May 30, 2012 – nearly two years later (compare Parent Ex. I, with IHO Decision). Furthermore, there is no explanation why the record was not deemed closed by the IHO until

May 30, 2012, almost one year after the final hearing date (see IHO Decision). A guidance document issued by the Office of Special Education in August 2011 reminds IHOs that "[a] record is closed when all post-hearing submissions are received by the IHO . . . Once a record is closed, there may be no further extensions to the hearing timelines [and] the written decision of the IHO must be rendered and mailed within 14 days" of the record close date ("Changes in the Impartial Hearing Reporting System," available at <http://www.p12.nysed.gov/specialed/dueprocess/ChangesinIHRS-aug2011.pdf>).

While the time period that existed between the date of the commencement of the impartial hearing and the issuance of a decision on merits was excessive, I agree with the district that the evidence does not suggest that the parent suffered any prejudice as a result of the inordinate delay. If anything, the parent has received the benefit of the delay because as noted above, during the 2010-11 school year, the student received all of the requested relief, pursuant to pendency. Moreover, under the circumstances, the parent has not demonstrated that the failure to render a timely decision has resulted in a denial of a FAPE to the student. Accordingly, although a decision in this matter was not rendered within the 45-day timeline, the hearing record fails to substantiate the parent's claims that the student was prejudiced by the delay or that the delay rose to the level of a denial of a FAPE.

D. Alternative Findings

Even assuming for the sake of argument that it was necessary to reach the merits of the parties' dispute, it would not alter the outcome of this proceeding in any practical way.

1. Meaningful Parent Participation in the Development of IEP

The parent asserts that the CSE process was procedurally flawed because the March 2010 CSE ignored the student's providers' recommendations during the development of the IEP. Namely, the parent maintains that the district excluded the student's home-based provider from the March 2010 CSE, because the CSE indicated that there was nothing to discuss with her, and that the student's home-based program was terminated as a matter of district policy. Conversely, the district characterizes the parent's testimony regarding her request to continue the student's home-based program as "dubious" (Answer ¶ 35). It further maintains although the CSE did not grant the parent's request to continue the student's home-based services, its refusal to do so does not give rise to a conclusion that the district denied the parent an opportunity to meaningfully participate in the development of the student's IEP. As set forth in more detail below, the hearing record fails to substantiate the district's argument.

State regulations provide that a CSE shall include "persons having knowledge or special expertise regarding the student, including related services personnel as appropriate, as the school district or the parent(s) shall designate. The determination of knowledge or special expertise of such person shall be made by the party (parents or school district) who invited the individual" (8 NYCRR 200.3[a][1][ix]).

Participants at the March 2010 CSE meeting included the following individuals: the student's special education classroom teacher, his physical therapist, his occupational therapist,

his speech-language therapist, a district school psychologist, who also served as district representative, an additional parent member and the parent (Tr. pp. 48-49, 205-06; Dist. Ex. 1 at p. 2).² It is undisputed that the March 2010 CSE knew that the student was receiving home-based ABA services at the time of the meeting; however, the student's home based provider was not in attendance (Tr. pp. 95, 206, 245-46; see Dist. Ex. 1 at p. 2). A review of the hearing record revealed that the results from the October 2009 administration of the Assessment of Basic Language and Learning Skills - Revised (ABLRS-R), classroom observations, an August 2009 PT evaluation and the PT discharge summary were used to develop the student's present levels of performance; however, the hearing record does not indicate that the March 2010 CSE reviewed any reports from the student's home-based provider (Tr. pp. 49-51; 114-15; Dist. Ex. 1 at pp. 2-5; 8; 9; Parent Ex. F).³

The hearing record is clear that the March 2010 CSE did not address whether the student required the continued provision of a home-based program in order to receive a FAPE, although the district was aware that the student had been receiving a home-based program, and that it was the parent's primary concern regarding the student's IEP (Tr. pp. 95, 112; see Tr. pp. 255-56). Contrary to the parent's testimony that she expressed concerns during the March 2010 CSE that the student required a home-based program in order to receive a FAPE and that she requested that the student continue with his home-based program, the district special education teacher testified that no one raised the matter of the student's need for a home-based program (Tr. pp. 95, 112, 212-14, 237-38).

However, the parent also testified that prior to the CSE meeting, although she had asked the district school psychologist about continuing the student's home based program, the parent also testified that whenever she had previously raised the matter with the district, the district had always advised her that "there [was] nothing they [could] do" (Tr. pp. 206, 210-11, 255-56). According to the parent, when she asked about the continued provision of the student's home-based program, the March 2010 CSE did not offer her any explanation for its decision to discontinue the service (Tr. pp. 210-11). Moreover, although the parent attempted to call the student's home-based provider during the March 2010 CSE meeting, she testified that the CSE advised her that there was nothing to discuss with the student's home-based provider (Tr. pp. 245-46). The hearing record does not contain evidence that sufficiently rebuts or contradicts the parent's testimony in this instance. Despite the parent's desire that the home-based provider's views be considered, the hearing record further reflects that the March 2010 CSE did not seek any input from the student's home-based provider in developing the student's IEP, nor did it review any evaluative reports from the student's home-based provider (Tr. pp. 130-31). Information that might have better demonstrated that the district had complied with the procedural requirements for considering the parent's concerns is simply absent. For instance, the hearing record contains no evidence to establish that the district complied with the procedures

² Although the parent testified that the district school psychologist did not attend the March 2010 CSE meeting, the hearing record contains evidence to the contrary; rather, the hearing record reflects that the district school psychologist signed in during the March 2010 CSE meeting (Tr. pp. 206, 237-38, 256-57; Dist. Ex. 1 at p. 2).

³ The hearing record also includes a January 2010 speech-language progress report, an October 2009 functional behavioral assessment (FBA) report and resultant behavioral intervention plan (BIP) ; however, it is not clear from the hearing record whether the district relied on these documents in order to develop the IEP (see Tr. p. 211; Dist. Exs. 4; 5; 7).

requiring that prior written notice be given to the parents, which would have required the district to describe why it changed the services and/or refused the parents' request to provide home-based services together with a description of each evaluation, procedure, assessment, record or report that was used as a basis for the refused action (see 34 CFR 300.503; 8 NYCRR 200.5[a][5][ii]).

Moreover, a review of the hearing record supports the IHO's finding that none of the reports reviewed by the March 2010 CSE were helpful in determining whether the student required a home-based program (IHO Decision at p. 16). Under the circumstances, given that the district failed to address the parent's concerns regarding the removal of the student's home-based program, a decision which was made without the input of the student's home-based provider or the consideration of any evaluative data from the home-based provider, and without any rationale for its determination, I am constrained to find that, in this instance, the lack of input from the student's home-based provider significantly impeded the parent's opportunity to participate in the decision-making process and ultimately rose to the level of a denial of a FAPE (see Application of the Dep't of Educ., Appeal No. 11-031; Application of a Student with a Disability, Appeal No. 08-035). Accordingly, the IHO's determination that the district offered the student a FAPE during the 2010-11 school year would, in the alternative to the mootness finding above, be reversed and the district directed to continue the student's home-based ABA services for the 2010-11 school year.

VI. Conclusion

In light of my determinations herein, I find that it is unnecessary to address the parties' remaining contentions.

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that, if it has not already done so and unless the parties otherwise agree, the CSE shall reconvene within 30 days to reevaluate the student for the purpose of considering whether the student requires home-based ABA services; and

IT IS FURTHER ORDERED that, unless the parties have otherwise agreed, the student's pendency placement shall include 10 hours of home based ABA services up through the date of this decision as directed by the IHO.

Dated: Albany, New York
August 16, 2013


JUSTYN P. BATES
STATE REVIEW OFFICER