The University of the State of New York

The State Education Department
State Review Officer
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No. 10-086

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 New York City Department of Education

Appearances:
Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Karyn R. Thompson, Esq., of counsel

DECISION

Petitioner (the parent) appeals from a decision of an impartial hearing officer which determined that the educational program respondent's (the district's) Committee on Special Education (CSE) had recommended for her son was appropriate and denied the parent's request for compensatory education. The appeal must be sustained.

The student's educational history in the hearing record is sparse (see Tr. pp. 1-16; Parent Exs. A-C).[1] The hearing record reveals that the student has a bilateral sensorineural hearing loss, profound in the right ear and mild in the left ear and has also received diagnoses of a pervasive developmental disorder (PDD), an attention deficit hyperactivity disorder (ADHD), and a language disorder (Parent Ex. C at p. 2). Additionally the student exhibits sensory, motor, and communication deficits (id. at pp. 2, 3, 5, 6). The student is currently nineteen (19) years old and has graduated from the district school with a Regents diploma (IHO Decision at pp. 2, 3; Tr. p. 4; Parent Ex. A).

A district school psychologist conducted a psychoeducational assessment of the student as part of a "triennial process" and in response to the parent's concerns regarding the student's

[1] The hearing record consists of a sixteen (16) page transcript, a one page letter from the district to the student's mother dated April 19, 2010, a one-page document entitled "Student Permanent Record," and a six page psychoeducational assessment report dated May 10, 2007 (Tr. pp. 1-16, Parent Exs. A-C).

education (Parent Ex. C at p. 3). The resultant report dated May 10, 2007 indicated that past and current testing of the student's cognitive and academic functioning had revealed that the student's intellectual potential was "at least within the average range" and that his nonverbal reasoning skills were better developed than his verbal comprehension skills (id. at p. 2).[2] According to the district psychologist, administration of the Test of Non-Verbal Intelligence to the student yielded results "within the [h]igh [a]verage range of nonverbal intelligence, reasoning, and concrete problem-solving ability" (id. at p. 5). Administration of the Kaufman Test of Academic Achievement to the student resulted in the following percentile (and grade equivalents) scores: reading comprehension 39th (9.3), reading/decoding 53rd (12.9), mathematics/applications 37th (8.0), math computations 27th (7.7), which the school psychologist indicated concurred with school reports and the student's cognitive potential (id.). The psychoeducational assessment report noted that attention, focus, and recall were weaknesses that affected the student's ability to complete tasks and that the student required coaxing, prompting, and redirection during the testing (id. at pp. 2, 4). The district school psychologist also noted that the student presented with emotional immaturity, impulsivity, and poor social relatedness and that his thought process appeared disorganized and often random in sequence or logic (id. at pp. 2, 4, 5).[3] According to the school psychologist, the student's conversation was disconnected in fluency and "mostly rooted in one to two word utterances and/or responses" (id.) The student rarely initiated conversation except to randomly question whether "he c[ould] go yet"(id. at p. 4). The school psychologist also noted that based on informal observation, the student's fine-motor coordination was average, his perceptual organization and visual recall were below average, his sensory integration was deficient, and the student's hearing deficits, which made it difficult for him to recognize words in a typical classroom where background noise existed, were addressed by the use of hearing aids and an FM unit (id. at pp. 2-4).

An impartial hearing was conducted on July 19, 2010 (Tr. pp. 1-16).[4] The transcript of the impartial hearing reveals that during the course of the hearing, the impartial hearing officer and the parent engaged in lengthy off-the-record discussions about the case (Tr. pp. 3, 4). According to the impartial hearing officer, one off-the-record discussion was "about a half-hour" in length and another was "about an hour and a half or so" (id.). The district did not appear at the impartial hearing (id.).

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[2] The May 10, 2007 psychoeducational assessment report states that "[a]lthough [the student] [wa]s a 'District 75' student, recommended a ratio of 8:1[+]1 in a specialized classroom, he ha[d] been mainstreamed into a general education setting with the supports of a special education teacher [and] a paraprofessional" (Parent Ex. C at p. 3). It is unclear from this statement whether, at the time of the psychoeducational assessment, the student was in the 8:1+1 special class, the general education setting, or both. The report also indicated that the student received the related services of "[s]peech, [h]earing [e]ducation, and [c]ounseling" (id.).

[3] The assessment report reflects that the student reportedly had a behavioral intervention plan to address inappropriate classroom behaviors such as angry outbursts, poor frustration tolerance, and physical lashing out at peers (Parent Ex. C at pp. 3, 4).

[4] The impartial hearing officer's decision indicates that the student's mother and sister appeared on January 12, 2010 (IHO Decision at p. 1). Presumably, the January 12, 2010 date is a typographical error.

In a two-page decision dated July 21, 2010, the impartial hearing officer noted that the parent requested a finding from the impartial hearing officer that the district failed to provide appropriate services to the student throughout high school, from September 2006 to June 2010 (IHO Decision at p. 2). The impartial hearing officer denied the parent's request for compensatory education, determining that "although there may have been gaps in the services provided to the student," the district provided a free appropriate public education (FAPE) to the student.(id. at p. 3).[5] She noted that the student graduated with a Regents diploma in June 2010, and further that many teachers had given him passing grades, which according to the impartial hearing officer indicated that he had succeeded in his education program (id.). She found that he had acquired sufficient skills to gain admittance into college (id.). She also found that the record indicated that "the school district did its job" (id.). Additionally, she found that because the student graduated, the district no longer had jurisdiction over him (id.). She ordered that the district was not required to provide additional services and denied the relief requested by the parent (id.).

The parent appeals and asserts that the impartial hearing officer erred in finding that the district offered a FAPE to the student because the district failed to send a representative to the impartial hearing and therefore failed to meet its burden. The parent also asserts that the student's promotion from tenth grade to twelfth grade jeopardized his future and harmed him emotionally. She further asserts that the district gave the student false grades in order to ensure that he graduated. Additionally, she asserts that the student was emotionally damaged because the district provided the student with instruction in an empty classroom used for other students who had learning disabilities much more severe than the student's disability. She further asserts that the student's FM unit failed to work for four months during tenth grade. She also alleges that the district failed to take her concerns seriously and denied her request for a new evaluation and a new individualized education program (IEP) and concomitant behavioral intervention plan. As relief she requests: (1) a tutorial class in English and mathematics, (2) a social group for teens with Asperger's Syndrome, (3) a personal coach in college and at home during vacations, (4) therapy for "[the student's] bad experience" in high school, and (5) payment for college if [the student] fails to perform well.

In its answer, the district asserts that the parent's claims for compensatory education for any alleged failures of the district prior to June 20, 2008, two years prior to the date of the due process complaint notice, are barred by the statute of limitations.[6] The district also asserts that the parent alleged four bases for compensatory education: (1) the student suffered emotionally because he felt unwelcome at the district's school, (2) he was placed with more severely disabled students, (3) his FM unit failed to function properly, and (4) he was socially promoted and should not have received a Regents diploma. The district asserts that the first three alleged bases were not gross violations of the Individuals with Disabilities in Education Act (IDEA) to support an award of compensatory education. As for the fourth ground, the district asserts that neither an impartial hearing officer nor a State Review Officer has the jurisdiction to review the State's academic standards for graduation, and as such, the student's graduation with a Regents diploma and his

[5] The impartial hearing officer did not specify what years her FAPE determination covered.

[6] The parent's due process complaint notice is not contained in the hearing record (see IHO Decision at p. 5).

acceptance to college bars a compensatory education award. As relief the district requests that the parent's petition be dismissed in its entirety.

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]).

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

114; Gagliardo v. Arlington Cent. Sch. Dist., 489 F.3d 105, 108 [2d Cir. 2007]; Walczak, 142 F.3d at 132; E.G. v. City Sch. Dist. of New Rochelle, 606 F. Supp. 2d 384, 388 [S.D.N.Y. 2009]; Patskin v. Bd. of Educ., 583 F. Supp. 2d 422, 428 [W.D.N.Y. 2008]). Also, a FAPE must be available to an eligible student "who needs special education and related services, even though the [student] has not failed or been retained in a course or grade, and is advancing from grade to grade" (34 C.F.R. § 300.101[c][1]; 8 NYCRR 200.4[c][5]).

An appropriate educational program begins with an IEP that accurately reflects the results of evaluations to identify the student's needs (34 C.F.R. § 300.320[a][1]; 8 NYCRR 200.4[d][2][i]; Tarlowe v. Dep't of Educ., 2008 WL 2736027, at *6 [S.D.N.Y. July 3, 2008]), establishes annual goals related to those needs (34 C.F.R. § 300.320[a][2]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (34 C.F.R. § 300.320[a][4]; 8 NYCRR 200.4[d][2][v]; see Application of the Dep't of Educ., Appeal No. 07-018; Application of a Child with a Disability, Appeal No. 06-059; Application of the Dep't of Educ., Appeal No. 06-029; Application of a Child with a Disability, Appeal No. 04-046; Application of a Child with a Disability, Appeal No. 02-014; Application of a Child with a Disability, Appeal No. 01-095; Application of a Child Suspected of Having a Disability, Appeal No. 93-9). Subsequent to its development, an IEP must be properly implemented (8 NYCRR 200.4[e][7]; Application of a Child with a Disability, Appeal No. 08-087).

Compensatory education is an equitable remedy that is tailored to meet the unique circumstances of each case (Wenger v. Canastota, 979 F. Supp. 147 [N.D.N.Y. 1997]). Compensatory education may be awarded to a student with a disability who no longer meets the eligibility criteria for receiving instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). 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 (34 C.F.R. § 300.102[a][3][i]; 8 NYCRR 100.5[b][7][iii]; 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). Within the Second Circuit, compensatory education has been awarded to students who are ineligible by reason of age or graduation if there has been a gross violation of the IDEA resulting in the denial of, or exclusion from, educational services for a substantial period of time (see Somoza v. New York City Dep't of Educ., 538 F.3d 106, 109 n.2, 113 n.6 [2d Cir. 2008]; Mrs. C. v. Wheaton, 916 F.2d 69 [2d Cir. 1990]; Burr v. Ambach, 863 F.2d 1071 [2d Cir. 1988]; Cosgrove v. Bd. of Educ., 175 F. Supp. 2d 375, 387 [N.D.N.Y. 2001]; Application of a Child with a Disability, Appeal No. 03-078 [awarding two years of instruction after expiration of IDEA eligibility as compensatory education]).

Compensatory education relief may also be awarded to a student with a disability who remains eligible for instruction under the IDEA (see 20 U.S.C. §§ 1401[3], 1412[a][1][B]; Educ. Law §§ 3202[1], 4401[1], 4402[5]). Within the Second Circuit, compensatory education relief in the form of supplemental special education or related services has been awarded to such students if there has been a denial of a FAPE (see P. v. Newington Bd. of Educ., 546 F.3d 111, 123 [2d Cir. 2008] [stating that "[t]he IDEA allows a hearing officer to fashion an appropriate remedy, and . . .

compensatory education is an available option under the Act to make up for denial of a [FAPE]"]; Student X. v. New York City Dep't of Educ., 2008 WL 4890440, at *23 [E.D.N.Y. Oct. 30, 2008] [finding that compensatory education may be awarded to students under the age of twenty-one]; see generally R.C. v. Bd of Educ., 2008 LEXIS 113149, at *38-40 [S.D.N.Y. March 6, 2008]). Likewise, State Review Officers have awarded compensatory "additional services" to students who remain eligible to attend school and have been denied appropriate services, if such deprivation of instruction could be remedied through the provision of additional services before the student becomes ineligible for instruction by reason of age or graduation (Bd. of Educ. v. Munoz, 16 A.D.3d 1142 [4th Dep't 2005] [finding it proper for a State Review Officer to order a school district to provide "make-up services" to a student upon the school district's failure to provide those educational services to the student during home instruction]; Application of a Student with a Disability, Appeal No. 09-111 [adding summer reading instruction to an additional services award]; Application of the Bd. of Educ., Appeal No. 09-054 [awarding additional instructional services to remedy a deprivation of instruction]; Application of a Student with a Disability, Appeal No. 09-044 [awarding "make-up" counseling services to remedy the deprivation of such services]; Application of a Student with a Disability, Appeal No. 09-035 [awarding 1:1 reading instruction as compensation for a deprivation of a FAPE]; Application of a Student with a Disability, Appeal No. 08-072 [awarding after school and summer reading instruction as compensatory services to remedy a denial of a FAPE]; Application of the Bd. of Educ., Appeal No. 08-060 [upholding additional services awards of physical therapy and speech-language therapy]; Application of a Student with a Disability, Appeal No. 08-035 [awarding ten months of home instruction services as compensatory services];[7] Application of the Bd. of Educ., Appeal No. 06-074; Application of a Child with a Disability, Appeal No. 05-041; Application of a Child with a Disability, Appeal No. 04-054).

Graduation and receipt of a high school diploma are generally considered to be evidence of educational benefit (Pascoe v. Washington Cent. Sch. Dist., 1998 WL 684583 [S.D.N.Y. 1998]; Application of a Student with a Disability, Appeal No. 09-145; Application of the Bd. of Educ., Appeal No. 05-037; see also Bd. of Educ. v. Rowley, 458 U.S. 176, 207 n.28 [1982]; Walczak, 142 F.3d at 130 [noting that "the attainment of passing grades and regular advancement from grade to grade are generally accepted indicators of satisfactory progress" under the IDEA]), the receipt of which terminates a student's entitlement to a FAPE (34 C.F.R. § 300.122[a][3][i]; 8 NYCRR 100.5[b][7][iii]). It would be a rare case for a student who graduates with a Regents or local high school diploma to qualify for an award of compensatory education (see, e.g., J.B. v. Killingly Bd. of Educ., 990 F. Supp. 57 [D. Conn. 1997][where student apparently graduated and received diploma prior to the district establishing the appropriate graduation requirements, court decided student had established a prima facie case of likelihood of success on the merits on a possible award of continued compensatory education]; Application of a Student with a Disability, Appeal

[7] Application of a Student with a Disability, Appeal No. 08-035 was upheld in Bd. of Educ. of the Hicksville Union Free Sch. Dist. v. Schafer, Index No. 18986/2008 (Nassau Co. Sup. Ct. March 24, 2009). An appeal was taken to the New York State Appellate Division, Second Department, Index No. 2010/00155, where the matter is currently pending as of this date.

No. 09-056; Application of a Child with a Disability, Appeal No. 05-089; Application of the Bd. of Educ., Appeal No. 05-037).

For the reasons set forth in greater detail below, I find that I am unable to meaningfully review the hearing record due to inadequacies in the hearing record and because the impartial hearing officer's decision was not written in accordance with State regulations. I note that the transcript of the impartial hearing is only sixteen pages in length and indicates that the impartial hearing officer and the parent held extensive off–the-record discussions about the student's case (see Tr. pp.3-4). The hearing record fails to include the due process complaint notice[8] and the student's IEPs for the school years at issue. Moreover, the hearing record contains insufficient information relating to the student's classification,[9] the student's special education needs, and the type of special education program(s) and service(s) provided to the student during the school years at issue (Tr. pp. 1-16; Parent Ex. A-C; see IHO Decision at pp. 1-3). There is also no reference made on the record as to why the district did not appear at the impartial hearing (id.). The impartial hearing officer's decision failed to clarify any of these insufficiencies in the hearing record (see Tr. pp. 1-16; IHO Decision at pp. 1-3).

State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall set forth the reasons and the factual basis for the determination. The decision shall reference the hearing record to support the findings of fact" (8 NYCRR 200.5[j][5][v]). In order to properly reference the hearing record, pages of transcript and relevant exhibit numbers should be cited with specificity (see Application of a Student with a Disability, Appeal No. 10-007; Application of a Student with a Disability, Appeal No. 09-084; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-138; Application of a Student with a Disability, Appeal No. 08-043). Moreover, State regulations further require that an impartial hearing officer "render and write decisions in accordance with appropriate standard legal practice" (8 NYCRR 200.1[x][4][v]). Citations to applicable law are the norm in "appropriate standard legal practice," and should be included in any impartial hearing officer decision (see Application of the Dep't of Educ., Appeal No. 09-092; Application of a Student with a Disability, Appeal No. 09-034; Application of a Student with a Disability, Appeal No. 08-064).

Here, the decision does not adequately identify the impartial hearing officer's reasons for her determination. Although she made several findings including that "there may have been gaps in the services provided to the student," that the student "acquired sufficient skills," and that "the school district did its job" (IHO Decision at p. 3), she failed to substantiate her findings by citing to specific portions of the hearing record (id.).[10] In fact, the impartial hearing officer's decision is devoid of any specific cites to transcript pages or to exhibits in evidence (id. at pp. 1-3). Moreover,

[8] The district's answer refers to an impartial hearing request dated June, 20, 2010 (Answer ¶ 18).

[9] Although there was some discussion at the hearing that the student was classified as a student with an emotional disturbance, it is unclear from the record whether he has always been so classified (Tr. p. 6).

[10] The impartial hearing officer also failed to provide a citation to support her finding that the student graduated in June 2010 with a Regents diploma, or her finding that he gained admittance to the Rochester Institute of Technology (IHO Decision at p. 3).

the impartial hearing officer does not reference any legal authority to support her determination. The impartial hearing officer's failure to cite with specificity to the facts in the hearing record and the law upon which the decision is based, and failure to provide the reasons for her determinations, is not helpful to the parties in understanding the decision. Thus, I find that the decision does not comport with State regulations at 8 NYCRR 200.5(j)(5)(v) requiring the decision to set forth the reasons and the factual basis for the determination. The impartial hearing officer is reminded to comply with State regulations, cite to relevant facts in the hearing record with specificity, and provide a reasoned analysis of those facts in support of her conclusions.

Based on the foregoing, I find that that the hearing record in this matter is incomplete. It is well-settled that it is an impartial hearing officer's responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of a Child with a Disability, Appeal No. 04-024; Application of a Child with a Disability, Appeal No. 03-003; Application of a Child with a Disability, Appeal No. 00-039; Application of a Child with a Disability, Appeal No. 00-021; Application of the Bd. of Educ., Appeal No. 97-92). Additionally, I also find that the impartial hearing officer's July 21, 2010 decision is unclear and fails to cite to the hearing record to provide a rationale for her findings and ultimate determination. As such, I find that the procedures at the impartial hearing were not consistent with the requirements of due process (34 C.F.R. § 300.514[b][2][ii]). I will therefore sustain the parent's appeal; vacate the impartial hearing officer's July 21, 2010 decision in its entirety and remand this matter to the same impartial hearing officer in order to ensure that a record is properly and clearly developed at the impartial hearing, and to ensure that the resultant decision comports with State regulations at 8 NYCRR 200.5(j)(5)(v). While the impartial hearing officer's decision is vacated by this decision, I have made no determination as to the merits of either parties' claims or arguments pertaining to whether the student was offered a FAPE and whether the student is entitled to an award of compensatory education services. I also note that upon remand, unless the parties otherwise agree, no resolution session is required and the parties may proceed to a direct continuation of the impartial hearing.

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

THE APPEAL IS SUSTAINED.

IT IS ORDERED that the impartial hearing officer's decision dated July 21, 2010 is annulled in its entirety; and

IT IS FURTHER ORDERED that unless the parties otherwise agree, this matter is remanded to the same impartial hearing officer who issued the July 21, 2010 decision to reconvene the impartial hearing, hear additional testimony and/or receive additional evidence into the record consistent with this decision, and render a new decision within 30 days from the receipt of this decision; and

IT IS FURTHER ORDERED, that if the impartial hearing officer who issued the July 21, 2010 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed to issue a new determination which is consistent with this decision.

Dated: **Albany, New York**
October 29, 2010

FRANK MUÑOZ
STATE REVIEW OFFICER