The University of the State of New York

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

No. 12-007

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:
Jaclyn Okin Barney, Esq., attorney for petitioner

Michael Best, Special Assistant Corporation Counsel, attorneys for respondent, G. Christopher Harriss, 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 respondent's (the district's) Committee on Special Education (CSE) recommended for her son for the 2011-12 school year is appropriate. The appeal must be dismissed.

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, at least one psychologist, and school district representatives (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 300.514[c]; 8 NYCRR 200.5[k][2]).

III. Facts and Procedural History

The hearing record describes the student as a "sweet boy who has made some attachments to adults in the classroom," has received a diagnosis of cerebral palsy (CP), is nonverbal and nonambulatory, has a history of seizures, communicates with the aid of assistive technology, exhibits significant global cognitive delays and impaired intellectual functioning, has difficulties in transitioning and focusing, and "needs assistance with basically everything" in connection with his activities of daily living (Tr. p. 121; Dist. Ex. 1 at pp. 1, 3, 5, 11, 13; Parent Exs. J at pp. 2-3; K; L at p. 2; M at pp. 1-2; N at pp. 2-3; O at p. 2; Q at p. 1; S at p. 3). The student's eligibility for

special education programs and related services as a student with multiple disabilities is not in dispute in this proceeding (Dist. Ex. 1 at p. 1; see 34 CFR 300.8[c][7]; 8 NYCRR 200.1[zz][8]).[1]

For the 2010-11 school year, the student began attending a district 12:1+4 special class in a special school and received related services (Parent Ex. S at p. 2). In December 2010, the student transferred from the district's program to the Children's Learning Center (CLC) pursuant to a November 5, 2010 IHO decision that found the district's 12:1+4 placement for the student's 2010-11 school year to be inappropriate (see Tr. p. 342; Parent Ex. S). The student attended CLC's summer program during summer 2011, during which time he was enrolled in a 12:1+4 special class and received related services consisting of occupational therapy (OT), physical therapy (PT), and speech-language therapy (Parent Ex. K). CLC has been approved by the Commissioner of Education as a school with which school districts may contract to instruct students with disabilities (Tr. pp. 260, 274; see 8 NYCRR 200.1[d], 200.7).

On June 20, 2011, the CSE convened to develop the student's IEP for the 2011-12 school year (Dist. Exs. 1 at pp. 1-2; 6). The June 2011 CSE recommended a 12-month educational program consisting of a 12:1+4 special class in a special school and related services of PT, OT, and speech-language therapy (Dist. Ex. 1 at pp. 1, 13). The CSE also recommended assistive technology, toileting assistance, and assistance during the school day with activities of daily living, including transitions, as well as special education transportation (Dist. Exs. 1 at pp. 1-5, 11, 13; 6 at p. 2).

In a letter dated July 6, 2011, the district summarized the CSE's recommendations pursuant to the June 2011 CSE meeting and advised the parent of the particular school to which it assigned the student for the 2011-12 school year (Parent Ex. C). On September 12, 2011, the parent, accompanied by an advocate, visited the assigned school and observed the recommended 12:1+4 special class (Tr. pp. 152-68, 203-06).

A. Due Process Complaint Notice

By due process complaint notice dated August 15, 2011, the parent requested an impartial hearing and alleged that the district failed to offer an appropriate placement to the student for the 2011-12 school year (Parent Ex. T). According to the parent, the district recommended the same 12:1+4 special class for the 2011-12 school year that was found inappropriate by an IHO in a previous impartial hearing relative to the 2010-11 school year (id.). The parent also asserted that the student's placement at CLC was appropriate for the student for the 2011-12 school year (id. at p. 2). The parent sought an interim decision maintaining the student's pendency (stay put) placement at CLC for the duration of the impartial hearing and, for relief, the parent requested an order directing the district to place the student at CLC for the remainder of the 2011-12 school year (id.).

[1] The hearing record contains duplicative exhibits. For purposes of this decision, only District exhibits were cited in instances where both District and Parent exhibits were identical. I remind the IHO that it is his responsibility to exclude evidence that is irrelevant, immaterial, unreliable, or unduly repetitious (see 8 NYCRR 200.5[j][3][xii][c]).

B. Impartial Hearing Officer Decision

On October 6, 2011, an impartial hearing convened and concluded on October 28, 2011, after three days of proceedings (Tr. pp. 1, 113, 318, 419). On December 5, 2011, the IHO issued a decision finding that the district offered the student a free appropriate public education (FAPE) for the 2011-12 school year (IHO Decision at pp. 9-12). Initially, the IHO noted that the parent waived any procedural flaws in the IEP development, did not challenge the student's classification, and "voiced no disagreement with any aspect of the IEP itself" (id. at pp. 7, 9, 12). Regarding the parent's allegation that the assigned school would not be able to provide the student with the level of OT recommended in the June 2011 IEP, the IHO found such allegation was based upon unsubstantiated hearsay and insufficient to determine that the district failed to offer the student a FAPE because the student never attended the assigned school (id. at pp. 9-10). The IHO also rejected the parent's argument that the physical size of the assigned classroom was too small to address the student's needs because he determined that the parent failed to properly raise this issue in her due process complaint notice (id. at p. 6; see Tr. pp. 92, 170-71). The IHO concluded that the parent "failed to demonstrate that the placement of the student at [the assigned school] was improper and/or incompetent to deliver a FAPE" (IHO Decision at p. 10). Lastly, the IHO found that there was no evidence the parent provided the district with the requisite 10-day notice that she was rejecting the district's program and unilaterally placing the student in a nonpublic school at public expense (id. at p. 6). Accordingly, the IHO dismissed the parent's due process complaint notice (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, arguing, among other things, that the IHO improperly allocated the burden of proof during the impartial hearing, erred in making several evidentiary determinations, and incorrectly applied the Burlington/Carter[2] standard in analyzing the parent's claims. The parent maintains that the district offered the student an inappropriate placement for the 2011-12 school year because a prior IHO found the same placement to be inappropriate for the 2010-11 school year. She further argues that the assigned school lacks sufficient OT resources. The parent seeks an order reversing the IHO decision, determining that the district failed to offer the student a FAPE for the 2011-12 school year, and directing the district to continue the student's placement at CLC for the remainder of the 2011-12 school year at public expense.

The district answers the petition, countering that the IHO correctly determined that the district offered the student a FAPE for the 2011-12 school year. The district argues that the parent did not specify any basis for disagreement with the student's June 2011 IEP in her due process complaint notice. The district also asserts that the due process complaint notice was insufficient to put the district on notice of any actual concerns about the assigned school and that any arguments about the assigned school are speculative because the student did not attend the assigned school for the 2011-12 school year. In addition, the district alleges that the hearing record demonstrates that the IHO properly understood that the burden of proof was on the district to show that it offered the student a FAPE. The district requests that the IHO's decision be upheld, or, alternatively,

[2] 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).

requests an order determining that CLC is not an appropriate placement for the student for the 2011-12 school year and that equitable considerations favor the district.

In a reply, the parent asserts that the district improperly raised in its answer for the first time the contention that the parent's due process complaint notice was insufficient.[3]

V. Discussion

A. Burden of Proof

Initially, I will address the parent's argument that the IHO misallocated the burden of proof to the parent regarding the appropriateness of the district's recommended program. Under the IDEA, the burden of persuasion in an administrative hearing challenging an IEP is on the party seeking relief (see Schaffer v. Weast, 546 U.S. 49, 59-62 [2005] [finding it improper under the IDEA to assume that every IEP is invalid until the school district demonstrates that it is not]). However, under State law, the burden of proof has been placed 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]). Although the IHO may have used less than optimal language in his decision to describe his conclusion that the district offered the student a FAPE (see IHO Decision at pp. 10, 12), a review of the IHO's decision in its entirety and of the complete impartial hearing transcript, taken together, demonstrates that the IHO properly placed the burden on the district to prove that it offered the student a FAPE (see Tr. pp. 16, 64, 329-30). Even if the IHO had allocated the burden of proof to the parent, the harm would be only nominal insofar as there is no indication that the IHO believed that this was one of those "very few cases" in which the evidence was equipoise (Schaffer, 546 U.S. at 58). Moreover, I have independently reviewed the evidence in the hearing record, and as discussed more fully below, I find that regardless of which party bore the burden of proof and given that the parent only asserted in her due process complaint notice that the district offered the student an inappropriate placement for the 2011-12 school year, the evidence in the hearing record demonstrates that the district offered the student an appropriate placement for the 2011-12 school year. Accordingly, I decline to reverse the IHO's decision on the ground that he misallocated the burden of proof.

B. Scope of Impartial Hearing

Next, I find that the IHO properly declined to consider the parent's contention about the size of the assigned school because it was not raised in her due process complaint notice, and he erred in addressing her claim that the assigned school lacked sufficient OT services. A party requesting an impartial hearing may not raise issues at the impartial hearing that were not raised in its original due process complaint notice unless the other party agrees (20 U.S.C. § 1415[f][3][B]; 34 CFR 300.507[d][3][i], 300.511[d]; 8 NYCRR 200.5[j][1][ii]) or the original due process complaint is amended prior to the impartial hearing per permission given by the IHO at least five days prior to the impartial hearing (20 U.S.C. § 1415[c][2][E][i][II]; 34 CFR

[3] The parent's reply to the district's answer is not verified and therefore is not in compliance with State regulations (see 8 NYCRR 279.7).

300.507[d][3][ii]; 8 NYCRR 200.5[i][7][b]). Additionally, although an IHO has the authority to ask questions of counsel or witnesses for the purposes of clarification or completeness of the hearing record (8 NYCRR 200.5[j][3][vii]), it is impermissible for the IHO to raise issues that were not presented by the parties to the hearing and then base his or her determination on the issues raised sua sponte.

The parent contends that the IHO erred in excluding evidence obtained via subpoena, which the parent argues, supports her argument that the physical size of the assigned classroom is too small to adequately address the student's special education needs. Although the IHO issued a subpoena enabling the parent to obtain evidence bearing on this issue,[4] he ultimately declined to consider the evidence obtained pursuant to the subpoena, finding that the parent did not assert in her due process complaint notice nor sought to amend her due process complaint notice to include an allegation that the classroom was too small (IHO Decision at p. 6). A review of the parent's due process complaint notice shows that it cannot be reasonably read to assert a claim regarding the physical size of the assigned classroom, and there is no indication in the hearing record that the district agreed to expand the scope of the impartial hearing to include this issue or that the parent requested, or the IHO granted, permission to amend the due process complaint notice to include this issue (see Parent Ex. T; IHO Decision at p. 6). Consequently, I find that the IHO properly excluded the parent's proffered evidence relative to the physical size of the assigned classroom and correctly declined to consider this issue.

The IHO found that the parent's allegation that the assigned school lacked sufficient OT services was based on unsubstantiated hearsay statements and insufficient to determine that the district failed to offer the student a FAPE because the student never attended the assigned school (IHO Decision at pp. 9-10).[5] The due process complaint notice states that the student was offered the same public school program that he had been assigned the previous school year, but in a different location (Parent Ex. T at p. 2). The parent further contends in her due process complaint notice that she was unable to visit the assigned school during the summer, but obtained some information about the placement from a teacher of a 12:1+4 classroom at the assigned school that led the parent to determine that the district did not offer the student an appropriate placement (id.). Here, I find that the due process complaint notice does not allege facts regarding the parent's concerns about the assigned school and cannot be reasonably read to include an allegation that the assigned school would be unable to provide the student with the amount of OT recommended on his June 2011 IEP (see Parent Ex. T). Moreover, although the parent asserts that upon visiting the assigned school in September 2011 she was told by the school coordinator that the school would not be able to provide the student with the level of OT he required (Tr. pp. 101, 167), there is no indication in the hearing record that the parent requested, or that the IHO authorized a further amendment to the due process complaint notice to include this additional issue. Thus, the IHO

[4] State regulations authorize an IHO "to issue subpoenas in connection with the administrative proceedings before him/her" (8 NYCRR 200.5[j][3][iv]).

[5] While the parent correctly points out that hearsay evidence is admissible in an administrative proceeding and such evidence may be the basis for an administrative determination, I decline to find that the IHO committed reversible error under the circumstances of this case where he also dismissed the parent's argument on the ground that the student never attended the assigned school and given my decision that he erred in addressing the parent's assertion that the assigned school lacked sufficient OT services.

should have confined his determination to the issues raised in the parent's due process complaint notice and erred in reaching the issue of whether the assigned school could offer the student sufficient OT services (see 20 U.S.C. § 1415[c][2]; [f][3][B]; 34 CFR 300.508[b], [d][3]; 300.511[d]; 8 NYCRR 200.5[i][1][iv], [i][7]; [j][1][ii]; B.P. v. New York City Dep't of Educ., 2012 WL 33984, at *4-*5 [E.D.N.Y. Jan. 6, 2012]; M.R. v. South Orangetown Cent. Sch. Dist., 2011 WL 6307563, at *12-*13 [S.D.N.Y. Dec. 16, 2011]; C.F. v. New York City Dep't of Educ., 2011 WL 5130101, at *12 [Oct. 28, 2011]; C.D. v. Bedford Cent. Sch. Dist., 2011 WL 4914722, at *13 [S.D.N.Y. Sept. 22, 2011]; R.B. v. Dep't of Educ., 2011 WL 4375694, at *6-*7 [S.D.N.Y. Sept. 16, 2011]; M.P.G., 2010 WL 3398256, at *8; Application of the Dep't of Educ., Appeal No. 11-156).[6]

C. 12:1+4 Placement

The parent contends that IHO erred in finding that the district offered the student an appropriate placement for the 2011-12 school year because the district offered the same 12:1+4 special class that a prior IHO found to be inappropriate for the student for the 2010-11 school year.[7]

Under the IDEA and State regulations, the "CSE must review each child's educational program at least once each year to determine its adequacy and to recommend an educational program for the next school year" (34 CFR 300.324[b][1]; 8 NYCRR 200.4[f]; see 20 U.S.C. § 1414[d][4][A][i]; Educ. Law § 4402[1][b][2]). An SRO is required to examine the entire hearing record before rendering an independent decision based upon the hearing record (20 U.S.C. § 1415[g]; 34 CFR 300.514[b][2]; 8 NYCRR 279.12[a]). There is no requirement that an SRO or IHO be bound by the decision of a prior IHO who rendered a determination concerning a different school year. Thus, a determination that a particular educational program is inappropriate to provide a student with a disability a FAPE for one school year is not relevant in evaluating the appropriateness of the same educational program in a different school year, nor should a district's decision not to appeal such a determination be construed as an admission with respect to claims for a different school year, insofar as claims for different school years are analyzed separately (see generally Dalrymple v. United Servs. Auto. Ass'n, 40 Cal.App.4th 497, 523 [Cal. Ct. App. 1995] [holding that a party's decision not to appeal was not an admission of any lack of merit of its previous position]; Florence v. Gabinski, 1985 WL 2503 [N.D.Ill. Sept. 11, 1985] [holding that a

[6] Even assuming for the sake of argument that the parent's assertion was properly raised, I concur with the IHO's finding that the student did not attend the assigned school and therefore, a meaningful analysis of the parent's claim would require a determination of what might have happened had the district been required to implement the student's June 2011 IEP (see IHO Decision at p. 10). Even assuming that the student had attended the district's recommended program, the evidence in the hearing record nevertheless does not support the conclusion that the district would have deviated from the IEP in a material way in the 12:1+4 special class and related services at the assigned school and thereby deny the student a FAPE (Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 [1982]; A.P. v. Woodstock Bd. of Educ., 2010 WL 1049297 [2d Cir. March 23, 2010]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]; see Van Duyn v. Baker Sch. Dist. 5J, 502 F.3d 811 [9th Cir. 2007]; Houston Independent Sch. Dist. v. Bobby R., 200 F.3d 341 at 349 [5th Cir. 2000]; see also D.D.-S. v. Southold U.F.S.D., 2011 WL 3919040, at *13 [E.D.N.Y. Sept. 2, 2011]; A.L. v. Dep't of Educ., 2011 WL 4001074, at *9 [S.D.N.Y. Aug. 19, 2011]; Catalan v. Dist. of Columbia, 478 F. Supp. 2d 73 [D.D.C. 2007]).

[7] The hearing record does not indicate whether the district appealed the prior IHO decision regarding the 2010-11 school year.

party's decision not to appeal may be made for a variety of reasons and that such a decision is not an admission]; see also M.C. v. Voluntown Bd. of Educ., 226 F.3d 60, 67 [2d Cir. 2000] [examining the prongs of the Burlington/Carter test separately for each school year at issue]; Snyder v. Montgomery County Pub. Schs., 2009 WL 3246579, at *9-*10 [D.Md. Sept. 29, 2009]; Omidian v. Bd. of Educ., 2009 WL 904077 at *21-*26 [N.D.N.Y. Mar. 31 2009] [analyzing each year of a multi-year tuition reimbursement claim separately]; Student X v. New York City Dep't of Educ., 2008 WL 4890440, at *16 [E.D.N.Y. Oct. 30, 2008]; Application of the Dep't of Educ., Appeal No. 11-124). Here, I note that the determination in the 2010-11 proceeding was made by a different IHO after considering the evidence in a different hearing record that was not before the IHO in this proceeding. Although the prior IHO's decision has become final and binding on the parties relative to the student's 2010-11 school year, the prior decision is not binding on the IHO or SRO's consideration of the merits of this case, which relates to the 2011-12 school year, and does not in of itself provide a basis for a finding that the district failed to offer the student a FAPE.

D. Exclusion of Witness Testimony

Lastly, the parent maintains that the IHO erred in not allowing the student's preschool administrator to testify. The parent contended at the impartial hearing that the testimony was designed to "show [the student's] potential to interact with peers, his potential to … communicate" and to "comment on what [the student] has shown the potential to do and given that potential what kind of classroom he could need" (Tr. pp. 362-64).

During an impartial hearing, parents have a right to compel the attendance of witnesses (34 CFR 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]), subject to an IHO's discretion to limit or exclude the testimony of witnesses that he or she deems to be irrelevant, immaterial, unreliable or unduly repetitious (8 NYCRR 200.5[j][3][xii][c], [d], [e]). However, an IHO must also protect against the infringement of the parents' due process rights, and balance this discretion with his or her responsibility to ensure that there is an adequate record upon which to permit meaningful review (Application of the Dep't of Educ., Appeal No. 11-004; 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).

Here, the IHO declined to permit the parent to present the preschool administrator's testimony because he viewed the proffered testimony as "superfluous and/or irrelevant" and that it related to "future projection" (Tr. pp. 363-64). However, the IHO admitted into evidence a preschool progress report dated June 22, 2010 (Parent Ex. Q) and a June 19, 2010 letter from the preschool administrator whose testimony the parent sought to present (Parent Ex. R). Those exhibits described in detail the student's social functioning within the classroom environment during his two years at the preschool and detailed the rationale behind the preschool's decision to modify the student-to-teacher ratio of the student's self-contained preschool class (Parent Exs. Q; R). I have no reason to disagree with the IHO's determination to preclude the testimony of the preschool administrator, especially where as here, the parent asserts in her petition that the proffered testimony was to support or bolster the same information contained in the documentary evidence (see Pet. ¶ 54).

Based on the above, I find that, after a careful review of the evidence contained in the hearing record, the IHO properly exercised his discretion in excluding the preschool administrator's testimony, that he had an adequate evidentiary basis upon which to render a decision and the parent was provided an opportunity to be heard at the impartial hearing, which was conducted in a manner consistent with the requirements of due process (see 34 CFR 300.514[b][2][ii]). Accordingly, I will not disturb the IHO's decision on the basis of his ruling to preclude the testimony of the witness.

VI. Conclusion

In summary, in light of my findings as discussed above, I find that the hearing record supports the IHO's determination that the district offered the student a FAPE for the 2011-12 school year (Rowley, 458 U.S. at 206-07; Cerra, 427 F.3d at 192).

I have considered the parties' remaining contentions and find that I need not reach them in light of my determination.

THE APPEAL IS DISMISSED

Dated: **Albany, New York**
March 9, 2012

STEPHANIE DEYOE
STATE REVIEW OFFICER