The University of the State of New York

The State Education Department
State Review Officer
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No. 10-035

Application of a STUDENT WITH A DISABILITY, by his parents, 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:
Bronx Legal Services, attorney for petitioners, Nelson Mar, Esq., of counsel

Michael Best, Special Assistant Corporation Counsel, attorney for respondent, Tracy Siligmueller, Esq., of counsel

DECISION

Petitioners (the parents) appeal from the decision of an impartial hearing officer which denied their request for funding of their son's tuition costs at the Rebecca School for the 2009-10 school year. The appeal must be sustained in part.

At the time of the impartial hearing, the student was attending the Rebecca School (Tr. pp. 25, 166; Parent Ex. C). The parents unilaterally placed their son at the Rebecca School at the beginning of the 2008-09 school year (Tr. pp. 59, 166). The Rebecca School has not been approved by the Commissioner of Education as a school with which districts may contract to instruct students with disabilities (see 8 NYCRR 200.1[d], 200.7; see also Tr. pp. 130-31). The student's eligibility for special education services as a student with autism is not in dispute in this proceeding (see 34 C.F.R. § 300.8[c][1]; 8 NYCRR 200.1[zz][1]).

The hearing record is sparse regarding the student's educational history. The hearing record reflects that the student has a diagnosis of a pervasive developmental disorder, not otherwise specified (PDD-NOS) (Tr. p. 125; Dist. Ex. 1 at p. 3). According to the student's father, the student received speech-language therapy, occupational therapy (OT), and "behavioral therapy" through an early intervention program (Tr. p. 28). Upon referral to respondent's (the district's) Committee on Preschool Special Education (CPSE), the student was classified as a preschool student with a disability and received special education services (id.).

For kindergarten (2007-08), the Committee on Special Education (CSE) determined the student eligible for special education services (Tr. p. 66). On October 31, 2007, the CSE reconvened to consider a change in the student's program (Dist. Ex. 2). The CSE determined the student eligible for special education services as a student with autism (id. at p. 1). The CSE recommended that the student be placed in a special class in a specialized school with a 6:1+1 student-to-staffing ratio and receive related services of physical therapy (PT) and speech-language therapy (id. at pp. 1-2, 14).

For the 2008-09 school year, the student attended the Rebecca School in an 8:1+4 classroom and received OT, speech-language therapy, art therapy, music therapy, drama therapy, and adapted physical education (Tr. pp. 25, 166; Dist. Ex. 4 at p. 1). In April 2009, the student's providers at the Rebecca School completed a multidisciplinary progress report update that detailed the student's progress relative to his functional emotional development as well as described the student's progress in his educational instruction, OT, speech-language therapy, and creative arts therapies (Dist. Ex. 4). The providers concluded that although the student had made progress throughout his program, he continued to demonstrate difficulties in regulation, shared attention, and engagement that were directly impacted by his ongoing sensory needs (id. at p. 6).

On June 9, 2009, the CSE convened to develop an individualized education program (IEP) for the student for the 2009-10 school year (Dist. Exs. 1; 6). The CSE recommended that the student attend a 6:1+1 special class in a specialized school for all areas of instruction and receive speech-language therapy and PT (Dist. Ex. 1 at pp. 1, 2, 12). At the CSE meeting, the parents expressed concerns about the student's need for OT and the CSE agreed to have the student evaluated for OT (Tr. pp. 126-27; Dist. Ex. 6). The June 2009 IEP included annual goals and short-term objectives relating to the student's reading, math, language, and PT needs (Dist. Ex. 1 at pp. 6-9). On June 11, 2009, the district issued a final notice of recommendation recommending a specific public school site (Dist. Ex. 7).[1]

By letter dated July 15, 2009, the parents notified the district that they would be unilaterally placing the student at the Rebecca School for the 2009-10 school year because they did not believe the district's recommended placement was appropriate (Parent Ex. A). The parents further advised the district that they intended to seek tuition payment for the student's placement at the Rebecca School (id.).

The parents, through their attorney, formally requested an impartial hearing by due process complaint notice dated November 4, 2009 (Parent Ex. B). The parents alleged that the district failed to develop an appropriate IEP and recommend an appropriate placement for the student for the 2009-10 school year (id. at p. 1). More particularly, the parents argued that the June 2009 IEP failed to properly document the student's current academic functioning through formal academic testing, failed to appropriately address the student's behavior management needs, and did not include a behavioral intervention plan (id.). For relief, the parents sought funding for the costs of the student's tuition at the Rebecca School for the 2009-10 school year and requested that the district provide the student with transportation services to and from the Rebecca School (id. at p.

[1] The student's father testified at the impartial hearing that he visited the recommended school in June 2009 (Tr. pp. 40-42, 80-81).

2). The parents further requested that the CSE reconvene to develop an appropriate IEP within 30 days of the impartial hearing officer's decision (id.).

An impartial hearing was held on February 11, 2010 and March 8, 2010, where both parties presented documentary evidence (Tr. pp. 1, 111; see Dist. Exs. 1-8; Parent Exs. A-D; F; H).[2] At the outset of the impartial hearing on February 11, 2010, the representative for the district identified two witnesses that she intended to call to testify on behalf of the district – the school psychologist who participated in the June 9, 2009 CSE meeting and an administrator from the district's recommended school (Tr. p. 12). The district's representative then explained that classes had been cancelled the day before due to a snow emergency and that although classes had resumed on the day of the impartial hearing, the administrator was unavailable to testify because she was covering for a teacher who was unable to get to work (Tr. pp. 12-17). The impartial hearing officer noted that it was 1:40 p.m. and suggested that the district's representative contact the administrator about her availability to testify after the school day ends, which the impartial hearing officer speculated was probably around 2:30 p.m. (Tr. pp. 14, 18). Upon contacting the school, the district's representative learned that the administrator was absent due to a family emergency and no one else was available to testify about the district's proposed placement for the student (Tr. p. 19).[3] The district's representative further stated that the other witness she intended to call, the school psychologist, was also not available to testify on February 11, 2010 (Tr. p. 16). Desiring the impartial hearing to move forward, the parents offered to proceed with the presentation of their case (Tr. pp. 23-24) and the student's father testified (Tr. pp. 24-108). Before adjourning for the day, the parties agreed on possible dates to continue the impartial hearing (Tr. p. 108).

The district presented the school psychologist as a witness when the impartial hearing resumed on March 8, 2010 (Tr. pp. 116-57). Following the school psychologist's testimony, the district's representative stated that as she "mentioned prior to this hearing" and in an e-mail dated Friday, March 5, 2010, the district's witnesses from the recommended school were not available on March 8, 2010 due to a State audit of the facility (Tr. pp. 157-58). Explaining that these witnesses had the "most relevant testimony," that the district had no control over the scheduling of a State audit, and that the district was not aware of the audit at the time it agreed to the March 8, 2010 hearing date, the district's representative requested that she be able to call the witnesses at a later date (Tr. pp. 158-59). The impartial hearing officer denied the district's request (id.). The parents proceeded with the presentation of their case and called three witnesses: the director of the Rebecca School, the head teacher at the Rebecca School, and a social worker who accompanied the student's father to visit the district's recommended placement (Tr. pp. 161-282). Following the conclusion of the parents' case at approximately 3:45 p.m., the representative for the district renewed her request to present the witnesses from the recommended school at a later date (Tr. p. 282). The impartial hearing officer denied her request to adjourn the impartial hearing to a later date, but stated that the witnesses could immediately testify if they were available by telephone

[2] The impartial hearing was scheduled to begin on January 22, 2010, but was adjourned because the assigned impartial hearing officer did not appear at the scheduled hearing (see Tr. pp. 3, 22, 283; Pet. ¶ 30; Answer ¶¶ 8, 32).

[3] The district's representative also advised the impartial hearing officer that the administrator had been "ready to testify" on January 22, 2010, the hearing date that was cancelled because the impartial hearing officer did not appear (Tr. p. 22).

(id.). The district's representative attempted to contact the witnesses; however, they were unavailable to testify at that time (Tr. p. 283). The district's representative stated that the impartial hearing officer's decision denying the district's request to extend the impartial hearing was "prejudicial" to the district because the district did "not have the capability of refuting the testimony [of the student's father]" and could not present testimony about its proposed program for the student (Tr. pp. 283-84). The impartial hearing officer responded that the district's witnesses were unavailable on February 11, 2010 and the parties agreed to continue the impartial hearing on March 8, 2010 (Tr. p. 284). She stated that she was not going to allow another date for the district to present its witnesses (id.). The impartial hearing officer then explained that she would render a decision based on the evidence that was before her and she adjourned the proceeding (Tr. pp. 285-86).

By a five-paragraph decision dated March 23, 2010, the impartial hearing officer dismissed the parents' claims (IHO Decision at pp. 1-2). She opined that the parties' dispute was limited to the issue of the "particular school" that the district offered the parents (id. at p. 1). The impartial hearing officer cited a federal regulation and T.Y. v. New York City Dep't of Educ., 584 F.3d 412 (2d Cir. 2009) for the proposition that "educational placement" means "the general type of educational program in which the child is placed . . . rather than the bricks and mortar of the specific school" (id.). The impartial hearing officer then concluded, without any further explanation, that "the parent had an obligation to notify the school district that the particular school was unacceptable and to request a different school" (id. at p. 2).

The parents appeal, requesting annulment of the impartial hearing officer's decision and an award of the student's tuition costs at the Rebecca School for the 2009-10 school year. The parents allege that the impartial hearing officer's decision failed to comport with State regulations because it was not written in accordance with standard legal practice. The parents further contend that the district failed to meet its burden to show that it offered the student a free appropriate public education (FAPE). More specifically, on appeal the parents contend the following: (1) the district failed to evaluate the student's OT needs; (2) the June 2009 IEP did not address the student's OT needs; (3) the district failed to present witnesses to testify that the district's offered placement was appropriate; (4) the district failed to offer the student an appropriate placement; (5) the parents met their burden to show that the Rebecca School is appropriate for the student; and (6) equitable considerations support an award of tuition costs.

In its answer, the district denies the parents' assertions, and states, among other arguments, that on appeal the parents narrowed their claims pertaining to the district's IEP to concerns about the evaluation and provision of OT services, and that the parents otherwise raised concerns about the appropriateness of the particular offered school pertaining to safety, access to related services, specialized instruction, behavior modifications, and the appropriateness of the school to meet the student's academic and emotional needs.[4]

Two purposes of the Individuals with Disabilities Education Act (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

[4] In the petition, the parents assert that they did not disagree with the district's recommendation of a 6:1+1 program (Pet. ¶ 70).

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 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).

The New York State Legislature amended the Education Law to place the burden of production and persuasion upon the school district during an impartial hearing, except that a parent seeking tuition reimbursement for a unilateral placement has the burden of production and persuasion regarding the appropriateness of such placement (Educ. Law § 4404[1][c], as amended by Ch. 583 of the Laws of 2007). The amended law took effect for impartial hearings commenced on or after October 14, 2007 (see Application of the Bd. of Educ., Appeal No. 08-016).

A board of education may be required to reimburse parents for their expenditures for private educational services obtained for a student by his or her parents, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable considerations support the parents' claim (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]). In Burlington, the Court found that Congress intended retroactive reimbursement to parents by school officials as an available remedy in a proper case under the IDEA (471 U.S. at 370-71; Gagliardo, 489 F.3d at 111; Cerra, 427 F.3d at 192). "Reimbursement merely requires [a district] to belatedly pay expenses that it should have paid all along and would have borne in the first instance" had it offered the student a FAPE (Burlington, 471 U.S. at 370-71; see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

First, I will review the parents' request that the impartial hearing officer's decision be annulled in its entirety because it was not written in accordance with State regulations. The parents argue that the decision does not contain any findings of fact, makes minimal citations to the hearing record, fails to reference applicable law to support its conclusions, does not properly address the parents' claims, was not written in accordance with standard legal practice, and was not written in a manner that is helpful to the parties in understanding the decision. State regulations provide in relevant part that "[t]he decision of the impartial hearing officer shall be based solely upon the record of the proceeding before the impartial hearing officer, and 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, I concur with the parents that the impartial hearing officer's decision is improper. The impartial hearing officer erred in concluding that the parties' dispute was limited to a single issue, the recommended district placement, when the parents' due process complaint notice sets forth other contentions and there is no indication in the hearing record that these other contentions had been resolved (see Parent Ex. B). While there is a brief, two-paragraph recitation of the facts with citations to the hearing transcript and the decision contains one passing reference to a legal principle, the decision makes no reference to, and does not appear to apply, the legal standards established by the United States Supreme Court and the United States Court of Appeals, Second Circuit, which apply given the facts in this case.[5] The decision does not adequately identify the impartial hearing officer's reasons for her determinations, or lack thereof. There is no explanation of how the impartial hearing officer reached her conclusion. There is insufficient application of the law to the facts. 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. Moreover, the impartial hearing officer does not reference any legal authority to support her concluding statement that the parents had an obligation to notify the district that they found the recommended school unacceptable and "request a different school" (see IHO Decision at p. 2). Such concluding statement also contradicts evidence in the hearing record that indicates the parents provided a letter to the district dated July 15, 2009 that expressed the parents' dissatisfaction with the proposed placement (see Parent Ex. A). Based on the foregoing, 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. Moreover, the decision improperly failed to address the parents' claims properly raised below pertaining to the student's OT needs, and reached a conclusion not supported by the evidence, that the parents did not notify the district of their concern with the offered placement.

In addition, an impartial hearing officer must provide all parties with an opportunity to present evidence and testimony, including the opportunity to confront and cross-examine witnesses (34 C.F.R. § 300.512[a][2]; 8 NYCRR 200.5[j][3][xii]). While an impartial hearing officer has the discretion to limit or exclude evidence or 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]), it is also 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). When a party requests an extension of

[5] The decision also makes no specific reference to statutory and regulatory provisions pertaining to a district's obligation to pay for tuition costs when a FAPE is at issue and a parental unilateral private school placement occurs (see 20 U.S.C. § 1412[a][10][C][ii]; 34 C.F.R. § 300.148).

time in order to present evidence, regulatory requirements set forth the specific factors that an impartial hearing officer must consider and the regulations provide that the reason for each extension must be documented in the hearing record (8 NYCRR 200.5[j][5][i], [ii]). The impartial hearing officer may grant a request for an extension only after fully considering the cumulative impact of the following factors:

> (a) the impact on the child's educational interest or well-being which might be occasioned by the delay; (b) the need of a party for additional time to prepare or present the party's position at the hearing in accordance with the requirements of due process; (c) any financial or other detrimental consequences likely to be suffered by a party in the event of delay; and (d) whether there has already been a delay in the proceeding through the actions of one of the parties

(8 NYCRR 200.5[j][5][ii]). State regulations also provide that agreement of the parties is not a sufficient basis for granting an extension, and further that "[a]bsent 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 . . . or other similar reasons" (8 NYCRR 200.5[j][5][iii]).

Here, in response to the district's request to extend the impartial hearing for the purpose of presenting witnesses, there was no indication in the hearing record that the impartial hearing officer considered the cumulative impact of the factors enumerated in State regulations (see 8 NYCRR 200.5[j][5][ii]). Further, there was no determination by the impartial hearing officer that the witnesses requested by the district would have offered irrelevant, immaterial, unreliable, or unduly repetitious testimony (see 8 NYCRR 200.5[j][3][xii][d], [e]). The district's representative stated that the denial of its request for an extension of time would prejudice the district because it would be unable to present evidence about the recommended placement and would not be able to refute testimony presented by the parents (Tr. pp. 283-84). According to the district's representative, the witnesses were available on the first scheduled hearing date when the impartial hearing officer was absent, and the witnesses were unavailable on subsequently scheduled hearing dates due to a snow emergency and a State audit (Tr. p. 283). Because the district was not afforded an opportunity to call certain requested witnesses, particularly here where the district had the burden of proof, I find that, given the facts of this case, this was a significant infringement upon the district's hearing rights requiring a remand.

For the above reasons, I will therefore remand this matter for the limited purpose of allowing additional testimony related to the district's recommended placement for the student for the 2009-10 school year. The parents shall have the opportunity to cross-examine and confront the district's witnesses, as well as present evidence, including testimony, in response to the district's witnesses' testimony. Upon the conclusion of the testimony, the impartial hearing officer shall render a written decision consistent with regulatory requirements which applies correct legal standards and addresses the claims and arguments of the parties, as appropriate.

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

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

IT IS ORDERED that the impartial hearing officer's decision dated March 23, 2010 is annulled in its entirety; and

IT IS FURTHER ORDERED that this matter shall be remanded to the impartial hearing officer who shall, unless the parties otherwise agree, reconvene the impartial hearing, hear additional testimony consistent with this decision, and render a decision within 30 calendar days of receipt of this decision; and

IT IS FURTHER ORDERED that if the impartial hearing officer who issued the March 23, 2010 decision is not available to reconvene the impartial hearing, a new impartial hearing officer be appointed.

Dated: **Albany, New York**
June 25, 2010

PAUL F. KELLY
STATE REVIEW OFFICER