The University of the State of New York

The State Education Department
State Review Officer
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No. 24-527

Application of a STUDENT WITH A DISABILITY, by her 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:
Law Office of Philippe Gerschel, attorneys for petitioner, by Philippe Gerschel, Esq.

Liz Vladeck, General Counsel, attorneys for respondent, by Cynthia Sheps, Esq.

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 denied her request that respondent (the district) fund the costs of her daughter's private services delivered by Yes I Can for the 2023-24 school year. 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 Committee on Special Education (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]; Educ. Law § 4404[1]; 34 CFR 300.151-300.152, 300.506, 300.511; 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

The parties' familiarity with this matter is presumed and, therefore, the facts and procedural history of the case and the IHO's decision will not be fully recited.

Briefly, a Committee on Preschool Special Education (CPSE) convened on June 13, 2023, found the student eligible for special education services as a preschool student with a disability, and developed the student's IEP for the 2023-24 school year (Parent Ex. B at pp. 1, 3; Dist. Ex. 12

at ¶¶ 5-6).[1] The June 2023 CPSE recommended that the student receive five hours of 2:1 special education itinerant teacher (SEIT) services per week in Yiddish, one 30-minute session of individual occupational therapy (OT) per week, and one 30-minute session of group (2:1) OT per week (id. at p. 10). At the time of the CPSE meeting, the student had not yet turned five years of age; however, the student was set to turn five years of age prior to the start of the 10-month portion of the 2023-24 school year (see Parent Ex. B at p. 1; Dist. Ex. 3). The CPSE IEP indicated that the student was one year younger than her actual age (id.).

The student began receiving SEIT and OT services in September 2023, which were arranged for by the district (Tr. p. 59; Dist. Ex. 12 at ¶ 7). At some point in early November 2023, the CPSE received information that the student's birth year was incorrect, she was already five years old and thus no longer eligible for services under the CPSE (Dist. Ex. 12 ¶¶ 8-9).[2] The CPSE administrator informed the agencies providing the student's SEIT and OT services to cease providing services on November 17, 2023, and also informed the parent that the student's services under the CPSE would be ending as the student was ineligible for preschool services (Tr. pp. 59-62, 66-68; Dist. Ex. 12 ¶ 9). According to the CPSE administrator, the student was then transferred to the district's CSE (Tr. p. 62-63).

On December 11, 2023, the parent executed a contract with Yes I Can to provide the student with the SEIT and OT services recommended by the June 2023 CPSE (see Parent Ex. C; G ¶¶ 13-15). On April 5, 2024, a CSE convened for the student's "Turning 5" meeting to determine her eligibility for special education services (Dist. Ex. 13 ¶ 7; see Dist. Ex. 11). At the April 2024 CSE meeting, the CSE reviewed a March 2024 psychoeducational evaluation, March 2024 classroom observation, March 2024 teacher progress report, January 2024 social history, January 2024 SEIT progress report, December 2023 OT evaluation progress report, and the student's June 2023 IEP and determined that the student was not eligible for special education services (see Dist. Exs. 9; 10; 11).

A. Due Process Complaint Notice

In a due process complaint notice dated June 27, 2024, the parent alleged that the district denied the student a free appropriate public education (FAPE) for the 2023-24 school year (Parent Ex. A). Specifically, the parent argued that the district failed to implement the "most recent CPSE IEP" dated June 13, 2023, and requested that the IHO issue an order of pendency to implement the June 2023 IEP (id. at p. 2). Moreover, the parent alleged that she "[was] concerned regarding

[1] Parent Exhibit B is a duplicate of District Exhibit 1 both of which are identical apart from a cover page in Parent Exhibit B; for the purposes of this decision, Parent Exhibit B will be cited when referring to the June 2023 IEP (see Parent Ex. B; Dist. Ex. 1).

[2] A review of the hearing record shows that at least one document provided to the CPSE in advance of the June 2023 CSE meeting, the April 26, 2023 psychological evaluation completed as part of the student's initial evaluation, contained the incorrect birth year (IHO Ex. II at p. 9). However, although the April 26, 2023 psychological evaluation indicated the wrong year for the student's birth date, it also indicated the correct age for the student at that time (id.).

implementation of the 6/13/2023 CPSE IEP for the 2023-24 school year" (id.). The parent stated she was "unable to locate providers for the recommended program" and the "District ha[d] failed to implement their own recommendations" (id.). The parent's requested a finding that the failure of the district to implement the recommendations was a denial of FAPE for the 2023-24 school year, district funding for the parent's providers for the 2023-24 school year at the agency's contracted rate, and district funding of a bank of compensatory education for "any parts of the program" for which the student did not receive services during the 2023-24 school year, also at the agency's contracted rate (id. at p. 3).

B. Impartial Hearing Officer Decision

An impartial hearing convened and concluded before the Office of Administrative Trials and Hearings (OATH) on September 9, 2024 (Tr. pp. 1-122). At the hearing, the district argued that the student was not eligible for preschool services during the 2023-24 school year as she was five years old at the start of the school year (Tr. p. 88-91). The district presented two witnesses including the school psychologist who participated in the April 2024 CSE meeting and a CPSE administrator (Tr. pp. 21-72; Dist. Exs. 12-13). The parent presented one witness, the educational director at the agency with which the parent contracted for delivery of SEIT and related services to the student (Tr. pp. 75-80; Parent Ex. G). In a decision dated October 10, 2024, the IHO summarized the relevant facts regarding the procedural and educational history of the student, the development of the June 2023 IEP by the CPSE, the witness testimony presented at the hearing, and the April 2024 CSE meeting and determination that the student was not eligible for special education (IHO Decision pp. 4-6). The IHO rejected the parent's claim that the district was required to implement the June 2023 IEP as the student was not eligible for preschool services during the 2023-24 school year (id. at p. 9). Moreover, the IHO held that there was no dispute between the parties as to the student's age during the 2023-24 school year and the district was not required to provide services under the June 2023 IEP because the child was five years old at the start of the school year (id.).

Ultimately, the IHO rejected parent's arguments that the district failed to convene a CSE meeting timely finding that it was not alleged in the parent's due process complaint notice (IHO Decision p. 11). The IHO agreed with the district's challenge that the parent did not properly raise the argument in the due process complaint notice, did not seek to amend the due process complaint notice, nor did the parent seek to conform the due process complaint notice with the evidence, holding that the due process complaint notice was "completely silent" as to the CPSE's determination in November 2023 that the student was not eligible for special education services as a preschool student and the CSE's subsequent determination that the student did not qualify for special education services as a school age student (id.). As an alternative finding, the IHO noted that the delay in holding a CSE meeting during the 2023-24 school year was "unreasonably long" but found that the district established that the student "was not a qualified student with a disability under the IDEA" and, therefore, the student was not eligible for services (id. at p. 12). The IHO dismissed the parent's due process complaint notice with prejudice (id. at p. 12).

IV. Appeal for State-Level Review

The parent appeals, alleging that the IHO erred in failing to order the implementation of the recommendations included in the June 2023 IEP. The parent argues that the student remained eligible for special education services despite the district's clerical error. The parent further argues that the student should have received services until the April 2024 CSE meeting and that the district's failure to convene an earlier CSE meeting deprived the student of educational benefits.

In an answer, the district argues that the IHO Decision should be affirmed as the student was not eligible to receive preschool services and the student was not denied a FAPE for the 2023-24 school year as she was not eligible for special education services as a school age student.

V. Applicable Standards

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 Sch. Dist. v. T.A., 557 U.S. 230, 239 [2009]; Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist. 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; T.M. v. Cornwall Cent. Sch. Dist., 752 F.3d 145, 151, 160 [2d Cir. 2014]; R.E. v. New York City Dep't of Educ., 694 F.3d 167, 189-90 [2d Cir. 2012]; M.H. v. New York City Dep't of Educ., 685 F.3d 217, 245 [2d Cir. 2012]; Cerra v. Pawling Cent. Sch. Dist., 427 F.3d 186, 192 [2d Cir. 2005]). "'[A]dequate compliance with the procedures prescribed would in most cases assure much if not all of what Congress wished in the way of substantive content in an IEP'" (Walczak v. Fla. Union Free Sch. Dist., 142 F.3d 119, 129 [2d Cir. 1998], quoting Rowley, 458 U.S. at 206; see T.P. v. Mamaroneck Union Free Sch. Dist., 554 F.3d 247, 253 [2d Cir. 2009]). The Supreme Court has indicated that "[t]he IEP must aim to enable the child to make progress. After all, the essential function of an IEP is to set out a plan for pursuing academic and functional advancement" (Endrew F. v. Douglas Cty. Sch. Dist. RE-1, 580 U.S. 386, 399 [2017]). While the Second Circuit has emphasized that school districts must comply with the checklist of procedures for developing a student's IEP and indicated that "[m]ultiple procedural violations may cumulatively result in the denial of a FAPE even if the violations considered individually do not" (R.E., 694 F.3d at 190-91), the Court has also explained that not all procedural errors render an IEP legally inadequate under the IDEA (M.H., 685 F.3d at 245; A.C. v. Bd. of Educ. of the Chappaqua Cent. Sch. Dist., 553 F.3d 165, 172 [2d Cir. 2009]; Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 381 [2d Cir. 2003]). Under the IDEA, if procedural violations are 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 CFR

300.513[a][2]; 8 NYCRR 200.5[j][4][ii]; Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 525-26 [2007]; R.E., 694 F.3d at 190; M.H., 685 F.3d at 245).

The IDEA directs that, in general, an IHO'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, 142 F.3d at 130; see Rowley, 458 U.S. at 189). "The adequacy of a given IEP turns on the unique circumstances of the child for whom it was created" (Endrew F., 580 U.S. at 404). 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 T.P., 554 F.3d at 254; P. v. Newington Bd. of Educ., 546 F.3d 111, 118-19 [2d Cir. 2008]). 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 Endrew F., 580 U.S. at 403 [holding that the IDEA "requires an educational program reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances"]; 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 CFR 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).

An appropriate educational program begins with an IEP that includes a statement of the student's present levels of academic achievement and functional performance (see 34 CFR 300.320[a][1]; 8 NYCRR 200.4[d][2][i]), establishes annual goals designed to meet the student's needs resulting from the student's disability and enable him or her to make progress in the general education curriculum (see 34 CFR 300.320[a][2][i], [2][i][A]; 8 NYCRR 200.4[d][2][iii]), and provides for the use of appropriate special education services (see 34 CFR 300.320[a][4]; 8 NYCRR 200.4[d][2][v]).[3]

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.

[3] The Supreme Court has stated that even if it is unreasonable to expect a student to attend a regular education setting and achieve on grade level, the educational program set forth in the student's IEP "must be appropriately ambitious in light of his [or her] circumstances, just as advancement from grade to grade is appropriately ambitious for most children in the regular classroom. The goals may differ, but every child should have the chance to meet challenging objectives" (Endrew F., 580 U.S. at 402).

Four v. Carter, 510 U.S. 7 [1993]; Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 369-70 [1985]; R.E., 694 F.3d at 184-85; T.P., 554 F.3d at 252). 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; see 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 CFR 300.148).

The burden of proof is 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 R.E., 694 F.3d at 184-85).

VI. Discussion

A. Scope of Review

Before addressing the merits, a determination must be made regarding which claims are properly before me on appeal. State regulation provides that a pleading must set forth "a clear and concise statement of the issues presented for review and the grounds for reversal or modification to be advanced, with each issue numbered and set forth separately," and further specifies that "any issue not identified in a party's request for review, answer, or answer with cross-appeal shall be deemed abandoned and will not be addressed by a State Review Officer" (8 NYCRR 279.8[c][2], [4]; see Phillips v. Banks, 656 F. Supp. 3d 469, 483 [S.D.N.Y. 2023], aff'd, 2024 WL 1208954 [2d Cir. Mar. 21, 2024]; L.J.B. v. N. Rockland Cent. Sch. Dist., 2024 WL 1621547, at *6 [S.D.N.Y. Apr. 15, 2024]; Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

Generally, the failure to comply with the practice requirements of Part 279 of the State regulations may result in the rejection of the submitted documents or a determination excluding issues from the scope of review on appeal (8 NYCRR 279.8[a]; see Davis v. Carranza, 2021 WL 964820, at *12 [S.D.N.Y. Mar. 15, 2021] [upholding an SRO's conclusions that several claims had been abandoned by the petitioner]; M.C. v. Mamaroneck Union Free Sch. Dist., 2018 WL 4997516, at *23 [S.D.N.Y. Sept. 28, 2018] [upholding dismissal of allegations set forth in an appeal to an SRO for "failure to identify the precise rulings presented for review and [failure] to cite to the pertinent portions of the record on appeal, as required in order to raise an issue" for review on appeal]).

As discussed above, it is undisputed between the parties that the student was five years old at the start of the 2023-24 school year (Req. for Rev. p. 1; Answer p. 2). Moreover, it is undisputed that the student received services pursuant to a CPSE IEP from September 2023 until November 2023 at which time the district ceased services when it was advised that the student was five years of age and no longer eligible for preschool services (Req. for Rev. p. 4; Answer p. 2).

Subsequently, the CSE convened in April 2024 and determined that the student was not eligible for special education as the student did not have a disability as defined in State regulation (Dist. Exs. 9; 10 at p. 6).

The IHO held that the parent's due process complaint notice was limited to a claim that the district failed to implement the June 2023 IEP during the 2023-24 school year, and then found that the parent failed to challenge the CSE's determination that the student was not eligible for services (IHO Decision pp. 10-11). The IHO further noted that the due process complaint notice was "completely silent" as to the determination by the CPSE that the student was not eligible for preschool services and the subsequent CSE determination that the student was not a student with a disability and those arguments were outside the scope of the hearing (id.). A review of the pleadings indicates that neither party has appealed those findings (see Req. for Rev; see also Answer).

In particular, the parent's request for review only addresses the IHO's alternative findings, specifically, the parent asserts that the delay in convening a CSE meeting until April 2024 resulted in a deprivation of educational benefits and that the April 2024 CSE incorrectly determined that the student was not eligible for special education services. The parent does not explicitly address the IHO's finding that the only issue raised in the parent's due process complaint notice was implementation of the June 2023 IEP, despite the parent having had opportunities to seek to amend the due process complaint notice or to respond to the issue after the district's closing argument (IHO Decision at pp. 10-11). Indeed, "[t]he parent must state all of the alleged deficiencies in the IEP in their initial due process complaint in order for the resolution period to function. To permit [the parents] to add a new claim after the resolution period has expired would allow them to sandbag the school district" (R.E., 694 F.3d 167 at 187-88 n.4; see also B.M. v. New York City Dep't of Educ., 569 Fed. App'x 57, 58-59 [2d Cir. June 18, 2014]).

Based on the above, the IHO's determination that all issues other than implementation of the June 2023 IEP were outside of the scope of the due process proceeding has become final and binding on the parties and will not be reviewed on appeal (34 CFR 300.514[a]; 8 NYCRR 200.5[j][5][v]; see Bd. of Educ. of the Harrison Cent. Sch. Dist. v. C.S. et al., 2024 WL 4252499, at *12-*15 [S.D.N.Y. Sept. 20, 2024]; M.Z. v. New York City Dep't of Educ., 2013 WL 1314992, at *6-*7, *10 [S.D.N.Y. Mar. 21, 2013]).

As the parent's permissible claims raised in this appeal are limited to the argument that the district was required to implement the June 2023 IEP, there is little basis to depart from the IHO's determinations.

State law provides that "[a] child shall be deemed a preschool child through the month of August of the school year in which the child first becomes eligible to attend" school as a school-aged student (see Educ. Law §§ 3202[1]; 4410[1][i]; 8 NYCRR 200.1[mm][2]). The student turned five years of age between the June 2023 CSE meeting and September 2023 (see Dist. Ex. 3). Thus, for July and August 2023, if the student had been recommended for 12-month services the student would have been entitled to receive such services under the CPSE; however, by the start of the 2023-24 10-month school year in September 2023, the student was no longer eligible for special education as a preschool student with a disability (see Educ. Law §§ 3202[1];

4410[1][i]; 8 NYCRR 200.1[mm][2]). Accordingly, the district was not required to deliver services pursuant to the June 2023 CPSE IEP during the 2023-24 school year. Consequently, the parent's challenges to the IHO's decision must be dismissed.

VII. Conclusion

Having found that the request for review must be dismissed because the parents failed to allege a legally cognizable claim, the necessary inquiry is at an end.

THE APPEAL IS DISMISSED.

Dated: **Albany, New York**
January 3, 2025

CAROL H. HAUGE
STATE REVIEW OFFICER