

**DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION**

Office of Dispute Resolution
810 First Street, N.E., 2nd Floor
Washington, DC 20002

OSSE
Office of Dispute Resolution
August 5, 2014

STUDENT, ¹)	
)	Date Issued: August 4, 2014
Petitioner,)	
)	Hearing Officer: John Straus
v.)	
)	
District of Columbia Public Schools)	
)	
Respondent.)	
)	

HEARING OFFICER DETERMINATION

Background

The Petitioner filed a due process complaint notice on May 21, 2014, alleging that Student had been denied a free appropriate public education (“FAPE”) under the Individuals with Disabilities Education Act (“IDEA”).

Petitioner made two allegations against the District of Columbia Public Schools (“DCPS”) that included significantly impeding the Petitioner and her grandmother’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the Petitioner at the May 7, 2013 Individualized Education Program (“IEP”) meeting regarding the provision of Extended School Year (“ESY”) services for the summer of 2013 ESY period and May 30, 2013 IEP meeting regarding continuing eligibility as a student with a disability under the IDEA and failing to implement the student’s May 30, 2013 IEP from August 25, 2013 to March 20, 2014 and the March 20, 2014 IEP from March 20, 2014 until the student graduation date at the end of the 2013-2014 school year.

DCPS asserted that on May 3, 2013, DCPS sent a Letter of Invitation to convene a meeting to amend the student’s IEP on May 7, 2013. Petitioner through her counsel declined to participate. There was no harm to Petitioner when DCPS convened the IEP meeting without the parent’s participation, as the parent agreed previously through counsel to an IEP amendment without her participation. DCPS sent a letter of invitation on May 14, 2013 to convene an eligibility meeting for the student on May 30, 2013. The IEP meetings occurred over a year ago.

¹ Personal identification information is provided in Appendix A.

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Any failure to include the parent in the IEP meeting is a procedural violation which has not substantively harmed the student or the parent. The student was able to access the general education setting with the support of the services outlined in her IEP and graduated on June 11, 2014.

Subject Matter Jurisdiction

Subject matter jurisdiction is conferred pursuant to the Individuals with Disabilities Education Act (“IDEA”), as modified by the Individuals with Disabilities Education Improvement Act of 2004, 20 U.S.C. Section 1400 et. seq.; the implementing regulations for the IDEA, 34 Code of Federal Regulations (“C.F.R.”) Part 300; and Title V, Chapter E-30, of the District of Columbia Municipal Regulations (“D.C.M.R.”); and 38 D.C. Code 2561.02.

Procedural History

The due process complaint was filed on May 21, 2014. This Hearing Officer was assigned to the case on May 23, 2014. The Petitioner waived the resolution meeting, but Respondent did not. The resolution meeting took place on June 4, 2014. At the resolution meeting, parties agreed to keep the 30-day resolution period open. The 30-day resolution period ended on June 20, 2014, the 45-day timeline to issue a final decision began on June 21, 2014, and the final decision is due on August 4, 2014. See 34 C.F.R. §§ 300.510 and .515.

The Petitioner presented three witnesses: the Petitioner, the Petitioner’s Grandmother and Former Legal Guardian and the Center Director at the Linda Mood Bell Center. DCPS presented no witnesses. Neither party objected to the testimony of witnesses by telephone.

The Petitioner’s disclosures dated July 9, 2014, containing a witness list and Exhibits P-1 through P-29, were timely filed and admitted into evidence. Exhibits P-9 and P-15 were admitted into evidence over objection.

DCPS’ disclosures dated July 9, 2014, containing a witness list and Exhibits R-1 through R-18, were timely filed and admitted into evidence without objection.

No stipulations were made between the parties. At the close of testimony on July 16, 2014, both parties agreed to provide the hearing officer with written closing statements by July 23, 2014. Both closing statements were timely submitted.

The issues to be determined in this Hearing Officer Determination are as follows:

Issue #1 – Whether Respondent denied the Student a FAPE by significantly impeding the Petitioner and her grandmother’s opportunity to participate in the decision-making process regarding the provision of a FAPE to the student at the May 7, 2013 IEP meeting regarding the

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provision of ESY services for the summer of 2013 ESY period and May 30, 2013 IEP meeting regarding continuing eligibility as a student with a disability under the IDEA.

Issue #2 – Whether Respondent denied Student a FAPE by failing to implement the student’s May 30, 2013 IEP from August 25, 2013 to March 20, 2014 and the March 20, 2014 IEP from March 20, 2014 until the Petitioner’s graduation date at the end of the 2013-2014 school year.

For relief, Petitioner requested the Hearing Officer declare that DCPS has denied her a FAPE by significantly impeding the opportunity to participate in the decision-making process regarding the provision of FAPE, and failing to implement her IEP during the 2013-2014 school year and order DCPS to fund 200 hours of Lindamood Bell instruction in the programs that Lindamood Bell recommends.

Findings of Fact²

After considering all the evidence, as well as the arguments of both counsel, this Hearing Officer’s Findings of Fact are as follows:

1. The Petitioner attended High School during the 2012-2013 and 2013-2014 school years where she was identified as a student with a disability under the IDEA.³
2. On May 11, 2010, the student received a Woodcock Johnson III Test of Achievement (“WJ-III”). The assessment yielded the following standard scores:

Letter-Word Identification	64
Reading Fluency	76
Calculation	85
Math Fluency	86
Spelling	81 ⁴
3. On April 13, 2011, the IEP team convened with the Petitioner’s grandmother present. The team determined the Petitioner required five hours per week of reading outside the general education setting, five hours per week of written expression in the general education setting, five hours per week of mathematics outside the general education setting and five hours per week of mathematics in the general education setting. The team determined the Petitioner did not require ESY services.⁵

² Footnotes in these Findings of Fact refer to the sworn testimony of the witness indicated or to an exhibit admitted into evidence. To the extent that the Hearing Officer has declined to base a finding of fact on a witness’s testimony that goes to the heart of the issue(s) under consideration, or has chosen to base a finding of fact on the testimony of one witness when another witness gave contradictory testimony on the same issue, the Hearing Officer has taken such action based on the Hearing Officer’s determinations of the credibility and/or lack of credibility of the witness(es) involved.

³ Petitioner, Petitioner’s grandmother

⁴ P-10

⁵ R-1

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4. On January 5, 2012, the IEP team convened with the Petitioner and her grandmother present. The team determined the Petitioner required 13.5 hours of specialized instruction in a general education setting. The team did not determine whether the Petitioner required ESY services.⁶
5. The Petitioner and her grandmother prefer that all IEP meetings be scheduled through her attorney. DCPS did not contact the Petitioner or her grandmother regarding scheduling May 7, 2013 and May 30, 2014 IEP team meetings.⁷
6. On April 25, 2013, the High School Special Education Coordinator (“SEC”) contacted the petitioner’s grandmother’s attorney (“attorney”) to schedule an IEP team meeting to discuss ESY services. The attorney initially stated that the petitioner’s grandmother would allow an amendment to the IEP regarding ESY services without an IEP team meeting. Then the attorney notified the SEC that the petitioner’s grandmother wanted ESY services included on the IEP even though she did not know whether the Petitioner would enroll in the summer ESY program due to her summer schedule. The SEC stated that the IEP team should convene to discuss ESY. The attorney stated he was not available on the dates provided. On May 3, 2013, the SEC coordinator informed the attorney that the IEP team meeting would take place on May 7, 2013 at 10:00 AM. The attorney stated that he was not able to attend the IEP meeting at 10:00 AM.⁸
7. On May 7, 2013, the IEP team convened without the Petitioner or her grandmother present. The team determined the student does not require ESY services. The team determined the Petitioner requires 13.5 hour per week of specialized instruction in the general education setting and 30 minutes per week of behavioral support services. No prior written notice was issued to the Petitioner or her grandmother.⁹
8. On May 3, 2013, the SEC contacted the attorney regarding another IEP team meeting to discuss eligibility. The attorney stated that one date proposed by the SEC was a holiday and the attorney was not available on the other date proposed. On May 14, 2013, the SEC offered an additional date. The attorney stated that neither the Petitioner’s grandmother nor he were available for the date provided and offered an additional date. The attorney also requested the team reconsider the decision to not provide ESY services. The SEC did not respond to the attorney’s request.¹⁰
9. On May 17, 2013, the student received a psychological assessment. The assessment yielded an extremely low full scale IQ score of 67. The assessment included a WJ-III which yielded the following standard scores:

Letter-Word Identification 54

⁶ R-2

⁷ Petitioner, Petitioner’s grandmother

⁸ P-16, P-17, P-20, P-21

⁹ P-5

¹⁰ P-18, P-21 to p-25

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Reading Fluency	73
Calculation	77
Math Fluency	89
Spelling	73
Writing Fluency	82 ¹¹

10. On May 30, 2013, the IEP team convened without the Petitioner or her grandmother present. The team reviewed the psychological assessment received by the student on May 17, 2013. The team stated the Petitioner's extremely low IQ scores is an underestimate of her intellectual functioning. The team determined the student continues to be a student with a specific learning disability under the IDEA and requires 13.5 hour per week of specialized instruction in the general education setting and 30 minutes per week of behavioral support services on a consultative basis. No prior written notice was issued to the Petitioner or her grandmother.¹²
11. The Petitioner and her grandmother wanted another IEP meeting to discuss ESY services. The Petitioner did not have a summer job during the summer of 2013; therefore, the Petitioner attended summer school instead during the summer of 2013.¹³
12. The student missed four weeks of school during the 2013-2014 school year due to hospitalizations and surgeries.¹⁴
13. The student received co-taught instruction in her English class from her regular education and Special Education Teacher (SET). High School follows a block schedule. The student's English class was 80 minutes long, two or three days a week depending on whether the class was on a A Day or B Day schedule. However, the SET never stayed the entire class period, and at least once a week would not show up for the class period at all. The SET would not always help the Petitioner in class when she requested assistance because there were a lot of students in the class. The Petitioner attended the after school program to help her pass her classes.¹⁵
14. On March 20, 2014, the IEP team convened with the Petitioner and her attorney present. The team determined the student continues to require 13.5 hour per week of specialized instruction in the general education setting and 30 minutes per week of behavioral support services on a consultative basis. The Petitioner stated her SET did not consistently attend her classes. However, there was no discussion regarding compensatory education to redress the fact the SET did not consistently attend.¹⁶
15. On June 16, 2014, the student received another comprehensive psychological assessment. The assessment included a WJ-III and yielded the following standard scores:

¹¹ P-11

¹² P-6, P-7, R-7

¹³ Petitioner's grandmother

¹⁴ Petitioner, Petitioner's grandmother

¹⁵ Petitioner, P-9

¹⁶ P-8, P-9, R-8

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Letter-Word Identification	58
Reading Fluency	70
Calculation	81
Math Fluency	78
Spelling	71
Writing Fluency	62. ¹⁷

16. The Petitioner will matriculate in to college in the Fall of 2014 to study nursing.¹⁸

Conclusions of Law

Based upon the above Findings of Fact, the arguments of counsel, as well as this Hearing Officer's own legal research, the Conclusions of Law of this Hearing Officer are as follows:

During the period of time which the relevant facts occurred, the Petitioner's grandmother was acting in *loco parentis* for the Petitioner. However, the Petitioner reached the age of majority is acting in *loco parentis*. She hired an attorney to represent her at hearing.

"Based solely upon evidence presented at the hearing, an impartial hearing officer shall determine whether the party seeking relief presented sufficient evidence to meet the burden of proof that the action and/or inaction or proposed placement is inadequate or adequate to provide the student with a FAPE." 5 D.C.M.R. E-3030.3. The burden of proof in an administrative hearing is properly placed upon the party seeking relief. *Schaffer v. Weast*, 44 IDELR 150 (2005).

DCPS did not deny the student a FAPE by significantly impeding the Petitioner and her guardian's opportunity to participate in the decision-making progress regarding the provision of FAPE at the May 7, 2013 IEP meeting or the May 30, 2013 IEP meeting.

In *Eley v. Dist. of Columbia*, 59 IDELR 189 (D.D.C. 2012), the court held that the district violated the IDEA when it decided what school the student would attend without the parent's input. That action seriously impaired the parent's right to participate and constituted an additional denial of FAPE. The *Eley* court goes on to state, "A public school may conduct a meeting without a parent in attendance only if it is unable to convince the parents that they should attend. 34 C.F.R. § 300.322(a)". *Id.*, citing J.N., 677 F. Supp. 2d at 322. The Petitioner alleges that both the Petitioner and her Grandmother not only wanted to participate in both meetings, but believe that they should have been part of the decision-making process at both meetings. It is clear from the facts that the Petitioner and her grandmother were not allowed to attend and DCPS violated 34 C.F.R. § 300.322.

However, the Petitioner failed to meet her burden of proof on this issue. A hearing officer's determination of whether a child received a FAPE must be based on substantive grounds. In matters alleging a procedural violation, a hearing officer may find that a child did not receive a

¹⁷ P-12

¹⁸ Petitioner

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FAPE only if the procedural inadequacies (i) impeded the child's right to a FAPE; (ii) significantly impeded the parent's opportunity to participate in the decision-making process regarding the provision of a FAPE to the parent's child; or (iii) caused a deprivation of educational benefit. 34 C.F.R. 300.513(a).

In *Lesesne v. Dist. of Columbia*, 447 F.3d 828, (D.C. Cir 2006)¹⁹, the U.S. Circuit Court of Appeals, District of Columbia concluded that the parent failed to show the district's purported failure to complete the student's evaluation in a timely manner affected his education in any way. Baffled by the parent's argument that the district had not created an IEP, the court found it irrelevant whether that argument represented "amnesic oversights or unseemly pettifogging." The parent and her attorney had reviewed the IEP, the student was currently receiving educational services in an appropriate placement, and the parent had not presented any evidence to claim the IEP or the placement was inappropriate or defective. The D.C. Circuit disagreed with the parent's allegation that her son was harmed by the district's alleged failure to meet a deadline for completing the student's evaluation. It noted that even assuming the district violated its procedural obligations, an IDEA claim is viable only if those procedural violations affected the student's substantive rights. According to the court, the parent "made no effort to demonstrate--much less demonstrated--that [the student's] education was affected by any procedural violations [the district] might have committed."

In this case, the Petitioner's grandmother expressed no disagreement with the IEP at the time it was developed with the exception of the ESY services. Just as in *Lesesne*, the Petitioner makes no challenge to the IEP other than ESY services, and this was a big factor in the *Lesesne* court determining that there was no "significant" deprivation of the parent's right to participate. An IDEA claim based on a district's procedural violations is viable only if the violations affect the student's substantive rights. If the violations result in a loss of educational opportunity or seriously deprive the parent of her participation in her son's education, then they are actionable under the IDEA. Here, the only substantive disagreement was regarding the IEP was the absence of ESY services.

Regarding the May 7, 2013 IEP meeting where the team determined the Petitioner did not require ESY services, the Petitioner's grandmother at first communicated, through counsel, to the SEC that she did not feel any meeting was necessary and that DCPS could make the ESY determination via amendment pursuant to 34 C.F.R. § 300.324(a)(4). The Petitioner's grandmother testified that the only way she ever communicated with regarding requests for meetings was through her attorney, she never once approached the SEC or any other staff member directly regarding meetings of any kind. Therefore, the full extent of the Petitioner's grandmother's communication with the SEC regarding the scheduling of meetings at the end of the 2012-2013 School Year is reflected in Petitioner's exhibits. The Petitioner's grandmother's counsel's email states that because she feels student needs ESY, DCPS can just go ahead and make the amendment without talking to her. However, the Petitioner's grandmother added that she is not sure that student will even be able to use ESY this summer due to her schedule.

¹⁹ In *Lesesne*, 16-year-old student with mental retardation and cannabis dependence received FAPE from his district, despite charges that it committed IDEA procedural violations. The D.C. Circuit denied his mother's claim for compensatory education and other relief because she failed to show that the district's alleged violations harmed him in any way.

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At the May 7, 2013 IEP meeting, DCPS determined that the Petitioner would not be eligible for ESY services during the summer of 2013. Pursuant to 34 CFR 300.106 (a):

- (1) Each public agency must ensure that extended school year services are available as necessary to provide FAPE, consistent with paragraph (a)(2) of this section.
- (2) Extended school year services must be provided only if a child's IEP Team determines, on an individual basis, in accordance with 34 CFR 300.320 through 34 CFR 300.324 , that the services are necessary for the provision of FAPE to the child.
- (3) In implementing the requirements of this section, a public agency may not --
 - (i) Limit extended school year services to particular categories of disability; or
 - (ii) Unilaterally limit the type, amount, or duration of those services.

Pursuant to 34 CFR 300.106 (b), the term "extended school year services" means special education and related services that --

- (1) Are provided to a child with a disability--
 - (i) Beyond the normal school year of the public agency;
 - (ii) In accordance with the child's IEP; and
 - (iii) At no cost to the parents of the child; and
- (2) Meet the standards of the SEA.

Extended school year services must be made available as necessary to provide FAPE and must be provided only if a child's IEP team determines, on an individual basis, that the services are necessary for the provision of However, the IDEA does not establish a standard for determining a student's need for ESY services. *Letter to Myers*, 213 IDELR 255 (OSEP 1989). States have the discretion to establish policies and procedures, within established judicial, statutory, and regulatory guidelines, for providing ESY services.

As a rule, if the student will experience any loss or regression in skills during the break from school, ESY services should be made available to the student. See *Lawyer v. Chesterfield County Sch. Bd.*, 19 IDELR 904 (E.D. Va. 1993). As in other areas of special education, ESY services are not meant nor required to maximize a student's educational benefit. *Cordrey v. Euckert*, 17 IDELR 104 (6th Cir. 1990), cert denied, 499 U.S. 938, 110 LRP 38027 (1991).

In the comments and discussion to the proposed 2006 IDEA Part B regulations, the United State Department of Education ("ED") rejected a request to clarify 34 C.F.R. §§ 300.106 by adding language to the effect "that 'recoupment and retention' should not be used as the sole criteria for determining the child's eligibility for ESY services." 71 Fed. Reg. 46,582 (2006). The ED acknowledged that:

The concepts of "recoupment" and "likelihood of regression or retention" have formed the basis for many standards that States use in making ESY eligibility

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determinations and are derived from well-established judicial precedents. [case cites omitted]. States may use recoupment and retention as their sole criteria but they are not limited to these standards and have considerable flexibility in determining eligibility for ESY services and establishing State standards for making ESY determinations. However, whatever standard a State uses must be consistent with the individually-oriented requirements of the Act and may not limit eligibility for ESY services to children with a particular disability category or be applied in a manner that denies children with disabilities who require ESY services in order to receive FAPE access to necessary ESY services.

71 Fed. Reg. 46,582 (2006). According to the forms used, the regression/recoupment approach is used in the District of Columbia.

In this case, there was no reason to fear regression and the inability to recover from any kind of natural summer regression. The Petitioner's grandmother did not express any specific concerns in any of her emails regarding these criteria—in fact she was so unconcerned that she stated she wasn't even sure if the student would use these services. Based on the evidence presented, the Hearing Officer concludes that the Petitioner failed to meet her burden of proof.

DCPS did not deny student a FAPE by failing to implement the number of hours of specialized instruction on student's IEPs during the 2013-14 School Year.

After the IEP is written and an appropriate placement determined, the district is obligated to provide the student with the special education and related services as listed in the IEP. 34 C.F.R. § 300.323(c). That includes all supplementary aids and services and program modifications that the IEP team has identified as necessary for the student to advance appropriately toward the established IEP goals, to be involved in and progress in the general curriculum, and to participate in other school activities. 34 C.F.R. § 300.323(c)(2) requires that, "As soon as possible following development of the IEP, special education and related services are made available to the child in accordance with the child's IEP."

A district must implement a student's IEP with all required components. 34 C.F.R. § 300.323(c). This implementation mandate does not mean that a district must perfectly implement a student's IEP. A minor discrepancy between the services provided and the services required under the IEP is not enough to amount to a denial of FAPE. However, the failure to implement a material portion of the IEP amounts to a denial of FAPE. *Sumter County Sch. Dist. 17 v. Heffernan*, 56 IDELR 186 (4th Cir. 2011) (emphasis added); *A.P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2d Cir. 2010); *Van Duyn v. Baker Sch. Dist. 5J*, 47 IDELR 182 (9th Cir. 2007), reprinted as amended, 107 LRP 51958 (9th Cir. 08/06/07); and *Neosho R-V Sch. Dist. v. Clark*, 38 IDELR 61 (8th Cir. 2003). In examining whether a district's failure to implement an IEP is material, courts will examine the circumstances of the denial. *A.P. v. Woodstock Bd. of Educ.*, 55 IDELR 61 (2d Cir. 2010).

In this case, DCPS failed to implement the Petitioner's IEP during the 2013-2014 school year by failing to implement all of the prescribed specialized instruction hours. "At the beginning of each school year, each public agency must have in effect, for each child with a disability within

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its jurisdiction, an IEP, as defined in [34 C.F.R. § 300.320]." 34 C.F.R. § 300.323(a). However, DCPS' failure to provide the Petitioner with all of the specialized instruction did not cause her to regress in these abilities during the last school year. Compare Findings of Fact 2, 9 and 15 (WJ-III subtest scores from May 11, 2010, May 22, 2013 and July 2, 2014), which show no significant change in standard scores in letter-word identification, reading fluency, math fluency, spelling, and writing fluency.

In *Wilson v. District of Columbia*²⁰, 56 IDELR 125 (D.D.C. 2011), "[T]he materiality standard does not require that the child suffer demonstrable educational harm in order to prevail" on a failure-to-implement claim. *Wilson*, 770 F.Supp.2d at 275 (emphasis in original), citing *Van Duyn*, 502 F.3d at 822 (emphasis added). *Wilson*, 770 F. Supp. 2d 270 (D.C. Cir. 2011), clarifies the standard for when there has been a more than *de minimus* failure to implement, which is when there has been a material deviation. The decision says the court must focus on the proportion and the import of the services missed.

No harm to the student need be demonstrated in order to find that a more than *de minimus* lack of implementation is a denial of FAPE. In order to prove a more than *de minimus* failure, the hearing officer must look at the import of the services missed. In this case, the services missed included around half of the hours of specialized instruction outside of general education. The purpose of these services is to provide student with access to the general education curriculum. However, the student was able to successfully graduate from high school this school year and there is no decline in the Student's academic achievement scores; therefore, the hearing officer concludes the failure to fully implement the IEP *de minimus*. Therefore, the Petitioner did not meet her burden of proof.

The Petitioner is not entitled to Compensatory Services.

In *Reid v. District of Columbia*, 401 F.3d 522, the D.C. Circuit has stated that the compensatory education award should "aim to place disabled children in the same position they would have occupied but for the school district's violation of the IDEA." 401 F.3d at 518. Relief depends entirely on proof of educational harm, and the idea is that the services awarded must be reasonably calculated to provide the benefits that would have accrued had there been no denial of FAPE. The Reid standard is a high bar. In this case, the hearing officer finds there is no denial of FAPE; therefore, the Petitioner is not entitled to compensatory education.

ORDER

Petitioner failed to meet her burden of proof on the issues presented.

The complaint is **DISMISSED** with prejudice.

All requested relief is denied.

²⁰ In *Wilson*, the District Court noted that the District of Columbia's delay in arranging transportation services caused a 9-year-old to miss three weeks of his four-week ESY program. The court held that the delay amounted to a material implementation failure. The court reversed an IHO's finding that the IDEA violation was harmless and remanded the case for a determination of the student's compensatory education needs.

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SO ORDERED.

NOTICE OF RIGHT TO APPEAL

This is the final administrative decision in this matter. Any party aggrieved by this Hearing Officer Determination may bring a civil action in any state court of competent jurisdiction or in a District Court of the United States without regard to the amount in controversy within ninety (90) days from the date of the Hearing Officer Determination in accordance with 20 U.S.C. §1415(i).

Date: August 4, 2014

/s/ John Straus
Hearing Officer