DISTRICT OF COLUMBIA
OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION
Student Hearing Office
810 First Street, N.E., 2nd Floor
Washington, DC 20002

STUDENT,[1] through the Parent,	)	
Petitioner,	)	Date Issued: January 15, 2012
v.	)	Hearing Officer: Virginia A. Dietrich
District of Columbia Public Schools	)	
Respondent.	)	

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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of ·year old Student who is in the grade, filed a due process complaint notice on November 1, 2011 alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). Since February 2011, Student was a child with a disability classification of Other Health Impairment ("OHI") resulting from Attention Deficit Hyperactivity Disorder ("ADHD"). Since the 6th grade, Student attended a private school, having been enrolled there by Petitioner. Petitioner complained that the Individualized Education Program ("IEP") that she developed with the District of Columbia Public Schools ("DCPS") in February 2011 lacked all of the accommodations that Student received at his private school, that the location of services that DCPS proposed for Student could not provide Student with the small, structured setting and accommodations he required to access the general education curriculum, that the amount of tutoring that DCPS offered as compensatory education for DCPS' delay in determining Student eligible for special education services was insufficient, that DCPS failed to timely review an auditory processing disorder ("APD") evaluation it completed, and that the amount of funding that DCPS provided for Petitioner to conduct an independent APD was inadequate.

DCPS asserted that the IEP developed in February 2011 was appropriate, that the IEP contained all of the accommodations that Student received at his private school, that the public

[1] Personal identification information is provided in Appendix A.

school offered to Petitioner could implement Student's IEP and provide him with all of the specialized instruction and accommodations in his IEP plus all of the instructional strategies utilized at his private school, that the amount of compensatory education was reasonable in view of the length of delay in determining Student eligible for special education services and the nature of Student's disability, and that the amount of funding for an independent APD evaluation was sufficient for Petitioner to get the evaluation completed. DCPS asserted that it had not denied Student a FAPE.

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.").

Procedural History

The due process complaint was filed on 11/01/11. This Hearing Officer was assigned to the case on 11/04/11. A resolution meeting took place on 11/07/11 at which time DCPS elected not to terminate the 30-day resolution period prior to proceeding to a due process hearing. The 30-day resolution period expired on 12/01/11, the 45-day timeline to issue a final decision began on 12/02/11, and the final decision is due by 01/15/12.

Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Petitioner presented four witnesses: Petitioner; Petitioner's educational advocate; an expert in APDs and evaluations; and a learning specialist from the of Maryland. DCPS presented three witnesses: Special education coordinator ("SEC") at School; DCPS Office of Special Education program manager who qualified as an expert in compensatory education determination and calculation and as an expert in assessing the reasonableness and appropriateness of educational programming; and a DCPS educational audiologist who qualified as an expert in audiology.

Petitioner's disclosures dated 12/22/11, containing a witness list and Exhibits P-1 through P-28, were admitted into evidence without objection. DCPS' disclosures dated 12/28/11, containing a witness list and Exhibits R-01 through R-19, were admitted into evidence without objection.

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

Whether DCPS denied Student a FAPE by failing to provide Student with an IEP on 02/24/11 with sufficient modifications and accommodations; specifically, (a) the IEP failed to

include the accommodations, supports and services that Student had at his private school; and (b) the IEP failed to provide for services in a small, structured setting with a small student/teacher ratio and the opportunity for one-to-one instruction as needed.

Whether DCPS denied Student a FAPE by failing to provide Student with reasonable compensatory education for the denial of a FAPE that resulted from DCPS' failure to timely evaluate Student, determine eligibility and develop an IEP from the beginning of the 2010-2011 school year until 02/24/11; this relief being open for litigation pursuant to a Hearing Officer Determination dated 02/02/11.

Whether DCPS denied Student a FAPE by failing to provide Petitioner with sufficient funding to obtain an independent auditory processing disorder ("APD") evaluation, after Petitioner requested the evaluation on 08/12/11.

Whether DCPS denied Student a FAPE by the delay in reconvening the Multidisciplinary Team ("MDT") to review an APD evaluation completed by DCPS; specifically, DCPS agreed to conduct the APD evaluation in February 2011, but did not complete the evaluation and convene a MDT to review it until September 2011.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services for the 2011-2012 school year; specifically, by issuing a notice of placement to Deal Middle School, a placement that could not provide the small, structured setting, small teacher/student ratio, one to one attention and modifications and accommodations that Student required to access the general education curriculum due to his ADHD.

For relief, Petitioner requested sufficient funding for the independent APD evaluation, a revision of Student's IEP to include the accommodations that he is receiving at his private school, reimbursement for private school tuition expenditures for the 2010-2011 school year, placement and funding at the private school for the 2011-2012 school year with reimbursement to Petitioner for tuition and expenses already paid, and an appropriate award of compensatory education for DCPS' delay in determining Student eligible for special education services and developing an IEP.

Footnotes hereinafter refer to the testimony of a witness or an exhibit admitted into evidence.

Findings of Fact

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

#1. Student, age resides in the District of Columbia and is in the grade.[2]

#2. Student attended his neighborhood public school in the District of Columbia from Kindergarten through the 5th grade. While Student was in either the 4th or 5th grade and upon

[2] Petitioner.

Petitioner's request, Student was evaluated for special education services and determined to be not eligible.[3] After Student's completion of the 5th grade, Petitioner enrolled Student at a private school in Maryland for children with learning differences.[4] After Student's enrollment at the private school, Petitioner again approached DCPS for an eligibility determination of whether or not Student required special education services. In January 2011, the MDT that was convened by DCPS determined that Student was eligible for special education services with a disability classification of Other Health Impairment ("OHI") as a result of his ADHD-Inattentive type.[5]

#3. At the private school that Student attends, he receives instruction in a classroom with a small student/teacher ratio and in accordance with a generic Student Learning Profile form that lists specific accommodations and instructional strategies that have proven to be beneficial to Student.[6] Student performed well at his private school with the accommodations and instructional strategies that were being provided in accordance with his Student Learning Profile.[7]

#4. At a MDT meeting on 02/24/11 that included DCPS and Petitioner, an initial IEP was developed that prescribed 8 hours/week of specialized instruction within the general education setting and 15 minutes/month of occupational therapy consultation services.[8] The IEP prescribed classroom accommodations that consisted of the reading of test questions, repetition of directions, write in text books, calculators, a location with minimal distractions, preferential seating, small group testing, testing to be administered over several days and at the best time of day for Student, and breaks between subtests and extended time on subtests.[9] The IEP also prescribed the following classroom aids and services for Student: the presentation of information with both visual and verbal cues, line tracker for reading, graphic organizers for story maps, math manipulatives, guided notes and an agenda book.[10] Student's IEP indicated that his disability impacted his ability to complete math computations and solve math word problems, it impacted his ability to read and analyze reading passages beyond the literal meaning, and his lack of organization impacted his ability to communicate written ideas in a well constructed format.[11]

#5. At the MDT meeting on 02/24/11, when Petitioner requested that specific accommodations and goals be added to Student's IEP, DCPS added them.[12] Petitioner agreed with all of the goals in the IEP.[13] At the MDT meeting, there was discussion about the type of setting that Student had at the private school in order to draft the IEP, but there was no discussion about Student needing a small, structured setting or 1:1 instruction as part of his

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[3] *Id.*
[4] Petitioner, learning specialist at of Maryland.
[5] Petitioner.
[6] P-24, Petitioner.
[7] Petitioner, learning specialist at of Maryland.
[8] P-17.
[9] P-1-6.
[10] P-1-7.
[11] P-12, P-1-3.
[12] P-13-1, SEC at School.
[13] Petitioner, SEC at School.

IEP.[14] Student's IEP did not require that Student receive instruction in a small, structured setting with a small teacher/student ratio and 1:1 instruction in order to access the general education curriculum. Petitioner signed the IEP and did not express any dissatisfaction with its contents.[15]

#6. At the 02/24/11 MDT meeting, DCPS issued a Prior Written Notice to School.[16] School is a location of services that can implement Student's 02/24/11 IEP and provide Student with all of the accommodations and instructional strategies that are used at Student's private school.[17]

#7. At the MDT meeting on 02/24/11, the speech-language evaluation conducted by DCPS was reviewed and discussed. That evaluation indicated that Student had average communication skills despite one relative weakness, and as a result, Student did not meet the criteria for a child with a Speech-Language Impairment.[18] Petitioner requested that an APD evaluation be conducted and DCPS agreed to conduct the testing.[19]

#8. On 02/24/11, DCPS issued a letter to Petitioner that authorized funding for 20 hours of tutoring as resolution of all compensatory education issues pertaining to a Hearing Officer Determination dated 02/02/11.[20]

#9. On 04/11/11, DCPS prepared a written summary of the APD evaluation it had conducted.[21] Student's audiological testing revealed that his peripheral and central auditory systems were functioning normally and the evaluator concluded that Student did not have an APD.[22]

#10. On or about July 2011, both Petitioner and the SEC at School became aware that DCPS had completed an APD evaluation.[23] Beginning in July 2011, both DCPS and Petitioner made efforts to convene a meeting to review and discuss the APD evaluation.[24]

#11. By letter dated 08/12/11, Petitioner formally disagreed with the results of DCPS' APD evaluation and requested that DCPS provide her with an independent APD evaluation at public expense.[25] DCPS complied with Petitioner's request by issuing an Independent Educational Evaluation ("IEE") letter to Petitioner on 09/14/11 that authorized funding for an independent APD evaluation at an hourly rate of for a maximum total cost of This amount was derived from an average of cost quotes obtained from practitioners at medical hospitals; however, no private practitioner cost quotes were solicited or factored into the analysis

[14] SEC at School.
[15] SEC at School.
[16] R-06.
[17] SEC at School.
[18] R-06.
[19] R-06.
[20] R-04.
[21] P-11.
[22] R-02, DCPS expert audiologist.
[23] P-12-1, SEC at School.
[24] P-7-1, P-12-1, SEC at School.
[25] P-10-1.
[26] P-4.

of the maximum cost allowed by DCPS.[27] There are no specific guidelines for conducting APD testing and a diagnosis of an APD falls solely under the capacity of the audiologist.[28] Petitioner took the IEE letter to a private practitioner who had previously conducted similar APD evaluations that had been funded by DCPS in the amount of which included his services for consultation with the client, conducting an APD evaluation, writing an evaluation report and being available for telephonic consultation about the report. That private practitioner refused to conduct the evaluation for at an hourly rate of as his time estimate for consultation, conducting the evaluation and writing an evaluation report was at least seven hours.[29] The private practitioner's estimate of the cost of an independent APD in the amount of was reasonable.

#12. At a MDT meeting on 09/14/11, DCPS' APD evaluation was reviewed. Since the results of the evaluation were that Student did not have an APD, no changes were made to Student's IEP.[30]

#13. Per a Hearing Officer Determination dated 02/02/11, DCPS had not made a FAPE available to Student in a timely manner when it failed to complete psychological and occupational therapy evaluations within a reasonable period of time, i.e., by approximately the start of the 2010-2011 school year.[31]

#14. 20 hours of compensatory education in the form of independent tutoring is reasonable to compensate Student for the five months delay in determining Student eligible for special education services and developing an IEP; i.e., from the end of September 2010 until 02/24/11. Student's OHI disability, based on his ADHD, was not severe as was evidenced by the type and amount of services in Student's 02/24/11 IEP.[32] ADHD symptoms generally manifest in executive functioning deficits and the appropriate remediation for a child with mild to moderate ADHD, such as Student, would include help with self-regulation, self-advocacy and cultivation of organizational skills; the remediation of which would carry over into all areas of academic functioning.[33]

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:

The overall purpose of the IDEA is to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living. 34 C.F.R. 300.1.

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[27] DCPS expert audiologist.
[28] APD evaluations expert.
[29] P-2, APD evaluations expert.
[30] SEC at School.
[31] P-18.
[32] Compensatory education expert and expert in appropriateness of educational programming.
[33] *Id.*

Hearing Officer Determination

"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).

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 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).

The first issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an IEP on 02/24/11 with sufficient modifications and accommodations; specifically, (a) the IEP failed to include the accommodations, supports and services that Student had at his private school; and (b) the IEP failed to provide for services in a small, structured setting with a small student/teacher ratio and the opportunity for one-to-one instruction as needed.

An IEP must contain a statement of the special education and related services and supplementary aids and services to be provided to the child, and a statement of the program modifications or supports for school personnel that will be provided to enable the child to advance appropriately toward attaining the annual goals and to be involved in and make progress in the general education curriculum and to be educated and participate with other children with disabilities and nondisabled children. 34 C.F.R. 300.320(a)(4).

Petitioner failed to meet her burden of proof on the entirety of this issue. The IEP developed on 02/24/11 provided Student with many accommodations and modifications, all of which were being provided to Student at the private school that he attended. The evidence revealed that all accommodations requested by Petitioner at the 02/24/11 meeting were added to Student's IEP and at the conclusion of the MDT meeting, Petitioner expressed no dissatisfaction with the contents of the IEP.

The Hearing Officer determines that there was insufficient evidence in the record to conclude that Student required a small, structured setting with a small student/teacher ratio and one-on-one instruction in order to be able to access the general education curriculum. If a psychological evaluation or other objective evaluative data that recommended this type of setting existed, it was not admitted into evidence. Although Petitioner testified that the small structured setting was the environment where Student could do his best, DCPS is not required to maximize or provide the best program; rather, it need only be an education that is specifically designed to meet the child's unique needs, supported by services that will permit the child to benefit from the instruction. *Board of Education of Hendrick Hudson Central School District, Westchester County, et. al. vs. Rowley*, 458 U.S. 176 (1982).

Hearing Officer Determination

The IDEA's requirement of a "free appropriate public education" is satisfied when the State provides personalized instruction with sufficient support services to permit the handicapped child to benefit educationally from that instruction. There was no evidence in the record that the 02/24/11 IEP would not provide Student with educational benefit or allow him to access the general education curriculum. Student's IEP was not being implemented at his private school and Student had never attended a public school so that the 02/24/11 initial IEP could be implemented by DCPS. There was no evidence in the record that the IEP developed by DCPS was not reasonably calculated to provide Student with a FAPE in the least restrictive setting. See 34 C.F.R. 300.114.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with reasonable compensatory education for the denial of a FAPE that resulted from DCPS' failure to timely evaluate Student, determine eligibility and develop an IEP from the beginning of the 2010-2011 school year until 02/24/11; this relief being open for litigation pursuant to a Hearing Officer Determination dated 02/02/11.

"When a school district deprives a disabled child of a free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate" relief, as the statute allows, may order compensatory education, i.e., replacement of educational services the child should have received in the first place." *Reid v. District of Columbia, 43 IDELR 32 (2005).* The qualitative standard for determining compensatory education is that "compensatory awards should aim to place disabled children in the same position they would have occupied but for the school district's violations of IDEA." *Id.*

Pursuant to 34 C.F.R. 300.323(c), a meeting to develop an IEP must be conducted within 30 days of a determination that the child needs special education and related services, and as soon as possible following the development of the IEP, special education and related services are to made available to the child in accordance with the child's IEP.

DCPS did not make a FAPE available to Student in a timely manner when it failed to complete psychological and occupational therapy evaluations within a reasonable period of time, i.e., by approximately the start of the 2010-2011 school year.

In this case, the Hearing Officer determines that an IEP should have been developed approximately by the end of September 2010, with special education services to be in place immediately thereafter. Student's initial IEP was developed on 02/24/11, approximately 5 months later than it should have been. Student, with a disability of OHI resulting from ADHD, had an IEP that prescribed 8 hours/week of specialized instruction within the general education setting. Student's disability affected his ability to conduct math computations and solve math problems, read beyond the literal meaning of passages and present information in an organized manner. Student's disability was not severe, as was evidenced by the description of his needs and the number and type of specialized instruction hours he required in order to access the general education curriculum.

Petitioner offered insufficient evidence for the Hearing Officer to determine that the 20 hours of independent tutoring offered by DCPS on 02/24/11 via an IEE letter was unreasonable.

Student was unable to receive any special education services from DCPS because Petitioner had enrolled Student in a private school that did not implement Student's IEP and Petitioner failed to show any harm as a result of the missed specialized instruction. Student was doing well at his private school with the accommodations that he received there. An expert in compensatory education provided credible and logically deduced testimony that based on the nature of Student's disability and the length of the delay in evaluating Student and providing him with an IEP, 20 hours of independent tutoring was appropriate and reasonable to help Student with self-regulation, organizational and self-advocacy skills that would spill over into Student's ability to function academically. Petitioner failed to meet her burden of proof on this issue.

The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Petitioner with sufficient funding to obtain an independent APD evaluation, after Petitioner requested the evaluation on 08/12/11.

The parents of a child with a disability have the right to obtain an independent educational evaluation of the child at public expense if the parent disagrees with an evaluation obtained by the public agency. A public agency may not impose conditions or timelines related to obtaining an independent evaluation at public expense, other than that the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria that the public agency uses when it initiates an evaluation. 34 C.F.R. 300.502.

There was no dispute that Petitioner was entitled to an independent APD. The problem for Petitioner was that the letter of authorization for funding of the APD was only and that amount was unacceptable to the private practitioner that Petitioner sought out to conduct the evaluation. That private practitioner had conducted the very same APD evaluation several times in the past for DCPS for and was unwilling to accept a reduced rate of DCPS based the reduced rate on an average rate quotes from hospital-based practitioners; however, the evidence revealed that DCPS did not ascertain whether the hospital-based practitioners would accept payment in accordance with DCPS' authorization of funding. Although the IEE letter indicated that a list of providers was attached to the letter, the list was not introduced into evidence as an exhibit and neither party elicited any testimony about whether or not Petitioner was provided with such a list.

Petitioner met her burden of proof on this issue. On 09/14/11, DCPS provided Petitioner with a letter of funding for an independent APD that she was unable to use because the maximum allowable rate was too low to be accepted by a private practitioner who has conducted the same evaluation for DCPS in the past for almost three times the rate. Petitioner's inability to get the independent APD evaluation completed in order to ascertain whether or not her child has an APD has significantly impeded her opportunity to participate in the decision-making process regarding the provision of a FAPE to her child. Based on this record, Petitioner was precluded from obtaining an independent ADP evaluation at public expense at a reasonable market rate. Petitioner met her burden of proof that the funding provided by DCPS for that purpose was insufficient.

Hearing Officer Determination

The fourth issue to be determined is whether DCPS denied Student a FAPE by the delay in reconvening the MDT to review an APD evaluation completed by DCPS; specifically, DCPS agreed to conduct the APD evaluation in February 2011, but did not complete the evaluation and convene a MDT to review it until September 2011.

As part of any reevaluation of a child, DCPS must review existing evaluation data on the child and on the basis of that review, and input from the child's parents, identify what additional data, if any, are needed to determine whether the child continues to have such a disability, and the educational needs of the child and whether additions or modifications to special education and related services are needed to enable the child to meet the measurable annual goals set out in the IEP and to participate, as appropriate, in the general education curriculum. 34 C.F.R. 300.305(a).

There is no statutory requirement that evaluation data must be reviewed within a specified amount of time. Though vague, the interpretation of the IDEA requiring reasonableness shows that prompt resolution of disputes involving the educational placement of learning disabled children is imperative. *See Spiegler v. Dist. of Columbia,* 866 F.2d 461, 466-67 (D.C.Cir.1989). "Delay in resolving matters regarding the education program of a handicapped child is extremely detrimental to his development. The interruption or lack of the required special education and related services can result in a substantial setback to the child's development." *Id.* at 467.

Petitioner failed to meet her burden of proof on this issue. Although an APD evaluation was completed by DCPS in April 2011, it was not reviewed by the MDT until September 2011. However, DCPS was involved in scheduling efforts to convene a meeting on a mutually agreeable date and time at least since mid-July 2011. A three months delay in this case, i.e., from April – July 2011, was of no harm because there was no indication in the results of both the speech-language evaluation and APD evaluations completed and reviewed by DCPS that Student had an APD. When DCPS' APD evaluation was reviewed at the MDT meeting in September 2011, no changes were made to Student's IEP based on the results of the APD evaluation. At the time of the due process hearing, there was no evaluative data that even vaguely suggested that Student had an APD. Without objective and standardized evaluative data that Student had an APD, it is impossible for the Hearing Officer to conclude harm and measure it.

The fifth issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement/location of services for the 2011-2012 school year; specifically, by issuing a notice of placement to Deal Middle School, a placement that could not provide the small, structured setting, small teacher/student ratio, one to one attention and modifications and accommodations that Student required to access the general education curriculum due to his ADHD.

Free appropriate public education or FAPE means special education and related services that are provided at public expense, meet the standards of the State Education Agency, include an appropriate school in the State involved, and are provided in conformity with an IEP. 34 C.F.R. 300.17.

Hearing Officer Determination

Petitioner failed to meet her burden of proof on this issue. As previously determined herein, Petitioner failed to prove that Student required a small, structured setting with a small student/teacher ratio and one to one instruction in order to access the general education curriculum. That determination necessarily precludes Petitioner from prevailing on this issue. Student's IEP did not require a small, structured setting with a small student/teacher ratio and one to one instruction as needed and Petitioner failed to prove that School was unable to implement Student's IEP. There was credible testimony from the SEC at School that School could not only implement Student's IEP, it could also provide Student with all of the accommodations and instructional strategies that were being employed at Student's private school. The 02/24/11 IEP and the designation of School as the location of services where the IEP could be implemented were both reasonably calculated to provide Student with a FAPE.

ORDER

(1) Within 10 business days of the date of this Order, DCPS shall issue to Petitioner an authorization for funding for an independent auditory processing disorder evaluation in the amount of

All other relief requested by Petitioner is **DENIED.**

IT IS 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: January 15, 2012

/s/ Virginia A. Dietrich
Hearing Officer