

**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,)
)
v.)
)
District of Columbia Public Schools)
)
Respondent.)
)

Date Issued: October 6, 2011

Hearing Officer: Virginia A. Dietrich

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STUDENT HEARING OFFICE
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HEARING OFFICER DETERMINATION

Background

Petitioner, the mother of -year old Student, filed a due process complaint notice on August 31, 2011, alleging that Student had been denied a free appropriate public education ("FAPE") under the Individuals with Disabilities Education Act ("IDEA"). At the time of the alleged violations, Student was a child with a disability classification of Other Health Impairment ("OHI") with an Individualized Education Program ("IEP") that prescribed full-time specialized instruction outside of general education and related services. Due to various and severe medical impairments, Student had no voluntary control of her muscles except for one index finger and her eyes; however, Student had no cognitive impairments.

Petitioner alleged that when Student was relocated to a different public school for the 2011-2012 school year, District of Columbia Public Schools ("DCPS") effectively changed Student's placement without convening a placement meeting that included Petitioner, DCPS failed to set up and train staff on Student's assistance technology ("AT") equipment, DCPS failed to develop an evacuation plan and train staff on the use of Student's evacuation equipment, DCPS failed to provide Student with an appropriate placement by placing her in an autism program at the new school, and DCPS failed to provide Student with a program that would allow her to mainstream. Petitioner alleged that the effect of DCPS' failure to set up and train staff on Student's AT equipment and to have an evacuation plan in place when Student began school in August 2011, was that Student could not attend school at all because she was unable to

¹ Personal identification information is provided in Appendix A.

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communicate and participate in the curriculum without her AT equipment and the lack of an evacuation plan posed a safety threat to Student. As a result, Student had not attended school since the beginning of the school year.

DCPS asserted that DCPS was willing to meet to review and revise Student's IEP, DCPS was willing to let Petitioner select from a list of proposed schools where Student's IEP could be implemented, DCPS was willing to develop an evacuation plan within one week of Petitioner's selection of a school, and DCPS was willing to provide Student with the necessary AT equipment and provide training to staff on the equipment. In other words, DCPS was willing to adhere to the requirements of the IEP and appropriately address safety concerns that would enable Student to attend school and receive 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 08/31/11 with a motion for an expedited hearing. This Hearing Officer was assigned to the case on 09/02/11. On 09/12/11, Petitioner's motion for an expedited hearing was granted. There was no adjustment to the timeline to issue a final decision because the basis of the complaint was non-disciplinary. A resolution meeting took place on 09/09/11, at which time the parties agreed to let the 30-day resolution period expire prior to proceeding to a due process hearing. The 30-day resolution period expired on 09/30/11, the 45-day timeline to issue a final decision began on 10/01/11, and the final decision was due on 11/14/11.

The due process hearing was a closed hearing that took place on 09/22/11. Petitioner was represented by Elizabeth Jester, Esq. and DCPS was represented by Victoria Healy, Esq. Neither party objected to the testimony of witnesses via telephone. Petitioner participated in the hearing in person.

Earnest efforts were made by both parties to settle the case prior to the start of the hearing; however, it was a particular settlement provision of the settlement agreement that DCPS offered, not the tasks or time frames that DCPS agreed to adhere to, that precluded a settlement.

Petitioner presented three witnesses: Petitioner; an assistive technology expert; and a special education expert. DCPS did not present any witnesses.

Petitioner's disclosures dated 09/15/11, containing a witness list and Exhibits P-1 through P-17, were admitted into evidence without objection. DCPS' disclosures dated 09/15/11, containing a witness list and Exhibits R-01 through R-06, were admitted into evidence without

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objection. On 09/20/11, Petitioner filed Petitioner's Objections to Respondent's Hearing Disclosure Materials, objecting to the testimony of specific witnesses. A ruling on the objections was held in abeyance pending the presentation of DCPS' case. The objections became moot when DCPS elected not to call any witnesses.

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

Whether DCPS denied Student a FAPE by failing to implement Student's IEP by failing to provide the necessary assistive technology ("AT") equipment to Student at _____ since 08/22/11 and by failing to train staff at _____ on how to use Student's AT equipment; specifically, but not limited to, Student's computer and software, stander, and wheelchair with attachment for the computer.

Whether DCPS denied Student a FAPE by failing to implement Student's IEP at _____ by failing to complete an evacuation plan, coordinate the plan with the fire department and have staff trained on how to implement the evacuation plan and use the evacuation equipment that included an evacuation chair.

Whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement when DCPS placed Student in the autism program at _____ beginning on 08/22/11.

Whether DCPS denied Student a FAPE by placing Student in the autism program at _____ where she could not be mainstreamed from an out of general education setting to an inclusion setting in the least restrictive setting.

Whether DCPS denied Student a FAPE by failing to convene a placement team meeting that included Petitioner prior to Student being placed at _____ for the 2011-2012 school year.

For relief, Petitioner requested a finding that Student was denied a FAPE on each of the issues presented, that DCPS convene a placement meeting to discuss and determine Student's placement, that DCPS have Student's AT equipment in place and ready to use within 5 days, that DCPS have a program in place to train personnel on the use of Student's AT equipment including evacuation equipment, that DCPS develop an appropriate evacuation plan and train staff on the evacuation plan and then meet with the fire department for review and revision of the plan if needed, and an award of compensatory education for the services that Student missed from 08/22/11 through the date of the due process hearing.

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 _____ is a special education student in the District of Columbia with a disability classification of OHI and an IEP dated 01/06/11 that prescribes 25.5 hours/week of

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specialized instruction, 60 minutes/week of occupational therapy, 90 minutes/week of speech-language pathology services, and 45 minutes/week of physical therapy consultation services, with all services to be provided outside of the general education setting. Student's IEP also provides for classroom aids and services that consist of a transport nurse, AAC device with eye gaze, mobile arm to arm support, preferential seating, power wheelchair to allow her to access the curriculum, a stander, appropriate software that will allow her to access the curriculum, daily access to a computer, a dedicated nurse, and a specific type of computer and specific computer software. Student's speech-language/communication goals in the IEP were designed to improve Student's ability to use language effectively, participate in language based classroom activities and socially interact with peers within the school setting.²

#2. Student has severe functional delays due to medical impairments; however, Student has no cognitive impairments.³ Student is completely dependent for bed mobility and transfers and requires maximal support to sit. She is dependent on a ventilator and a gastrointestinal tube ("G-tube") for feeding, and she requires a dedicated nurse with her in the school setting to take care of her medical needs at all times.⁴ The only parts of her body that Student has muscle control over are one index finger and her eyes, which is why the use of Student's motorized wheelchair, stander, and assistive technology computer and software are vital to Student's ability to participate in the academic curriculum. Without the use of the AT computer and software, Student can only say one or two words which are unintelligible 50% of the time to people who are not familiar with her.⁵ But, with the use of the AT computer which has an eye gaze device that Student uses her eyes to operate, Student is able to communicate effectively by using full sentences to ask and answer questions and the eye gaze device allows Student to participate in the educational curriculum, make progress towards her IEP goals, and test on par with her peers.⁶

#3. During the preceding 2010-2011 school year, Student attended _____ where she was able to participate in the curriculum because most of her AT equipment was in place and an appropriate evacuation plan was in place and staff had been properly trained in the use of the AT equipment and in the implementation of the evacuation plan.⁷ At _____ Student's classmates exhibited characteristics of Learning Disabled and Developmental Delay disabilities and Student's classmates provided models for emulation in that they were moving around and talking.⁸ At _____ Student participated in a general education class even though her IEP called for all services to be provided outside of general education.⁹

#4. At some point during the 2010-2011 school year, Petitioner was advised by the special education coordinator ("SEC") that _____ was closing and that Student would be relocated to _____ however, this discussion did not take place at a Multidisciplinary Team ("MDT") meeting and no meeting took place with Petitioner to discuss the location of _____

² P-1.

³ P-1, AT expert, special education expert.

⁴ AT expert.

⁵ AT expert.

⁶ R-2, R-3, AT expert, special education expert.

⁷ AT expert.

⁸ Special education expert.

⁹ R-2, Petitioner, special education expert.

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services.¹⁰ On or about 07/14/11, Petitioner received written notice by mail that Student would be attending _____ for the 2011-2012 school year.¹¹

#5. A transportation mix-up by DCPS resulted in Student not going to school the first few days of the 2011-2012 school year. Subsequent to that, Student attended Walker-Jones ES for only four days, and during those four days, her AT equipment was not set up and the staff had not been trained in its use. Also, there was no emergency evacuation plan in place and no one had been trained in the use of Student's emergency evacuation chair. Moreover, staff had not been trained in the use of Student's stander, which Student needed to use periodically during the day to improve circulation for medical reasons. During the four days that Student attended school, she was unable to communicate effectively and was unable to participate in the educational curriculum because she did not have access to her AT computer and software. All of Student's AT equipment was purportedly in a closet at the school, but the special education expert was unable to locate it when she searched for it during the first few weeks of school.¹²

#6. Due to Student's medical needs and complex AT communication needs, it is vital that an emergency evacuation plan be developed that is school specific and classroom specific and encompasses Student's need to transfer to an evacuation chair from her motorized wheelchair while Student's ventilator and G-tube hook up is maintained. An appropriate evacuation plan must contain information such as designated exits from the school building, the duties of designated staff and other levels of detail so that step by step procedures may be employed to safely and quickly evacuate Student. Staff must be trained on the use of Student's AT equipment and staff must be trained in the implementation of an evacuation plan. When Student began attending _____ an evacuation plan was not in place and the evacuation chair could not be located; therefore, staff at HSC Pediatric Center, the extended stay facility where Student resides, decided not to send Student to school for safety reasons.¹³

#7. The children in the class that Student was placed in at _____ all displayed characteristics of children with autism. Only one student was minimally verbal, two displayed rocking motions and Student was the only student who attempted to speak. The teaching style was not call and response. Student's placement in the autism class/program was inappropriate.¹⁴

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.

¹⁰ Petitioner.

¹¹ P-12, Petitioner.

¹² Special education expert.

¹³ Special education expert.

¹⁴ Special education expert.

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“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 implement Student’s IEP by failing to provide the necessary AT equipment to Student at _____ since 08/22/11 and by failing to train staff at _____ on how to use Student’s assistive technology equipment; specifically but not limited to, Student’s computer and software, stander, and wheelchair with attachment for computer.

An assistive technology device is any item, piece of equipment, or product system whether acquired commercially off the shelf, modified, or customized, that is used to increase, maintain, or improve the functional capabilities of a child with a disability. 34 C.F.R. 300.5. Pursuant to 34 C.F.R. 300.105, DCPS must ensure that assistive technology devices are made available to a child with a disability if required as a part of the child’s special education, related services or supplementary aids and services. In this case, the various pieces of AT equipment that Student required was specified in her IEP and should have been provided to her at the start of the 2011-2012 school year, pursuant to 34 C.F.R. 300.105, 300.323(a), but they were not.¹⁵

Petitioner met her burden of proof. The record was clear that Student needed a myriad of AT equipment in order to effectively communicate in the classroom and in order to participate in the educational curriculum, and without the use of this equipment, Student was not able to communicate or access the curriculum at all.¹⁶ The record revealed that the necessary AT equipment could not be located by the special education expert who scoured the school for it within the first few weeks of school. Therefore, the AT equipment was unavailable for Student’s use. And, even if the equipment had been physically available to Student, it was still useless to Student because the staff had not been trained in its operation. The impact of DCPS’ failure to provide Student with the necessary AT equipment was that Student was unable to receive *any* educational benefit from the curriculum without it.

“The IEP is the “centerpiece” of the IDEA’s system for delivering education to disabled children,” *D.S. v. Bayonne Bd. of Educ.*, 54 IDELR 141 (2010) (*quoting Polk v. Cent. Susquehanna Intermediate Unit 16*, 853 F.2d 171, 173 (3d Cir. 1988) and the centerpiece for the

¹⁵ Finding #5.

¹⁶ Findings #1, #2.

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implementation of FAPE is the IEP. *S.H. v. State-Operated Sch. Dist. of the City of Newark*, 336 F.3d 260, 264 (3d Cir. 2003). A party challenging the implementation of an IEP must show more than a *de minimis* failure to implement all elements of the IEP, and, instead, must demonstrate that the school board or other authorities failed to implement substantial or significant provisions of the IEP. This approach affords local agencies some flexibility in implementing the IEP, but it still holds those agencies accountable for material failures and for providing the disabled child a meaningful educational benefit. *Houston Independent School District v. Bobby R.*, 200 F.3d 341, 349 (5th Cir. 2000). See *Catalan ex rel E.C. v. District of Columbia*, 478 F. Supp 2d 73, 75 (D.C.C. 2007). In the present case, Student was deprived of *all* educational benefit due to DCPS' failure to provide the AT necessary equipment. Student was denied a FAPE.

The second issue to be determined is whether DCPS denied Student a FAPE by failing to implement Student's IEP at Walker-Jones ES by failing to complete an evacuation plan, coordinate the plan with the fire department and have staff trained on how to implement the evacuation plan and use the evacuation equipment.

Petitioner met her burden of proof. Although an evacuation plan was necessary to ensure Student's safety at school, an evacuation plan was not part of Student's IEP; therefore, there was no failure by DCPS to implement Student's IEP. However, the IDEA requires a state to provide a disabled child's parent or guardian with an opportunity to present complaints with respect to *any matter* relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child. 34 C.F.R. 300.507(a). "This broad language suggests that Congress did not intend to exclude from consideration any subject matter – including safety concerns—that could interfere with a disabled child's right to receive a free appropriate public education." "This conclusion comports with common sense given that some infirmities will likely render disabled children more vulnerable to injury from certain conditions than their non-disabled peers, therefore requiring special accommodations to fulfill the statutory preference for educating such children together to the maximum extent possible." *Lillbask v. State of Connecticut Department of Education*, 42 IDELR 230 (2nd Cir. 2005).

In *Lillbask*, the court held that safety concerns with respect to the student's placement were within the independent hearing officer's consideration as these concerns fell within the realm of *any* subject matter that could interfere with a student's right to receive a FAPE. In the present case, the lack of an evacuation plan and the lack of an evacuation chair, were legitimate unaddressed safety concerns that interfered with Student receiving a FAPE. The staff at HSC Pediatric Center chose not to send Student to school because in the event of an emergency that required evacuation of the building, Student's safety would be seriously compromised.¹⁷ In the event of an emergency evacuation, Student required immediate relocation from her motorized wheelchair to an evacuation chair with her G-tube and ventilator hook-up maintained, and a specific plan for exit from the building. Without the evacuation plan in place and without personnel trained to execute the evacuation plan, Student could not safely attend school. DCPS' failure to have an evacuation chair on site and an appropriate evacuation plan in place resulted in Student being denied a FAPE.

¹⁷ Finding #6.

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The third issue to be determined is whether DCPS denied Student a FAPE by failing to provide Student with an appropriate placement when DCPS placed Student in the autism program at _____ beginning on 08/22/11.

“The touchstone of ‘educational placement’ is not the location to which the student is assigned but rather the environment in which educational services are provided. To the extent that a new setting replicates the educational program contemplated by the student’s original assignment and is consistent with the principles of mainstreaming and affording access to a FAPE, the goal of protecting the student’s educational placement served by the stay-put provision appears to be met. Likewise, where a change in location results in a dilution of the quality of a student’s education or a departure from the student’s least restrictive-compliance setting, a change in educational placement occurs.” *A.W. v. Fairfax County School Board*, 41 IDELR 119 (2004).

Petitioner met her burden of proof. The autism program at _____ was not an appropriate placement for Student.¹⁸ Student had physical impairments, but no cognitive impairments. There was no evidence that the number and type of services hours in Student’s IEP could not be implemented in the autism program; however, Student’s IEP had speech-language/communication goals that were designed to improve her ability to use language effectively, participate in language based classroom activities and socially interact with peers within the school setting. In the autism class, the classroom environment likely would not have induced an improvement in Student’s ability to use language effectively, particularly in view of the fact that the teacher did not teach in a call and response style and Student’s classmates were mostly non-verbal. Student was denied a FAPE because she was deprived of the educational benefit of receiving instruction in a classroom with her peers. Student required a classroom where a call and response teaching style was used and where her classmates were verbal and interactive with each other and their environment. The evidence was clear that when Student had the use of her AT equipment, she tested on par with her peers. Without her AT equipment, Student was conceivably on par with her peers in the autism class; however, with her AT equipment, Student was on par with the peer group she had during the 2010-2011 school year, i.e., students with a Learning Disability or a Developmental Delay who were verbal and interactive with each other, and learning in a call and response teaching environment.¹⁹ Student was denied a FAPE when DCPS placed her in the autism class at _____

The fourth issue to be determined is whether DCPS denied Student a FAPE by placing Student in the autism program at _____ where she could not be mainstreamed from an out of general education setting to an inclusion setting in the least restrictive setting.

Petitioner failed to meet her burden of proof on this issue. Although Student received some general education classes (inclusion) at her prior school, inclusion classes and mainstreaming initiatives were not prescribed by Student’s IEP. The IEP that went to _____ with Student prescribed that all services were to be provided outside of general education and the IEP did not contain any provision or references to the inclusion setting or mainstreaming requirements and/or goals.

¹⁸ Finding #7.

¹⁹ Finding #2.

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The fifth and final issue to be determined is whether DCPS denied Student a FAPE by failing to convene a placement team meeting prior to Student being placed at Walker-Jones ES for the 2011-2012 school year.

Petitioner met her burden of proof. As stated previously, "The touchstone of 'educational placement' is not the location to which the student is assigned but rather the environment in which educational services are provided." *A.W. v. Fairfax County School Board*, 41 IDELR 119 (2004).

Student's educational placement effectively changed when Student was relocated to for the 2011-2012 school year. Although the number of service hours in Student's IEP could be provided in the autism class, the environment in which the instruction was to be provided was vastly different from the Student's prior classroom environment at Student went from a classroom at during the 2010-2011 school year with peers who were verbal and interactive to a classroom at where children were predominantly non-verbal and displayed characteristics of autism and where the teaching style was not call and response. The educational environment at lacked the verbal classroom stimulation that was contemplated by Student's IEP and that was necessary for her to achieve her IEP goals in the area of communication/speech-language. When Petitioner was advised that Student would be relocated to another school, Petitioner thought the classroom environment would be similar to the one at

The record revealed that the decision to relocate Student to an autism class at was not made at a meeting that included Petitioner.²¹ Petitioner had a right under the IDEA to be present when a placement determination was made. 34 C.F.R. 300.116. As a result, Petitioner was deprived of the right to participate in the decision-making process regarding the provision of a FAPE to her child, and Student was denied a FAPE.

Summary

In this case, Student was denied a FAPE by DCPS' failure to ensure that Student's AT equipment was made available to her since the beginning of the 2010-2011 school year. Without the use of the AT equipment, Student was not able to access the curriculum *at all*. In order for Student to safely attend school, it was critical that an evacuation plan be developed, and evacuation chair be present on site and staff trained in the implementation of the evacuation plan. It became readily apparent to staff at the HSC Pediatric Center, that without an evacuation plan and evacuation chair, Student's safety was seriously compromised and the staff decided not to send Student to school until the situation was rectified. As a result, Student missed approximately one month of schooling by the time of the due process hearing. That meant that all of the services in Student's full-time IEP were not provided to her.

"When a school district deprives a disabled child of free appropriate public education in violation of the Individuals with Disabilities Education Act, a court fashioning "appropriate"

²⁰ Petitioner.

²¹ Finding #4.

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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.*

The special education expert opined that compensatory education services of 1:1 tutoring in reading and mathematics with a tutor knowledgeable in the use of eye gaze equipment for 2 hours/day for a period of one month would be appropriate compensatory education for missed services.

ORDER

(1) Within one calendar week of the date of this Order, DCPS shall begin scheduling efforts for an IEP meeting with all relevant and necessary personnel in attendance, to review and revise Student’s IEP, and discuss placement; and when placement has been determined and a Prior Written Notice issued, DCPS, in conjunction with HSC Pediatric Center staff, shall develop an appropriate evacuation plan and review it with the fire department within 10 business days of the determination of the placement;

(2) Within 10 business days of the date of this Order, DCPS shall have Student’s AT equipment accessible to Student in the classroom; including, but not limited to a motorized wheel chair, wheel chair mount, AT computer and appropriate software, stander and evacuation chair, and if the equipment is not available, DCPS shall place an order for its procurement within the same 10 business days;

(3) Within 10 business days of the date of this Order, DCPS shall have contracted with independent qualified providers to provide the necessary AT equipment training and evacuation training to the appropriate school staff;

(4) Since the AT equipment training and evacuation training are specific to the placement, AT equipment training and evacuation training shall begin within 13 business days of the date that the placement is determined;

(5) Within 10 business days of the date of this Order, DCPS shall provide authorization for 60 hours of independent tutoring by a tutor knowledgeable in the use of eye gaze equipment, as compensatory education; and

(6) Any delay caused by Petitioner or Petitioner’s representatives shall extend the deadline for DCPS’ performance, day for day.

IT IS SO ORDERED.

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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: October 6, 2011

/s/ Virginia A. Dietrich
Hearing Officer